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CHIEF JUSTICES :

The Hon'ble Mr. Justice C. Honniah (Acting up to 21-3-1978).
" " D. M. Chandrashekhar (From 22-3-1978).

PUISNE JUDGES :

e Hon'ble Mr. Justice	C. Honniah, B.Sc. LL.B. (From 22-3-1978 to 24-4-1978).	The Hon'ble Mr. Justice	Manepalli Narayanarao Venkatachaliah, B.Sc. B.L.
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THE

All India Reporter

1978

Karnataka High Court

AIR 1978 KARNATAKA 1

D. B. LAL, J.

Basalingappa and another, Petitioners v. Ramakant Mallappa Desai and another, Respondents.

Civil Revn. Petns. Nos. 1967 and 2415 of 1974, D/- 26-7-1977.*

Karnataka Rent Control Act (22 of 1961), S. 50 — Interference by High Court — When High Court can interfere.

As per S. 50 the High Court would be concerned with the legality or correctness of the order made by the first appellate judge. From this it cannot be inferred that the High Court would convert itself into a Court of second appeal; but would rather confine its attention to the legality or correctness of the order made. If upon the evidence adduced, the first appellate Judge could arrive at a reasonable inference in favour of the landlord or the tenant, that would be the end of the matter. It may not be correct to contend that the evidence considered sufficient by the appellate Judge should be considered insufficient by the High Court, as long as something definite could be concluded in favour of either party on the basis of that evidence. Therefore, the High Court being a revising Court against the order of the appellate Judge would only interfere if some more compelling reasons are pointed out to hold that the order made by the judge was perverse, or illegal, or resulted in miscarriage of justice. (Para 6)

Gangi Reddy for S. K. Venkataranga Iyengar, for Petitioner. In C. R. P. No. 1967 of 1974 and for Respondent in C. R. P. No. 2415 of 1974; Benurmath for, K. A. Swami, for Respondent. In C. R. P. No. 1967 of 1974 and for Petitioner in C. R. P. No. 2415 of 1974.

ORDER:— These two revisions under S. 50 of the Karnataka Rent Control Act, 1961 (hereinafter referred to as the 'Act'), are directed against the judgment of the Additional District Judge, Bijapur, partly allowing the petition of the landlord under S. 21 provisos (h) and (i) of the Act and directing the eviction of the tenant from the first floor of the schedule premises bearing CTS Nos. 1522 to 1525 in Ward No. II of Bijapur City.

2. One Ramakant Mallappa Desai owns the schedule premises and filed his application before the II Additional Munsiff, Bijapur (H. R. C. No. 19 of 1967), for vacation of the premises by his tenant Basalingappa Mugbasappa Pattanshetti, under Section 21 (a) (h) and (i) of the Act, and the pleas were: (1) that the tenant failed to pay the rent; (2) that the premises were bona fide and reasonably required for occupation by the landlord; and (3) that the premises needed major repairs and unless the same were vacated, the repair

*(Against order of Dist. J., Bijapur, D/- 1-8-1974).

work could not be carried out. The landlord applicant produced his attorney, PW 2, and one Assistant Engineer, PW 1, who came to state about the condition of the building. Besides these two witnesses, PWs. 3 and 4 were also produced. These witnesses came to state that some other premises had fallen vacant at Bijapur and the tenant could as well occupy them; and that he would not suffer any greater hardship if he is asked to vacate the disputed premises.

3. As against this evidence, the tenant PW 1 gave his own statement and denied that any repairs were needed in the premises, or that the landlord at all needed the same for his bona fide and reasonable requirement or that the tenant failed to pay the rent.

4. The learned II Additional Munsiff dismissed the application of the landlord. Thereafter, the landlord came in appeal before the learned Addl. District Judge and he partly succeeded, inasmuch as, the pleas under the provisos (h) and (i) prevailed before him. It was held that the first floor of the disputed premises was bona fide and reasonably required by the landlord for his occupation and that the said first floor was highly delapidated and needed major repairs, which could not be undertaken without the premises being got vacated from the tenant. With that finding, the application of the landlord was allowed for the first floor of the disputed premises. Against that order of the learned District Judge, two revisions are filed in this Court, one by the landlord in respect of the ground floor of the disputed premises. The other revision is filed by the tenant challenging the findings of the learned appellate Judge in respect of the first floor of the disputed premises.

5. Since a common question of law and fact arises, these two revisions can be disposed of by a single judgment.

6. As evident under S. 50 of the Act, this Court would be concerned with the legality or correctness of the order made by the first appellate Judge. From this it cannot be inferred that this Court would convert itself into a Court of second appeal, but would rather confine its attention to the legality or correctness of the order made. If upon the evidence adduced, the first appellate Judge could arrive at a reasonable inference in favour of the landlord or the tenant, that would be the end of the matter. It may not be correct to argue, that the evidence considered sufficient by the appellate Judge should be considered insufficient by this Court, as long as something definite could be concluded in favour of either party on the basis of that evidence. Therefore, the High Court being a revising Court against the order of the learned appellate Judge would only interfere if some more compelling reasons are pointed out to hold that the order made by the Judge was perverse, or illegal, or resulted in miscarriage of justice.

7. I have heard the learned counsel representing the landlord as well as the tenant in the two revisions. I have also gone through the statements of PWs. 1 and 2. The first witness is the Assistant Engineer and he candidly pointed out that the first floor required major repairs, and that the said repairs could not be undertaken without that floor being got vacated from the tenant. As regards the ground floor, he stated that the tenant need not vacate the ground floor for the repair work to be done in the first floor. With that statement of the Assistant Engineer, it was futile on the part of PW 2 to state on behalf of the landlord that the ground floor required similar repair work, or, DW 1 the tenant, to state that neither of the two floors required a repair work. Therefore, the findings of the first appellate Judge that the first floor should be got vacated, because it needed major repairs which cannot be undertaken without the tenant having vacated that floor, seems to be unassailable.

8. On the question of bona fide and reasonable requirement of the landlord, similarly the learned appellate Judge considered the statements of PW 2 and DW 1. These were the only two important witnesses, and an assessment of their

evidence clearly pointed out that the landlord needed the first floor for his bona fide and reasonable requirement.

9. The main argument of the learned counsel for the tenant was that the landlord visited Bijapur for some temporary work. Thereafter, he left for Jainapur, a place where he resides with his wife and children. The learned counsel argued that for his temporary stay at Bijapur, perhaps the two rooms already in occupation, should be considered sufficient. But for that, the answer is given by the learned first appellate Judge. Considering the requirement of the landlord, coupled with his status and his day-to-day need while he visits Bijapur, according to the first appellate Judge, the first floor is a dire necessity for him. In that connection, PW 2 has stated that there is no other residential property belonging to the landlord at Bijapur and that he will be put to a greater hardship in case he is deprived of the first floor and is made to stay in only two rooms. It has also come in evidence that the landlord engages some other house for his stay at Bijapur. DW 1 also admitted that there is no other residential premises in the name of the landlord at Bijapur. It was then pointed out by the learned counsel that the parents of the landlord reside in some adjoining house, meaning thereby that the landlord can as well go and reside with them. But that would be some thing too far to expect from the landlord, because he may prefer to stay in a separate house for his own business while staying at Bijapur. That apart, the convenience of the landlord is also a factor to be considered. The two courts below have considered the statements of those witnesses. They could certainly arrive to a certain definite inference which they have drawn in favour of the landlord. The statements of PWs. 3 and 4 could not be availed of, because that part of the evidence related to the greater hardship which the tenant was not likely to suffer, in case he is asked to vacate the first floor of the disputed premises. It was also stated that, perhaps, on the date the application was filed, no issues were born to the landlord and the learned counsel contended that the need of his son or daughter would not be considered his need, at any rate, on the date of the application. That may be so. But, at present, there is already a family of the landlord consisting of his wife and two children. It is undisputed that the occupation of the landlord, includes the occupation by his family members, especially when they are minors and naturally reside with him. Considering all these facts and circumstances, in my opinion, the first appellate Judge has arrived at a correct conclusion and no interference can be made in these two revisions.

10. The two revision petitions are therefore without any merit and the same are dismissed. This judgment is being given in C. R. P. No. 1967 of 1974 and shall govern the decision in C. R. P. No. 2415 of 1974. A copy of the judgment shall be kept on the record of that case.

Revision petitions dismissed.

AIR 1978 KARNATAKA 3

K. JAGANNATHA SHETTY, J.

D. L. Ramesh, Petitioner v. State of Karnataka and others, Respondents.

Writ Petn. No. 6301 of 1977, D/- 1-9-1977.

Constitution of India, Art. 226 — Natural justice — Justice should be seen to be done — Presence of wife of opposite party in chambers of appellate authority.

When his house became vacant, the petitioner intimated the vacancy to the Controller and also sought permission for self-occupation. The Controller rejected his request and allotted the house to respondent as per the direction of the State Government. Against the allotment order, the petitioner preferred an appeal to the Special Deputy Commissioner, Bangalore District and asked for an interim stay of the allotment. The Special Deputy Commissioner declined to stay the said al-

lotment. The wife of the respondent allottee met the Special Deputy Commissioner in his chambers and enquired about her case, and the petitioner along with his advocate saw the wife of the allottee coming out of the chambers when they went to present the appeal against the order of the Controller.

Held that the Special Deputy Commissioner primarily being an executive Officer, has got manyfold duties to perform. But when he is acting as an appellate authority under the Rent Control Act, his decision in the matter is no less judicial. He must shed the mentality of an executive officer. He must keep himself absolutely independent of all authority save that of the law. If his conduct, by any chance, gives rise to a reasonable suspicion that justice does not seem to have been done, his decision would be set aside. It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done. In the present case the presence of the wife of the allottee in chambers of the Special Deputy Commissioner and the talk she had with him about the appeal, had given rise to a reasonable suspicion. This suspicion had been further strengthened by the manner in which the Special Deputy Commissioner had disposed of the stay matter. These circumstances were by themselves sufficient to hold that the impugned order regarding stay had been vitiated, and contrary to natural justice. (1937) 2 KB 309 and (1976) 1 WLR 1052, Rel. on. (Paras 2, 6, 7, 8)

Cases Referred: Chronological Paras

(1976) 1 WLR 1052 6
(1937) 2 KB 309 : (1937) 2 All ER 726 6

V. K. Govindarajulu, for Petitioner; B. B. Mandappa, High Court Govt. Pleader, for Respondents Nos. 1 to 3.

ORDER:— This is one of the many cases we have had in this Court depicting the manner in which the Special Deputy Commissioner who is the appellate authority under the Karnataka Rent Control Act disposing of a stay petition in appeals relating to allotment of houses. To some, this case may appear to be a small matter but having regard to our legal system which must, of necessity, conform to the rule of law, the case has greater importance.

2. The facts are these:

The premises bearing No. 119, Bull Temple Road, Bangalore City, was jointly purchased by the petitioner, his father and brothers under a registered sale deed dated Feb. 18, 1977 for rupees one lakh. It consists of a big site with two out-houses widely separated from each other. One out-house is already under the occupation of the brother of the petitioner. When, the other out-house became vacant, the petitioner intimated the vacancy to the Controller and also sought permission for self-occupation. The Controller rejected his request and allotted the house to respondent-4 as per the direction of the State Government. Against the allotment order, the petitioner has preferred an appeal to the Special Deputy Commissioner, Bangalore District and asked for an interim stay of the allotment. The Special Deputy Commissioner has declined to stay the said allotment.

3. What happened before the Special Deputy Commissioner is not quite clear from the records. There are two divergent versions, one by the petitioner and another by the Special Deputy Commissioner. The petitioner has stated thus:

"The petitioner and his counsel Sri G. Narayanamurthy, entered the chambers of the 2nd respondent to plead for consideration of the stay application and get the impugned order stayed. As they entered the chambers, they found the wife of the 4th respondent Smt. S. Nagalakshmi coming out of the chambers. When the petitioner and his counsel met the 2nd Respondent, he said to their surprise, that their stay application had already been rejected and an endorsement will follow. The petitioner went to the office with his lawyer to find out what orders were passed by the 2nd respondent, they were informed that the orders on the stay application had not yet been passed and they were directed to come to

the office on Monday the 25th July 1977. The petitioner again went to the office of the 2nd respondent to see what orders were passed. Even on that day the order of the 2nd respondent was not available and only on 26-7-1977, the order was available in the office and immediately a copy of the same was applied and obtained the same day. It is that order that is produced as Exhibit 'C'.

While stating so, the petitioner has also made certain allegations against the Special Deputy Commissioner. He has complained that the Special Deputy Commissioner did not hear the petitioner or his counsel, but heard only Smt. Nagalakshmi, the wife of the allottee, and that too, in the absence of the petitioner and his counsel.

Since the allegations are of serious nature this Court while issuing notice to the Deputy Commissioner, called for his comments. The Deputy Commissioner has submitted his report in which he has denied the above allegations. He has got his own story to tell, and it is like this:

"On 23-7-1977 (Saturday) after hearing number of Revenue and Miscellaneous cases in the Court, I retired to my chambers. As is the practice in the Revenue Office a large number of visitors were waiting to see me to make representations etc. My peon started admitting the visitors, one by one to my chambers at 4.00 p.m. and at about 4.15 p.m. or so a lady appeared, who never disclosed her name and represented that she is the wife of a patient who has been allotted a house by the Controller and that I should hear her regarding an appeal relating to the house allotted to her husband. Thereupon, taking into consideration that a number of innocent and illiterate persons come to my chambers to submit representations, I asked that lady what is the appeal about and the number of the appeal, so that I could ask my judicial clerk to inform her of the date of hearing. She stated that the landlord is threatening to file an appeal against the order of the Controller and that she and her family will be put to immeasurable hardship. Immediately I advised her that she cannot make any such representation to me at that stage and after ascertaining from my judicial clerk, who was present in my chambers that no appeal has been filed in respect of the house referred to by her, while representing I told her that in case the appeal is filed, she will be getting a notice and on the day appointed in the notice, she can appear in the Court and make her submissions either through a lawyer or by herself. After informing her, I asked for the next party, who was waiting to call upon me to enter into my chambers. After about 15 or 20 minutes i. e., at about 4.45 p.m. one Sri G. Narayana Murthy, an advocate came and presented a HRC Appeal petition, which has been registered in my office in No. 84/77-78, and prayed for stay. The appeal was not accompanied by a certified copy of the order appealed against. After hearing the counsel, as I had number of other visitors to see, I stated that I will be passing necessary orders in the course of the day. In the evening at about 5.30 p.m. I wrote the order and asked my judicial clerk to get it typed. On his bringing the typed copy, I signed the order and sent the papers to the section. That is what happened on that day as far as I can recollect."

4. On a close perusal of these allegations and counter allegations, I am inclined to believe the major portion of the statements of the Deputy Commissioner. The record of the case also substantially corroborates his version. The petitioner appears to have overstated his case in some particulars with some allegations that are far from truth. The stay order which was hand-written by the Deputy Commissioner is on the file. It was stated therein that counsel for the appellant was heard. I have no reason to disbelieve this statement. But, I would only add that it would have been proper for the Special Deputy Commissioner to have written the order in the presence of the appellant and his counsel, instead of writing and sending it to the Section, after the appellant left the chambers.

5. There is yet one other aspect of the matter. The case really turns on that aspect. The petitioner has complained that the Special Deputy Commissioner heard Smt. Nagalakshmi, the wife of the allottee even before the appeal was presented and his refusal to stay the allotment was, therefore. vitiated. But the Special Deputy Commissioner has stated that the wife of the allottee met him in his chambers and enquired about the appeal, to which he said that the appeal has not yet been presented and she would be notified about the hearing of the appeal. In this part of the case, one thing is clear, that is, the wife of the allottee met the Special Deputy Commissioner in his chambers and enquired about her case, and the petitioner along with his advocate saw the wife of the allottee coming out of the chambers when they went to present the appeal.

The nature of the conversation between the Special Deputy Commissioner and the wife of the allottee may be of anybody's guess, and therefore, I think the petitioner is fairly entitled to complain that the presence of the wife of the allottee and the conversation she had with the Special Deputy Commissioner, must have influenced the decision of the Special Deputy Commissioner. The Special Deputy Commissioner, of course, has explained that he being a Revenue Officer, a large number of visitors would come to see him every day to make representations about their grievances and the wife of the allottee was one among them on July 23, 1977, and he did not hear her on the merits of the appeal.

6. It is no doubt true that the Special Deputy Commissioner primarily being an executive Officer, has got manyfold duties to perform. But when he is acting as an appellate authority under the Rent Control Act, his decision in the matter is no less judicial. He must shed the mentality of an executive officer. He must keep himself absolutely independent of all authority save that of the law. His conduct should be above broad and must inspire public confidence in his impartiality. To ensure such independence, and to inspire public confidence, he must afford to the litigant public open and fair hearing. He should always remain without bias and the like. He must not give scope for any party to entertain a doubt or suspicion that there was an opportunity for one party to influence his judgment. If his conduct, by any chance, gives rise to a reasonable suspicion that justice does not seem to have been done, his decision would be set aside.

These are only some of the principles which are to be borne in mind by persons exercising judicial functions. I may refer in this context one or two decisions. In Cooper v. Wilson (1937) 2 KB 309 the presence of one of the respondents in the Watch Committee while considering the appeal. was held to have vitiated the decision of the committee. In Regina v. Barnsley Metropolitan Borough Council (1976) 1 WLR 1052, a statutory Committee under the Barnsley Corporation Act, 1969, heard the complainant and representative of the street trader. Thereafter, the committee started discussing the case for coming to certain conclusion. During the discussion the Market Manager who was in the position of a prosecutor was present all the time. On these facts, Lord Denning M. R., set aside the decision of the Committee by observing thus:

"When the committee discussed the case and came to their decision, the market manager was there all the time. His presence at all their deliberations is enough to vitiate the proceedings. It is contrary to natural justice that one who is in the position of a prosecutor should be present at the deliberations of the adjudicating committee."

7. It is noticeable, in both the above cases, that the person whose presence was complained of when the Tribunal was considering its decision, in fact, took no part in the decision or deliberation, yet it was held that the decision was vitiated. That is because of a well known principle to which we, in this country, also steadfastly adhere "that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should mani-

festly and undoubtedly be seen to be done."

8. In the present case also, the presence of the wife of the allottee in the chambers of the Special Deputy Commissioner and the talk she had with him about the appeal, had given rise to a reasonable suspicion. The nature of their conversation, as I have earlier observed, may be of anybody's guess. At any rate, it would have reasonably led the appellant to say to himself: "There has been an opportunity here for one of the parties to influence the judgment of the Special Deputy Commissioner, and it looks as if justice may not be done". This suspicion has been further strengthened by the manner in which the Special Deputy Commissioner has disposed of the stay matter. These circumstances are by themselves sufficient to hold that the impugned order has been vitiated, and contrary to natural justice.

9. In the result, the writ petition is allowed. The order of the Special Deputy Commissioner is quashed. To avoid embarrassment to the Special Deputy Commissioner, I direct that the appeal be heard and disposed of by the Deputy Commissioner, Bangalore District, as expeditiously as possible.

In the circumstances, I make no order as to costs.

Petition allowed.

AIR 1978 KARNATAKA 7

G. K. GOVINDA BHAT C. J.
AND M. N. VENKATACHALIAH, J.

Radhakrishna Setty, Appellant v. Land Tribunal, Somwarpet Taluk, and another, Respondents.

Writ Appeal No. 52 of 1976, D/- 22-8-1977.

Karnataka Land Reforms Act (10 of 1962), Sec. 48-A — Application under — Duty of Tribunal to pass speaking order. W. P. No. 5741 of 1975, D/- 8-12-1975 (Kant), Reversed. (Karnataka Land Revenue Act (12 of 1964), S. 133).

The order of the Tribunal in the proceedings on an application under S. 48A is liable to be quashed on the sole ground that it is not a speaking order. W. P. No. 5741 of 1975 D/- 8-12-1975 (Kant), Reversed. (Para 3)

When there is a statutory presumption arising from the fact that the name of the landlord is entered in the Record of Rights as the person cultivating the land, the Tribunal has to give reasons for holding that the statutory presumption has been rebutted by other evidence on record. The mere subjective satisfaction of the Tribunal that the applicant before it is a tenant is not sufficient to sustain its decision. What is required of the Tribunal is an objective consideration of the evidence on record and therefore the Tribunal has to give reasons for its conclusions. When the order of the Tribunal is not a speaking order, it amounts to no adjudication at all. Such an order is a void order. When such an order is challenged under Art. 226 of the Constitution, the High Court cannot give its own reasons to support the order, which, in effect. would mean that the court is taking upon itself the functions of the Land Tribunal. (Para 3)

K. S. Gourishankar, for Appellant; M. P. Chandrakantraj Urs., Govt. Advocate, for Respondent No. 1.

G. K. GOVINDA BHAT, C. J.:— This appeal is directed against the order of Venkataramiah, J., D/- 8-12-1975 made in Writ Petn. No. 5741 of 1975 rejecting the appellant's writ petition at the preliminary hearing stage.

2. The appellant is the landlord owning 3 acres of agricultural land in Koodlur village, Somwarpet Taluk, in Survey Nos. 19/1 and 19/2. The second respondent alleging that he is the tenant of the said land filed an application under S. 48A of the Karnataka Land Reforms Act for grant of occupancy right. The said application was opposed by the appellant on the ground that the second-respondent is not a tenant of the said land and the appellant is personally cultivating the land. The parties beside examining themselves, have examined some witnesses on either side. The Tribunal granted the application of the second-respondent

confirming occupancy rights in respect of 3 acres of land in Survey Nos. 19/1 and 19/2 of Koodlur Village. The order of the Tribunal reads thus:

"Order dated 17-9-75.

Case called: The applicant and the landlord present. Depositions of the appellant recorded. He says that he was cultivating the land from the last seven years by paying half share. But the landlord denies and says that the applicant was cultivating the land on cooli basis. The landlord further says that he had obtained signature to an application by the applicant agreeing to withdraw the application. The Tribunal feels that the applicant is cultivating the lands on wara basis. The Tribunal therefore determines that the applicant is ordinary tenant and further confirms the occupancy of 3.00 acres in Sy. Nos. 19/1 and 19/2 of Koodlur Village.

Sd/-
Asst. Commr. & Chairman,
Land Reforms Tribunal
Somwarpet."

The above order was challenged by the appellant before this Court in W. P. No. 5741 of 1975 which came up for preliminary hearing before Venkataramiah, J. who appears to have looked into some documents produced in the writ petition and made an order rejecting the writ petition and upholding the order of the Tribunal.

3. The second respondent has not appeared before us despite notice. The first-respondent, Land Tribunal is represented before us by Sri M. P. Chandrakantraj Urs, Senior High Court Government Advocate, and he has made available the records of the case before the Land Tribunal. The order of the Tribunal which has been fully set out by us is clearly not a speaking order. It makes no reference to the entries in the Record of Rights from which a statutory presumption under S. 133 of the Karnataka Land Revenue Act arises. It was stated before us that the name of the appellant is shown in the Record of Rights as the person cultivating the land. When there is a statutory presumption arising from the fact that the name of the appellant is entered in the Record of Rights as the person cultivating the land, the Tribunal has to give reasons for holding that the statutory presumption has been rebutted by other evidence on record. The evidence on record before the Tribunal consisting of oral evidence has not been discussed. The mere subjective satisfaction of the Tribunal that the applicant before it is a tenant is not sufficient to sustain its decision. What is required of the Tribunal is an objective consideration of the evidence on record and therefore the Tribunal has to give reasons for its conclusions. The scope of the enquiry before the Tribunal under the Act has been laid down by this Court in more than one decision. When the order of the Tribunal is not a speaking order, it amounts to no adjudication at all. Such an order is a void order. This Court, when such an order is challenged under Art. 226 or 227 of the Constitution, cannot give its own reasons to support the order, which, in effect, would mean that this Court is taking upon itself the functions of the Land Tribunal. The learned single Judge ought to have quashed the impugned order on the sole ground that it is not a speaking order without going into the merits of the case.

4. Therefore, we allow this appeal and reversing the order of the learned single Judge, quash the impugned order dated 17-9-1975 made in case No. LRM VII 13/3/74-75 on the file of the first respondent and remit the matter to the Tribunal for adjudication afresh after affording both the parties reasonable opportunity of being heard. Parties to bear their own costs. Ordered accordingly.

Appeal allowed.

AIR 1978 KARNATAKA 8

K. JAGANNATHA SHETTY, J.

Smt. Saraswatibai, Appellant v. Smt. Malati, Respondent.

Second Appeal No. 852 of 1972, D/- 14-7-1977.

Insurance Act (4 of 1938), S. 39 (1) and (6) — Nomination in policy

does not confer title over the amount but only the bare right to collect it and give a valid discharge to the insurance company.

By reading sub-sections (1) and (6) of Section 39, it is clear that the sum secured by the Policy shall be payable in the event of the death of the assurer to the surviving nominee. Upon such payment, the liability of the Insurance Company gets discharged. The payment, however, has no relevance to the title or ownership of that money. The plain meaning of sub-s. (6) of S. 39 is that the nominee has no other right except a bare right to collect the policy money without affecting the title to other claimants, if any. AIR 1956 Cal 275, AIR 1957 Mad 115 and AIR 1961 Ker 126 (FB), Rel. on. AIR 1963 Mad 245, Disting.

(Paras 4, 6)

Cases Referred: Chronological Paras

AIR 1963 Mad 245	4
AIR 1961 Ker 126 (FB)	4
AIR 1957 Mad 115	4, 5
AIR 1956 Cal 275	4

W. K. Joshi, for Appellant; H.F.M. Reddy, for Respondent.

JUDGMENT:— The sole question that arises for consideration in this Second Appeal relates to the right of the appellant under S. 39 of the Insurance Act, 1938.

2. The facts which are necessary for the determination of the question are:

One Madhukar Kulkarni had taken a Policy of Assurance for Rs. 2,000/- with the Life Insurance Corporation of India. He was a teacher and the premiums were paid out of his salary income. He had nominated his mother as a nominee under Section 39. The Policy was taken on 14th December, 1959, and the assurer died on 31st October, 1966, leaving behind his wife (the plaintiff) and the mother (the defendant). In the normal course, each would have got one-half of the assured amount. But, the mother being the nominee, claimed the entire amount on the sole ground that the nomination confers on her an absolute right to the exclusion of the wife. So, the wife filed a suit for declaration and also for recovery of half the amount due under the Policy of her husband.

3. On the consideration of the evidence, both the Courts treated the sum due under the policy as a separate asset of the deceased as the premiums were paid out of his salary and not from the joint family fund. The Courts have further held that Section 39 confers on the nominee a bare right to collect the Policy money on the death of the assured and to give a good discharge to the Insurance Company and the nominee does not become the owner of the money payable under the Policy.

The correctness of this view is assailed in this Second Appeal preferred by the defendant.

4. For immediate reference, the relevant portion of Section 39 is set out below.

"39. (1) The holder of a policy of life insurance on his own life, may, when effecting the policy or at any time before the policy matures for payment, nominate the person or persons to whom the money secured by the policy shall be paid in the event of his death:

Provided that, where any nominee is a minor, it shall be lawful for the policy-holder to appoint in the prescribed manner any person to receive the money secured by the policy in the event of his death during the minority of the nominee.

....
....

(6) Where the nominee or, if there are more nominees than one, a nominee or nominees survive the person whose life is insured, the amount secured by the policy shall be payable to such survivor or survivors.

....
...."

By reading sub-sections (1) and (6) of Section 39, it is clear that the sum secured by the Policy shall be payable in the event of the death of the assurer to the surviving nominee. Upon such payment, the liability of the Insurance Company gets discharged. The payment, however, has no relevance to the title or ownership of that money. This has been the uniform view taken by several High Courts. In Ramballav Dhandhania v. Gangadhar Nathmall, AIR 1956 Cal 275, P. B. Mukharji, J. observed:

"All that sub-s. (6) of S. 39, Insurance Act does is to confer on the nominee the right to receive the insurance money as between such nominee and the Insurance Company, but it does not provide for the title or ownership of that money in general."

The above view has been followed by a Bench of the Madras High Court in D. Mohnavelu Mudaliar v. Indian Insurance and Banking Corporation Ltd. Salem, AIR 1957 Mad 115. Govinda Menon, J., as he then was, while summarising the law on question, observed at page 118 thus:

"The result of the above discussion seems to me to be this:— If the construction placed upon the declaration is that a trust has been created under the provisions of the Married Women's Property Act, the beneficiary would take the assured amount free of all the liabilities of the insured and if it is construed as a mere nomination, the nominee would have no more right than to receive the amount subject to all the liabilities as if the disposition was by means of a testamentary instrument."

A similar view has been taken in a Full Bench decision of the Kerala High Court in Sarojini Amma v. Neelakanta Pillai, AIR 1961 Ker 126 (FB).

My attention was, however, invited to a later decision of the Madras High Court in Karuppa Gounder v. Palaniammal, AIR 1963 Mad 245, which, according to the counsel for the appellant, has taken a contrary view.

5. I do not think that the said decision could be of any assistance to the case on hand. In that case, the previous decision of the same Court reported in AIR 1957 Mad 115, has not been referred to. Even Sec. 39 of the Insurance Act was not noticed. The decision appears to have proceeded on the special facts of that case and not on the scope of sub-section (6) of S. 39.

6. In my view, there is no scope for taking any contrary view. The plain meaning of sub-s. (6) of Sec. 39 is that the nominee has no other right except a bare right to collect the policy money without affecting the title to other claimants, if any.

7. In the result, the appeal fails and is dismissed.

8. Since the parties are closely related, there shall be no order as to costs in this Court.

Appeal dismissed.

AIR 1978 KARNATAKA 10

K. JAGANNATHA SHETTY, J.

B. Siddalingappa, Petitioner v. M. C. Moben, Respondent.

Civil Revn. Petn. No. 1123 of 1975, D/- 31-3-1977.*

(A) Karnataka Small Causes Courts Act (11 of 1964), S. 18 — Revisional powers — Scope of — Interference in revision not permissible unless the conclusion is one which no judge acting judicially could reasonably reach. AIR 1969 SC 1344; AIR 1963 SC 698 and AIR 1955 Mad 271, Applied. (Para 7)

(B) Evidence Act (1872), S. 34 — Entries in account books — Reliability.

An entry in an account book is an admission by the maker thereof in his own favour and it is accepted as evidence only if it strictly complies with the requirements of being kept regularly and in the ordinary course of business. If the account books and the entries made therein are of suspicious character, or do not inspire confidence in a court of justice, they should not be relied upon. AIR 1967 SC 1058 and AIR 1964 SC 818 Applied. (Paras 10, 11, 12)

Cases Referred: Chronological Paras

AIR 1969 SC 1344	7
AIR 1967 SC 1058	11
AIR 1964 SC 818	11
AIR 1963 SC 698	7
AIR 1955 Mad 271	7

M. Ramabhat, for Petitioner; Padubidri Raghavendra Rao, for Respondent.

ORDER:— This is a revision petition by the defendant preferred under S. 18 of the Karnataka Small Causes Courts Act, 1964.

*(Against order of Addl. Civil J., Udipi, D/- 29-1-1975).

2. The suit out of which the revision petition arises, has got many ugly features. and it seems to me that there is something more than that meets the eyes.

3. The plaint unfolds the following facts: The plaintiff was the Secretary, Udipi Co-operative Stores and also the proprietor of a textile shop called "Vijaya Textiles". The defendant was a District Inspector of Co-operative Societies, who was charged with the duty to supervise the Co-operative Societies. The plaintiff has a daughter who, in 1970, appeared for B. Com. degree examination of the Mysore University. The plaintiff wanted her to secure a second class, if not first class. In the beginning of November, 1970, the defendant was in his usual inspection tour to Udipi. When he was inspecting the said Co-operative Stores, the plaintiff expressed his anxiety about his daughter's result. Then, it is said that the defendant told him not to worry and assured him that he would get the matter done, with the assistance of his friends at Mysore. He particularly referred to one Dr. P. Rangaramu at Mysore and induced the plaintiff to part with Rs. 800/-. The plaintiff readily accepted the offer and paid Rs. 800/- and also accompanied the defendant upto Mysore and back spending in all Rs. 350/- to meet the expenses. It was also stated that on 6th November, 1970, the defendant borrowed from the plaintiff Rs. 700/- as hand-loan on the representation that he had not then received his pay. In the suit, the plaintiff has claimed the alleged hand-loan of Rs. 700/- and also Rs. 350/- said to have been spent towards travelling expenses. He has generously stated that the defendant has returned the said sum of Rs. 800/-.

4. The defendant denied the plaint allegations. He said that the attempt of the plaintiff was to malign him since he had made certain caustic remarks against the plaintiff in his inspection report relating to the working of the Co-operative Society of which the plaintiff was Secretary.

The only undisputed fact in this shrouded mystery is that the plaintiff's daughter did not get a class, much less a pass in the B. Com., degree examination.

5. The plaintiff, besides his oral evidence to prove the payment of hand-loan of Rs. 700/- to the defendant, has also produced Ext. p-1, the Day Book of the Vijaya Textile and Ext. p-2, the General Ledger of the same establishment. In Ext. p-1, at the bottom of page 68, there is an entry made to this effect:

"Suspense Account Amt. paid to Siddalingappa 700.00".

That entry has been marked as Ext. p-1(a). In the General Ledger, at the top of page 50, the following entries are found:

"...

6-11-70	Siddalingappa	700-00
30-11-70	Siddalingappa	800-00."

The above entries have been marked as Exhibits p-2(a) and p-2(b).

6. The learned Civil Judge, Udipi who tried the case, decreed the plaintiff's suit for Rs. 700/- while disallowing the claim of the plaintiff for Rs. 350/- on the ground that it was spent for illegal purposes.

7. Before I go into the merits of the contentions urged for the parties, it is necessary to see the scope of the revision petition. S. 18 of the Karnataka Small Causes Courts Act, 1964 confers revisional power to the High Court to examine whether the decision of the lower court is according to law or not. It reads.

"18. Revision of decrees and orders of Courts of Small Causes. — The High Court, for the purpose of satisfying itself, that a decree or order made in any case decided by a Court of Small Causes was according to law, may call for the case and pass such orders with respect thereto, as it thinks fit."

The scope of the similar expression found in S. 75 (1) of the Provincial Insolvency Act, 1920, came up for consideration before the Supreme Court in Malini Ayyappa Naicker v. Seth Manghraj Udhavdas Firm, AIR 1969 SC 1344 in which it was observed that the expression "according to law" is wider in ambit than the expression "contrary to law" found in S. 100 of the Code of Civil Procedure. It was also observed therein that the Court ought not to interfere merely because it thinks that possibly the

Judge who heard the case may have arrived at a conclusion which the High Court would not have arrived at. In Hari Shankar v. Rao Girdhari Lal Chowdhary, AIR 1963 SC 698 the Supreme Court while considering the expression "according to law" found in S. 35 of the Delhi and Ajmer Rent (Control) Act, observed that it should not be equated to errors of law or of fact simpliciter; it refers to the overall decision, which must be according to law which it would not be, if there is a miscarriage of justice due to a mistake of law. It was also observed that in exercise of such power, the High Court cannot interfere with a plain finding of fact arrived at by the court below. While dealing with the scope of the jurisdiction of the High Court under S. 25 of the Small Cause Courts Act, 1887, the Madras High Court in re Firm Beharilal Baldeoprasad, AIR 1955 Mad 271 case observed that where the evidence makes it clear that a question of fact was gone into by the Judge and his decision is apparently in accordance with the evidence, the High Court will not usually interfere in revision merely because it is possible to take a different view of the evidence to that of the court below. It was further observed that the decision of the Small Cause Court should not be interfered with in revision, though it may even be erroneous, unless the conclusion is one which no Judge acting judicially could reasonably reach.

8. Bearing in mind these principles, I will now consider whether the decision of the court below is in accordance with law.

9. The suit has been decreed relying on the entry Ext. p-1(a) in the Day Book of the Vijaya Textiles and a corresponding entry in Ext. p-2(a) and Ext. p-2(b) in the General Ledger of the same establishment. In support of these entries, the oral evidence of the plaintiff (P.W.1), and the evidence of one Babu Shetty (P.W. 2) was also relied upon. It may be interesting to note the observations made by the learned Judge while commenting on the said entries and the oral evidence. He has observed that the Day Book and the General Ledger have not been maintained as they were expected to be maintained. He has also observed that there is slight difference in the ink with which the entries in question have been made. But he said that it does not mean that it was a subsequent entry. The learned Judge, out of his own imagination, has further observed that it might have depended upon the pen used for making those entries. On P. W. 2, he has commented that his evidence was not up to the mark. But he said that it should not be ruled out as false one. He went on to observe that even leaving aside the evidence of P.W. 2, the remaining materials on record, coupled with the circumstances in the case, would be sufficient to prove the lending of Rs. 700/- to the defendant. The manner in which the judgment was written shows that the learned Civil Judge had no firm conclusion. He was more often oscillating, sometimes faultering and finally landed himself in favour of the plaintiff, if I may say so, on a slippery ground.

10. The conclusion of the learned Civil Judge was primarily based on the entries in the account book and the ledger book of the Vijaya Textiles of the plaintiff. It is relevant to state that an entry in an account book is an admission by the maker thereof in his own favour and it is accepted as evidence only if it strictly complies with the requirements of being kept regularly and in the ordinary course of business. If the account books and the entries made therein are of suspicious character, or do not inspire confidence in a court of justice, they should not be relied upon.

11. Now, turning to the Day Book or the Ledger Book, produced by the plaintiff, it strikes to any one that they have not been kept regularly and in the ordinary course of business. The entry under Ext. p-2(a) is undoubtedly of a suspicious character for more than one reason. Firstly, it has been entered in a different ink; secondly, the said entry was written in between the two regular lines in a cramped style although it could have been written neatly one below the other on the lines clearly drawn on the said page. Likewise, Ext. p-1, the Day Book entry also shows that

the writing therein is also in a different ink. All the rest of the entries made on that particular day, are in a marked contrast with the entry under Ext. p-1(a), besides it is at the end of that page. These circumstances, in my opinion, detract from the value of the entries and no court of law would be justified in accepting them.

In Kurapati Venkata Mallayya v. Thondepu Ramaswamy and Co. AIR 1964 SC 818 the Supreme Court, while dealing with the scope of S. 34 of the Evidence Act observed that the cumulative effect of the circumstances like a debit entry at the end of a page in an account book, that the description of the goods so closely written in a cramped style on the same page though it could have been written on the next page and the total amount debited being written in different ink detracted from the value of the entry. It is necessary to point out, even where books of account have been kept in the regular course of business, no person can be charged with the liability merely on the basis of entries in such books and there has to be further evidece to prove the alleged payment. In Chandradhar Goswami v. Gauhati Bank Ltd., AIR 1967 SC 1058 while dealing with the scope of S. 34 of the Evidence Act, the Supreme Court observed at page 1061 thus:

"S. 34 says that such entry alone shall not be sufficient evidence, and so, some independent evidence had to be given by the bank to show that this sum was advanced. What would be the nature of such independent evidence would certainly depend upon the facts of each case, but there can be no doubt that some independent evidence to show that advance had been made has to be given."

12. The oral evidence in the case is of P.W. 1 and P.W. 2. The evidence of the plaintiff is only self-serving. The evidence of P.W. 2 has been characterised by the learned Civil Judge as not being up to the mark. Yet, he has relied upon that evidence, P.W. 2 has admitted that he did not know the exact amount paid by the plaintiff to the defendant. He has only stated that he saw the plaintiff paying some amount to the defendant. He was ignorant of the talk that was going on between the plaintiff and the defendant and the source from which the plaintiff took the cash and paid to the defendant. That is all the evidence in the case. On these evidence, in my view, even a lay man cannot form an opinion in favour of the plaintiff, leave alone a Judge acting judicially. The learned Civil Judge, unfortunately, while writing the lengthy judgment, apparently forgot the crux of the matter and erroneously reached the conclusion which nobody could reasonably reach. If such evidence is accepted, nobody would be safe in the society. The plaintiff could go on writing something in his account book and charge his opponent with liability to pay any amount.

13. In the result, the revision petition is allowed, the judgment of the lower court is set aside, and the plaintiff's suit in dismissed with costs of the defendant, here and in the court below. Advocate's fee is Rs. 100/-.

Revision allowed.

AIR 1978 KARNATAKA 13

K. JAGANNATHA SHETTY, J.

R. G. Hiremath and another, Petitioners v. T. Krishnappa, Respondent.

Civil Rev. Pet. Nos. 1421 and 1422 of 1975, D/- 25-3-1977.*

(A) Evidence Act (1 of 1872), S. 116 — Estoppel — Tenant not denying title of his previous landlord cannot question the title of a purchaser of the same premises from the previous landlord. AIR 1976 SC 2335, Rel. on. (Para 3)

(B) T. P. Act (1882), S. 108 Cl. (h) — "Whatever is affixed or built on soil becomes part of it" — Doctrine of — Limited application in India — Rights of property in buildings may be different from the rights in the soil over which the buildings stand — Whatever is attached to soil need not become part of it and be subjected to the same rights as those of the soil itself. AIR 1927 PC 135, Rel. on. (Para 4)

*(Against order of 2nd Addl. Dist. J. Dharwar, D/- 27-2-1975).

GU/GU/C118/77/ABO/VSS

Cases Referred: Chronological Paras

AIR 1976 SC 2335 3
AIR 1927 PC 135 4

B. V. Deshpande for Petitioners (in Both Petns) V. Krishna Murthy, for respondent (in Both Petns.)

ORDER:— These two revision petitions raise a common question of law. The question is, whether there exists a relationship of landlord and tenant as between the parties to the eviction proceedings in respect of the premises occupied by the petitioners.

2. The relevant facts bearing on the question are these:

In 1915 a site measuring 1 acre 20 guntas was leased to one Rao Saheb Gopalgiri, as a building site under Sanads — Exs. P. 3 and P. 4. In 1917 Gopalgiri executed a Kabuliyat Ex. P-5 in favour of the Government. The said Kabuliyat provided inter alia conditions for erecting buildings and also stated that he would pay ground rent at the rate of Rs. 30/- (being at the rate of Rs. 24/- per acre) for 50 years commencing from 1st Aug. 1915, and thereafter he would pay such ground rent for such further periods as may from time to time be fixed by lawful authority. It also provided that he should be entitled to occupy the said land, in perpetuity, but if he contravened any of the conditions, the Collector may declare the land forfeited to Government and may dispose of the same.

Between 1917 and 1927 Gopalgiri erected several buildings in the said site. After the death of Gopalgiri, his son Ramachandragiri leased one of those buildings to one of the petitioners in 1941, and in 1945 he leased another building to the other petitioner. In 1950 Ramachandragiri died leaving behind his wife Kamalinibai. The Petitioners continued to pay rent to Kamalinibai. The rent was admittedly paid from 1950 to 23-8-1969, on which date Kamalinibai sold the said buildings to the respondent herein, under Exhibit P-1 for a sum of Rupees 20,000/-. Thereafter the petitioners refused to pay rent to the respondent in spite of the latter's demand. Thereupon, the respondent determined their tenancy and brought the action for eviction on the ground that the buildings were reasonably, and bona fide required by him for self-occupation.

The petitioners raised a preliminary objection before the learned Munsiff stating that the proceedings for eviction were not maintainable as there was no relationship of landlord and tenant as between the parties. It was contended for them that the lease in respect of the site granted to Gopalgiri was for 50 years and after the expiry of that period, the land with buildings vested in the State.

The learned Munsiff upheld that plea and rejected the application for eviction. But, in the appeals, the learned District Judge overruled the objection. The learned Judge held that Kamalinibai was the owner of the buildings and was competent to sell the same in favour of the respondent and the respondent as landlord could maintain the action for eviction.

The correctness of the decision of the learned Judge is called into question in these petitions.

3. In my view, the problem presented is not a complicated one.

It is not in dispute that the petitioners came to occupy the buildings as tenants and it is also not in dispute that they paid rents first to Ramachandragiri and after his death, to his wife Kamalinibai continuously for a period of 20 years. They however, refused to recognise the respondent as owner despite the registered sale deed in his favour. In these circumstances I am quite unable to understand the legitimacy of their stand, when they did not dispute the right of Kamalinibai to receive the rent in respect of the same buildings. The relationship that existed as between the petitioners and Kamalinibai continued under the same terms and conditions, after the respondent purchased the buildings. The petitioners are, therefore, estopped from questioning the title of the respondent under S. 116 of the Evidence Act. If any decision is needed on this question, see Sri Ram Pasricha v. Jagannath (AIR 1976 SC 2335) in which it was also observed that under the general law, in a suit between landlord and tenant the question of title to the leased property is irrelevant.

4. There is one other reason for me to uphold the view taken by the learned District Judge. Assuming that there was a cloud on the title passed on to Gopalgiri in respect of the site in question under the Sanads Exs. P. 3 and P. 4 granted to him, there cannot be any dispute on title in respect of the buildings in question. It is not in dispute that Gopalgiri constructed those buildings according to the conditions set out under Ex. P. 5 and it is also not in dispute that he was the owner of those buildings. It is nobody's case that Ramachandragiri had no right to succeed his father or Kamalinibai has no right to succeed her husband. Kamalinibai was therefore competent to sell the buildings to the respondent.

There may be separation of the ownership of the buildings from the ownership of the land, and there is no rule of law that whatever is affixed or built on the soil becomes a part of it and is subjected to the same rights of property as the soil itself, as has been observed by Sir Lancelot Sanderson in Narayan Das v. Jatindranath, (AIR 1927 PC 135). The learned Judge observed:

".....In India respecting the separation of the ownership of buildings from the ownership of the land; and to the recognition by the Courts in India that there is no rule of law that whatever is affixed or built on the soil becomes a part of it, and is subjected to the same rights of property as the soil itself, their Lordships are of opinion that in order to make a house erected upon the land, as well as the land itself, subject to the Government power of sale for arrears of revenue special words indicating the intention of the Legislature to make the building subject to sale would be necessary."

5. It may be relevant to state that there was no condition in the Sanads Exs. P. 3 and P. 4 or in the Kabuliyat Ex. P. 5 that any building built by the grantee would become automatically the property of the State. On the contrary, if one peruses closely the terms of the said deeds, it becomes clear that the property was transferable, heritable and capable of being enjoyed in perpetuity.

6. In the view that I have taken, it is unnecessary to consider the other documents like Ex. P. 7 (Certificate of commutation of N. A. Assessment) on which reliance was placed by Sri V. Krishnamurthy, learned counsel for the respondent stating that Kamalinibai was registered as the holder of the property.

7. In the result, these petitions fail and are dismissed.

The respondent is entitled to his costs. Advocate fee Rs. 100/-, one set.

Petitions dismissed.

AIR 1978 KARNATAKA 15

M. S. NESARGI, J.

Venkatesh M. Mariyappa Gowda, Petitioner v. Land Reforms Tribunal, Sringeri and others, Respondents.

Writ Petn. No. 6932 of 1976, D/- 27-9-1977.

Karnataka Land Reforms Act (1961), S. 48-A (2) — Karnataka Land Reforms Rules (1974), Rr. 19 and 43 (d) — Requirement as to service of individual notices to persons interested — Non-compliance — Enquiry, held, vitiated. (Constitution of India, Arts. 226, 227 — Natural justice).

Section 48-A (2) of the Act makes it mandatory for the Tribunal to issue individual notices to persons whose names are mentioned in Form 7 filed by the person claiming to be registered as an occupant and to persons who appear to be interested in the land in question. If the material as required by Rule 19 is provided by the Tahsildar, as is incumbent upon him by the said Rule, the Tribunal would be certainly in a position to know the persons who are interested in the land.

(Paras 5 and 7)

Where it was clear from the records maintained by the Tribunal that there was an endorsement on the individual notice sent to the person interested that the said notice was affixed to the land as the said person was not available, it was held that the provisions of R. 43 (d) had not been com-

plied with and the principles of natural justice having been violated the enquiry was vitiated. (Para 8)

Mohandas N. Hegde, for Petitioner; D. Ponnurangam, for Respondent No. 3.

ORDER:— This writ petition is directed against the order dated 4-6-1976 passed by the Land Tribunal, Sringeri, in Case No. LRT. 1432/75-76 so far as it pertains to respondent 3, Rukminiyamma, as the case of the petitioner against respondent 2, Mariya Gowda, has been given up at the stage of issuing Rule itself.

2. By the said order, Rukminiyamma, respondent 3, was granted occupancy rights to the extent of 2 acres 26 guntas in Survey No. 53 of Kagodu village, Sringeri Taluk.

3. It is undisputed that the petitioner is an interested person in the land inasmuch as he is the descendant of Kalanna Gowda, the original owner of the land. That fact is available in the statement of objections filed by Rukminiyamma.

4. The main grievance put forth by Sri Mohandas N. Hegde, the learned Advocate appearing for the petitioner, is that the petitioner was entitled to an individual notice under Section 48-A (2) of the Karnataka Land Reforms Act, 1961, but the same was not issued and served on him and as such he was not present before the Tribunal during the enquiry that took place, and hence he had no opportunity to put forth his case.

5. Section 48-A (2) of the Act makes it mandatory for the Tribunal to issue individual notices to persons whose names are mentioned in Form-7 filed by the person claiming to be registered as an occupant and to persons who appear to be interested in the land in question.

6. In order to find out what the legislature meant by the use of the words "persons appear to be interested" in the land in question, it would be, in my opinion, necessary to refer to Rule 19 of the Karnataka Land Reforms Rules, 1974. The said rule reads as follows:—

"19. Form of application and notice,—

(1) The application under sub-section (1) of Section 48-A shall be in Form 7. The application shall furnish particulars of all the lands held under each separate tenancy in one or more than one Taluk in respect of which the applicant claims to be entitled to be registered as an occupant. Where the lands are situated in more than one Taluk, the application shall be filed before the tribunal of the Taluk where the greater part of the lands is situated. On receipt of the application, the Tahsildar shall send extracts of the application to the Tribunals concerned. So far as the lands in his Taluk are concerned, the Tahsildar shall verify the particulars mentioned in the application with reference to the revenue records including the Record of Rights wherever they are prepared and also note the same on the application. The public notice and individual notice referred to in sub-section (2) of the said section shall be in Form 8 and Form 9 respectively.

(2) Such notice in addition to being served in the manner laid down in Rule 42 shall also be published in the chavadi of the village concerned and in the offices of the village panchayat and the Tahsildar for a period of not less than thirty days."

7. If the materials as required by Rule 19 are provided by the Tahsildar, as is incumbent upon him by the said Rule, the Tribunal would be certainly in a position to know the persons who are interested in the land. But in this case it is not necessary to probe into that question. It is an undisputed fact that Venkatesha Gowda referred to by respondent 3 in her application is none other than the petitioner. When that is so, it is to be seen whether the petitioner was served with individual notice as contemplated by Section 48-A (2) of the Act. The mode of service of notice is provided in Rule 43 of the said Rules. Rule 43 (d) which is relevant for our purpose reads as follows:

"43 (d) in the case of an individual, person be served—

(i) by delivering or tendering the notice or order to the person concerned or his Advocate or authorised agent; or

(ii) by delivering or tendering the notice or order to some adult member of the family; or

(iii) by sending the notice or order to the person concerned by registered post acknowledgment due; or

(iv) if none of the aforesaid modes of service is practicable, by affixing the notice or order in some conspicuous part of the last known place of residence or business of the person concerned."

8. The records maintained by the Tribunal have been called for. In regard to the individual notice sent to the petitioner, it is seen that an endorsement is made on the obverse of it that the said notice was affixed to the land as the said person was not available. It is evident that the provisions of Rule 43 (d) of the Rules have not been complied with. Therefore, it will have to be held that no service as contemplated by law was made on the petitioner and his contention in this regard is substantiated. When that is so, the principles of natural justice have been violated and the enquiry becomes vitiated.

9. Therefore, the rule is made absolute and the impugned order is quashed. The Tribunal is directed to hold the enquiry afresh according to law and dispose of the case expeditiously.

10. No order as to costs.

Rule made absolute.

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K. BHIMIAH, J.

M/s. Sowcar T. Thimmappa & Sons and others, Petitioners v. The State of Karnataka and others, Respondents.

Writ Petns. Nos. 5093, 5239 and 5240 of 1977, D/- 23-9-1977.

(A) Constitution of India, Art. 226 — Writ petition — Maintainability — Existence of legal right.

The existence of a legal right is the foundation for a petition under Art. 226 of the Constitution for the enforcement of rights, even after the 42nd Amendment of the Constitution. AIR 1962 SC 1183 and AIR 1964 SC 685, Rel. on. (Para 13)

(B) Constitution of India, Arts. 19 (1) (g) and 14 — Right to carry on business — No citizen can claim a right to trade in liquor as a fundamental right. AIR 1972 SC 1816 and AIR 1975 SC 1121, Foll. (Para 14)

(C) Karnataka Excise (Lease of the Right of Retail Vend of Liquors) Rules (1969), R. 18 Proviso (unamended)—Scope — No conferment of any right on previous licensee — Constitution of India, Art. 226.

The discretion is conferred on the Deputy Commissioner, under R. 18 proviso whether or not to continue the previous licensee in the event of default committed by the highest bidder. There is no conferment of right on the licensee to demand the continuance of his previous license, if any default is committed by the highest bidder by failure to comply with the provisions of Rr. 16 and 17. The proviso to R. 18 of 1969 Rules, therefore, does not confer upon the petitioners—previous licensees—a cause of action under the special powers of the High Court under Art. 226 of the Constitution of India. It is not a right, which could be recognised and enforced by writ. (Paras 15, 16, 17)

(D) Karnataka Excise (Lease of the Right of Retail Vend of Liquors) Rules (1969), R. 18 (i) (as amended) — Cancellation of acceptance and confirmation in exercise of discretion under unamended R. 18 — State Govt. held had power to cancel the cancellation under the amended rule the amendment having been made with retrospective effect. (Para 19-A)

(E) Karnataka Excise (Lease of the Right of Retail Vend of Liquors) Rules (1969), R. 18 Proviso (unamended) — Previous licences continued under — Terms and conditions applicable.

It is not possible to read the proviso to R. 18 to mean that the previous license should be continued on the terms and conditions of the fresh licenses viz., depositing and giving Bank guarantee at the highest bid amount. Continuing the previous license would mean that the license should be continued on the same terms and conditions on which it was issued in the previous year. (Para 27)

Cases Referred: Chronological Paras

AIR 1975 SC 1121 : 1975 Tax LR 1569 — 14
AIR 1972 SC 1816 : 1972 Tax LR 2298 — 14
AIR 1964 SC 685 — 13
AIR 1962 SC 1183 — 12

AIR 1957 SC 912 15
AIR 1954 SC 592 16
AIR 1953 SC 309 16

H. B. Datar for K. S. Desai (in W. P. No. 5093 of 1977) and K. A. Swami (in W. P. Nos. 5239 and 5240 of 1977), for Petitioners; R. N. Byra Reddy, Advocate-General (for Nos. 1 to 5) in W. P. No. 5093 of 1977 and (Nos. 1 to 3) in W. P. Nos. 5239 and 5240 of 1977, A. M. Farooq (for No. 6) in W. P. No. 5093 of 1977, T. S. Pai (for No. 4) in W. P. Nos. 5239 and 5240 of 1977, for Respondents.

ORDER: — These three writ petitions under Art. 226 (1) (b) and (c) of the Constitution of India (42nd Amendment) are by the petitioners who are excise contractors and who had been given lease of right of retail vend of Arrack and Toddy for the year 1976-77 in different taluks in Shimoga, Chickmagalur and Chitradurga Districts, seeking a writ of certiorari for quashing the order passed by the 1st respondent in H.D. 65 EDC 77 dated 24th June, 1977 and also for the issue of a writ of mandamus in W. P. Nos. 5239 and 5240 of 1977 regarding the disposal of the lease of right of vend of Arrak and Toddy afresh in those taluks.

2. These writ petitions raise common questions of facts and law and, therefore, they are heard together and disposed of by a common order.

3. In W. P. No. 5093/1977 the case of the petitioner is that he had been given the lease of right of retail vend of Arrak in the year 1976-77 by the Deputy Commissioner, Shimoga, for Rs. 95,100/- towards the monthly rent of lease to vend arrak in the shops located in Thirthahally taluk, Shimoga District. For the year 1977-78 auction was held in respect of arrak shops in Thirthahally taluk and the 6th respondent was the highest bidder. The State Government confirmed the disposal of retail vend of liquors by him by its order No. 65 EDC 77 dated 26-3-1977. But the 6th respondent failed to comply with the provisions of Rr. 16 and 17 of the Karnataka Excise (Lease of the Right of Retail Vend of Liquors) Rules, 1969 (to be hereinafter called the Rules of 1969). Therefore, the 1st respondent passed an order in HD 65 EDC '77 dated 16-6-1977 under R. 18 of the 1969 Rules, cancelling the disposal of the right of retail vend of liquor by the 6th respondent and the confirmation thereof, ordering that the deposit made be forfeited and directed the said right of retail vend of liquors be disposed of afresh as per rules and making liable the 6th respondent for the loss if any sustained by the 1st respondent on account of the fresh disposal. As a consequence it is necessary under the Rule that the right of retail vend of liquors is required to be disposed of afresh in such manner as the State Government directs and till such disposal is made and fresh licences are granted the petitioner has a right to continue, being a previous licensee in respect of the same shops and under proviso to R. 18 of 1969 Rules he could also participate in the bid and that he has every chance of becoming a licensee. The 1st respondent amended the R. 18 of 1969 Rules by incorporating the words "may be cancelled by Government at its discretion and if it is so cancelled the deposit made by such person" shall be and shall be deemed to have been substituted with effect from 1st Jan. 1977. It is pleaded that the amended R. 18, has no application to the facts of this case and the petitioner has got right to continue as lessee under the proviso to R. 18 of 1969 Rules and that the impugned order was passed without the petitioner being heard. Therefore, he has sought for the issue of a writ of certiorari quashing the order passed by the 1st respondent in HD 65 EDC '77 dated 24-6-1977 at Exhibit 'E' and also for issue of a writ of mandamus restraining the 1st respondent from proceeding any further in pursuance of the above order with regard to the disposal of the lease of the right of retail vend of arrack in Thirthahally in Shimoga District.

4. In W. P. Nos. 5239 and 5240 of 1977, the case of the petitioners is that they were the highest bidders in the auction sale held for the year 1976-77 for the lease of retail vend of toddy and their bid was accepted and confirmed by the 1st respondent. Auction was held for the year 1977-78 in respect of toddy shops in Kadur taluk and Davanagere, Harihar and Holalkere taluks. The 4th respondent was the highest bidder. The 4th respondent's bid was accepted and confirmed by the 1st respondent. The 4th respondent failed to comply with the requirements of Rr. 16 and 17 of 1969 Rules and, therefore, the disposal of the right of retail vend of liquor in favour of the 4th respondent was required to be cancelled by the 1st respondent. But the 1st respondent did not act under R. 18 of 1969 Rules, but amended Rule No. 18,

and by virtue of provisions of R. 18 ratified the belated acceptance of 1 month's deposit of the bid amount and Bank guarantee for 3 months.

5. The plea of the petitioners is that their right to continue the vend of toddy under the old license until a fresh disposal of that right under the proviso to R. 18 has been violated by the amendment of R. 18 promulgated by the 1st respondent. Therefore, the petitioners have sought for the issue of a writ in the nature of mandamus to the 1st respondent to cancel the lease in favour of the 4th respondent and to hold fresh auction of right of retail vend of toddy in the taluks of Kadur, Davanagere, Harihar and Holalkere.

6. The contentions urged on behalf of the petitioners are:

(1) That they had a legal right under the proviso to unamended R. 18 of 1969 Rules for continuance of their previous licence of the right of retail vend of liquors till fresh disposal of such right is made and fresh licenses are granted.

(2) When the bidders viz., 6th and the 4th respondents failed to comply with the provisions of Rules 16 and 17 of 1969 Rules, the 1st respondent was bound under unamended R. 18 to cancel the disposal of the right of retail vend of liquors.

(3) In that event the petitioners had every chance to bid in the auction sale and secure the right to vend liquor.

(4) The amended R. 18, is not applicable when once the Government acted under unamended R. 18 and cancelled the acceptance and confirmation of the right in favour of the 6th respondent in W. P. No. 5093 of 1977.

7. The main contentions urged on behalf of the respondents are: (1) that the petitioners had no legal right under the proviso to R. 18 to continue to vend liquors and it was within the discretion of the Deputy Commissioner, whether or not to continue license of the petitioners in respect of the same shop or shops.

(2) That the petitioners have no locus standi to file these writ petitions under Art. 226 (1) (b) and (c) of the Constitution of India, since there is no contravention of any Rule resulting in injury of a substantial nature or substantial failure of justice.

(3) That the Government is empowered under the amended R. 18 of 1969 Rules to accept the belated deposits and the Bank guarantee furnished, and without cancelling the disposal of the right of retail vend of liquors.

8. From these contentions, the questions that arise for decision are:

(1) Whether the petitioners have any legal right to continue to vend liquor, under the proviso to unamended R. 18, when there is non-compliance with the provisions of Rules 16 and 17 of 1969 Rules.

(2) Whether the Rules 16, 17 and 18 as they stood before amendment are directory or mandatory.

(3) Whether the unamended R. 18 of 1969 Rules is attracted in W. P. No. 5093/1977 and the deemed deposit and acceptance of Bank Guarantee is valid in law.

(4) Whether the 1st respondent is legally bound to cancel the acceptance and confirmation of the bid of 4th respondents in W. P. Nos. 5239 and 5240 of 1977 and order fresh disposal of the right to retail vend.

9. The contention of Mr. H. B. Datar, on behalf of the petitioner in W. P. No. 5093/1977 is that when the Rr. 16 and 17 are not amended the amended R. 18 does not empower the 1st respondent to extend time by directing the Dy. Commissioner and the Commissioner of Excise to accept the belated deposit of money and Bank guarantee furnished by the 6th respondent. Alternatively, he, contended that even though the amended R. 18 of the Rules empower the Government to direct the belated acceptance of deposit and Bank guarantee, it was illegal to cancel the order passed on 16-6-1977, cancelling the acceptance and confirmation of the bid, since the amended Rule was made on 22-6-1977. He argued that by virtue of the cancellation of the acceptance and confirmation of the bid on 16-6-1977 the petitioner has got a vested right under the proviso to unamended R. 18 of the 1969 Rules, to continue the vend of arrack.

10. Now therefore, the crucial question for determination is whether the petitioners have any legal right to continue their previous license in respect of the same shop or shops under the proviso to the unamended R. 18 of 1969 Rules. The proviso to R. 18 of 1969 Rules reads thus:

"Provided that till such disposal is made and fresh licenses are granted, the Deputy Commissioner may continue the licence of the previous licensee in respect of the same shop or shops.

(Underlining is mine)

It is undisputed that in all these three writ petitions the petitioners did not comply with the provisions of Rules 16 and 17 of the 1969 Rules. In Writ Petition No. 5093 of 1977 the 1st respondent passed orders of cancellation of acceptance and confirmation of 6th respondent as required under unamended R. 18 of 1969 Rules. But in respect of the petitioners in Writ Petitions Nos. 5239 and 5240 of 1977 no such order of cancellation was passed by the 1st respondent.

11. Mr. Advocate General, strongly urged that the petitioners have no legal right, requiring the Deputy Commissioner (2nd respondent) to continue their previous licence in respect of the same shop or shops to attract the application of the provisions of Art. 226 (1) (b) and (c) of the Constitution. He contended, that the High Court shall have power to issue writs of the nature specified in Art. 226 (1) of the Constitution, for the redress of any injury of a substantial nature by reason of the contravention of any other provision of this Constitution or any provision of any enactment, ordinance, or any other order, rule, regulation, bye-law or other instruments made therein, as required under Art. 226 (1) (b) or by reason of any illegality in any proceedings by or before any authority under any provision referred to in sub-cl. (b), where such illegality has resulted in substantial failure of justice. He urged that the petitioners have not suffered any injury by reason of the impugned orders in W. P. No. 5093/1977 and also by the omission on the part of the 1st respondent to pass orders as required under the unamended R. 18 of the 1969 Rules in W. P. Nos. 5239 and 5240 of 1977. He further urged that injury as well understood is a legal concept, which results from violation of any legal right vested in any person. Reference was made to S. 2 of Part II relating to Cause of Action in Halsbury's Laws of England III Edition Volume I. At para 10, it reads:

"The general rule is that wherever there exists a "right" recognised by the law, there exists also a remedy."

12. Reliance was placed upon the decision of the Supreme Court in Kalyan Singh v. State of Uttar Pradesh (AIR 1982 SC 1183). In para 14 of the judgment the Supreme Court has observed thus (at page 1188 of AIR):

"After cancellation of his permit, he could not maintain a petition for a writ under Article 226 because a right to maintain such a petition postulates a subsisting personal right in the claim which the petitioner makes and in the protection of which he is personally interested. It is true that the appellant did at the date of the petition filed in the High Court hold a permit which was to enure till the 27th Nov. 1960. But if the permit was validly terminated from the date specified, he will not be entitled to relief even if he had on the date of the petition a subsisting right. Ground No. 2 must therefore fail."

13. In the decision in State of Orissa v. Ramachandra Dev (AIR 1964 SC 685) the same view has been reiterated. At para No. 8 of the judgment the Supreme Court has observed thus:

"But though the jurisdiction of the High Court under Art. 226 is wide in that sense, the concluding words of the article clearly indicate that before a writ or an appropriate order can be issued in favour of a party, it must be established that the party has a right and the said right is illegally invaded or threatened. The existence of a right is thus the foundation of a petition under Art. 226. The narrow question which falls for decision in the present appeals is whether the respondents can be said to have proved any legal right in respect of the properties of which they apprehended they would be dispossessed by the appellant."

In the light of the enunciation of law by the Supreme Court the existence of a legal right is the foundation for a petition under Art. 226 of the Constitution for the enforcement of rights, even after the 42nd Amendment of the Constitution. Therefore, as rightly contended by the learned Advocate General, the petitioners are required to demonstrate that there existed a legal right which has been infringed by the failure on the part of the 1st respondent to take action as required under unamended R. 18 of 1969 Rules.

14. The learned Advocate General next urged that there is no right conferred on any citizen under the Constitution to trade in liquor. Reliance is placed upon the decision of the Supreme Court in State of Orissa v. Harinarayan Jaiswal (AIR 1972 SC 1816): (1972 Tax LR 2298) wherein the Supreme Court has observed in Para 17 of the judgment thus:

"The fact that the Government was the seller does not change the legal position once its exclusive right to deal with those privileges is concerned. If the Govern-

ment is the exclusive owner of those privileges, reliance on Art. 19 (1) (g) or Art. 14 becomes irrelevant. Citizens cannot have any fundamental right to trade or carry on business in the property or rights belonging to the Government, nor can there be any infringement of Art. 14, if the Government tries to get the best available price for its valuable rights." The same view has been reiterated by the Supreme Court in its decision in Har Shankar v. Deputy Excise and Taxation Commr. (AIR 1975 SC 1121): (1975 Tax LR 1569). In Para No. 53 of the judgment the Supreme Court observed thus:

"There is no fundamental right to do trade or business in intoxicants. The State under its regulatory powers, has the right to prohibit absolutely every form of activity in relation to intoxicants—its manufacture, storage, export, import, sale and possession. In all their manifestations, these rights are vested in the State and indeed without such vesting there can be no effective regulation of various forms of activities in relation to intoxicants."

In the light of the decision cited above, no citizen can claim a right to trade in liquor as a fundamental right. Further there exists a remedy wherever there exists a right.

15. It is not necessary to decide the question whether Rules 16, 17 and 18 of 1969 Rules are mandatory or directory since the limited and crucial question for determination for the disposal of these writ petitions is whether the proviso to unamended R. 18 of 1969 Rules conferred any legal right on the petitioners to continue their previous license, if action has been taken as contemplated under unamended R. 18. A plain reading of the proviso, makes it clear that discretion is given to the Deputy Commissioner (2nd Respondent) to continue the license of the previous licensee in respect of the same shop or shops till a fresh disposal of the right of retail vend of liquors is made and fresh licenses are granted. It is manifest in the words "the Deputy Commissioner may continue the license of the previous licensee" that a discretion is vested in the Deputy Commissioner (2nd Respondent). The mandate given to the Deputy Commissioner, from the plain meaning of those words is not in my opinion mandatory, but directory. The object to be achieved by this proviso was to see that revenues to the Government do not suffer till the disposal of the right is made and fresh licenses are granted before 1st July of every year when the right of retail vend of liquors is disposed of. If as provided in the proviso to the unamended R. 18 of 1969 Rules, the Deputy Commissioner declined to continue the license of the previous licensee in respect of the same shop or shops, there is no apprehension of loss of revenue to Government, in view of the provisions of Sub-rule (2) of unamended R. 18 of 1969 Rules. Sub-rule (2) says:

"The disposal under Sub-rule (1) shall be at the risk of the defaulter, who shall, however, be not entitled to any excess amount realised from such disposal but shall be liable for the losses sustained by the State Government. The State Government shall be entitled to assess such loss and recover it as if it were an arrear of land revenue."

This position in law clearly supports the view that the Deputy Commissioner may or may not exercise his discretion to act under the proviso to unamended Rule 18 of 1969 Rules. This view is further supported by the decision of the Supreme Court in State of U. P. v. Manbhodhan Lal Srivastava (AIR 1957 SC 912). While interpreting the word "may" in Art. 320 (3) (c) of the Constitution of India, the Supreme Court observed thus: (at pp. 917, 918 of AIR).

"On the other hand, it is not always correct to say that where the word "may" has been used, the statute is only permissive or directory in the sense that non-compliance with those provisions will not render the proceeding invalid. in that connection, the following quotation from Crawford on 'Statutory Construction' — Art. 261 at p. 516 is pertinent:

"The question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained, not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it the one way or the other." "

12. We have already indicated that Art. 320 (3) (c) of the Constitution does not confer any rights on a public servant so that the absence of consultation or any irregularity in consultation should not afford him a cause of action in a Court of law, or entitle him to relief under the

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special powers of a High Court under Art. 226 of the Constitution or of this Court under Art. 32. It is not a right which could be recognized and enforced by a Writ."

It is clear, therefore, that the proviso to R. 18 of 1969 Rules, did not confer upon the petitioners a cause of action under the special powers of the High Court under Art. 226 of the Constitution of India. It is not a right which could be recognised and enforced by writ.

16. The learned advocate for the petitioners' placed reliance upon a decision of the Supreme Court in K. M. Guruswamy v. State of Mysore, (AIR 1954 SC 592) and emphasized the binding nature of the 1969 Rules on the State Government and its officers and further urged that all actions on the part of the State Government and its officers are strictly controlled by the Karnataka Excise Act and the Rules, framed thereunder. Therefore they contended that the proviso to unamended R. 18 of 1969 Rules, confer right on the petitioners to have their previous license continued for the succeeding year until the right in question is disposed of in any one of the modes prescribed in R. 3. In the above decision at Paras 10 and 11 of the judgment, the Supreme Court has observed thus:

"10. This Court had occasion to observe in State of Assam v. Keshab Prasad Singh, AIR 1953 SC 309 — a fisheries case — that the sale of these licenses forms such a lucrative source of revenue that State legislatures have deemed it wise not to leave the matter to unfettered executive discretion; accordingly legislation has been enacted in most parts of India to regulate and control the licensing of these trades; Acts are passed and elaborate Rules are drawn up under them. It is evident that there is a policy and a purpose behind it all and it is equally evident that the fetters imposed by legislation cannot be brushed aside at the pleasure of either Government or its officers. The Rules bind State and subject alike.

11. The Act and the Rules make it plain that liquor licensing in the State of Mysore can only be done in certain specified ways and such discretion as is left to the authorities is strictly controlled by Statute and Rule."

The enunciation of the principle of law by the Supreme Court in the above decision does not speak of any conferment of right on the licensee nor any right on the licensee to demand the continuance of his previous license, if any default is committed by the highest bidder by failure to comply with the provisions of Rules 16 and 17. The Supreme Court has laid down that the liquor licensing in the State can only be done in certain specified ways and such discretion as is left to the authorities is strictly controlled by the statute and Rule.

17. As already pointed out, the discretion is conferred on the Deputy Commissioner, whether or not to continue the previous licensee in the event of default committed by the highest bidder. Therefore, viewed from any angle it is not possible to accede to the contention that the petitioners have got legal right to continue their previous license in respect of the shop or shops which entitled them to enforce it under Art. 226. On this ground alone, Writ Petitions 5239 and 5240 of 1977 are liable to be dismissed. I will presently deal with the question whether the petitioners in these two writ petitions have sustained any injury of a substantial nature or whether there is any substantial failure of justice.

18. In Writ Petition No. 5093 of 1977 Mr. Datar, learned counsel for the petitioner, contended that when the Government cancelled the acceptance and confirmation of the bid of the 6th respondent as per Exhibit 'D' the mode of disposal should have been by any one of the modes enumerated in R. 3 of 1969 Rules. He further urged that the 1st respondent having acted under the unamended R. 18, had no power to cancel the sale purporting to act under the amended R. 18 of 1969 Rules. He further urged that when the 1st respondent acted under unamended R. 18 and cancelled the acceptance and confirmation, the petitioner got a vested right to continue his previous license in respect of those shops. He argued that amended R. 18 of 1969 Rules, does not take away the right since the amended Rule came into force subsequent to the passing of the order at Exhibit 'D'. The Unamended as well as amended R. 18 reads thus:

(For Rule 18 see next page)

19. The power of the Government to amend the Rules is not assailed in these writ petitions. The 1st respondent is therefore competent to amend the Rule even retrospectively. The amended R. 18, deleted the words "shall be cancelled by the State Government" and the words "may be cancelled by the Government at its discretion" were substituted. Further, "If it is so cancelled, the deposit

UNAMENDED RULE 18.

Failure to execute lease agreement etc. :—

(1) Where the person in whose favour the disposal is confirmed fails to comply with the provisions of Rules 16 and 17, the disposal of the right of retail vend of liquors shall be cancelled by the State Government. The deposits made by such person shall be liable to be forfeited to the State Government and the right of retail vend of liquors shall be disposed of afresh in such manner as the State Government may direct.

(Underlining is mine)

AMENDED RULE 18.

In R. 18 of the Karnataka Excise (Lease of the Right of Retail Vend of Liquors) Rules, 1969 for the words "shall be cancelled by the State Government. The deposit made by such person" the words "may be cancelled by the Government at its discretion and if it is so cancelled the deposit made by such person" shall be and shall be deemed to have been substituted with effect from 1st January 1977.

(Underlining is mine)

made by such a person" shall be and shall be deemed to have been substituted with effect from 1st Jan. 1977. The plain meaning of the amended R. 18 is that the Government has now been conferred with discretion either to cancel licenses of the retail vend of liquors for non-compliance of Rules 16, 17 (and when the licenses are so cancelled only the deposit made by such person shall be forfeited to the Government) or confirm in its discretion licenses of the retail vend of liquors in spite of there being belated compliance of Rules 16 and 17. In the latter case, it is obvious when the licenses are confirmed even if there were to be delay either in making deposits or in complying with conditions specified in Rules 16 and 17 by such persons in whose favour the licenses are confirmed, they become regularised and to that extent they are deemed to have been validly made or complied. This discretionary power could be exercised by the Government retrospectively from 1st Jan. 1977, in view of the concluding wordings inserted under the amended R. 18, that the words "shall be and shall be deemed to have been substituted with effect from 1st Jan. 1977." Thus the amended R. 18, validates the belated deposit and the Bank guarantee furnished by the 6th and the 4th respondents respectively in these writ petitions.

19-A. But the contention of Mr. Datar is that when the 1st respondent exercised the discretion under the unamended R. 18 of 1969 Rules, it has no power to cancel the cancellation of acceptance and confirmation made under Exhibit-D, in W. P. No. 5093 of 1977. This contention ignores the position that the unamended R. 18 of 1969 Rules has been amended retrospectively and anything done under the unamended R. 18 nullifies the previous order unless there is a vested right in a citizen. As already held the petitioner in W. P. No. 5093 of 1977 had no such vested right under the proviso to unamended R. 18 of 1969 Rules. Therefore, there is no force in the contention of Mr. Datar. Similarly, there is no force in the contention of the learned counsel for the petitioners in W. P. Nos. 5239 and 5240 of 1977 that the 1st respondent was bound to cancel the acceptance and confirmation of the highest bid made by the 4th respondent in these two writ petitions.

19-B. Assuming for the sake of argument, but not conceding that the impugned orders are violative of the Rules 16 and 17 and the unamended R. 18 of 1969 Rules, the question which arises for determination is whether these petitioners sustained injury of a substantial nature or whether there is substantial failure of justice as required under Art. 226 (1) (b) and (c) of the Constitution of India.

20. The learned Advocate General, contended that there is neither injury of a substantial nature nor any substantial failure of justice occasioned to the petitioners by reason of the impugned order at Exhibit-D, and also by reason of non-compliance with the provisions of unamended Rule 18 of 1969 Rules.

21. The counsel for the petitioners contended that they had invested monies to set up their shops under the previous license and that they continued the establishment till the end of June 1977 with the expectation of orders being passed by the Deputy Commissioner as required under the proviso to unamended R. 18 of 1969 Rules, in view of the default committed by the 6th and the 4th respondents in these writ petitions. By continuing the establishment they were

likely to suffer financial loss which is according to them an injury of a substantial nature as laid down in Sub-cl. (b) of Cl. (1) of Art. 226 of the Constitution. There is no substance in this contention. The petitioners knew that their license period would be over by the end of June 30, 1977 and they had also failed to get their bids accepted for the year 1977-78 (as they were low) it is now not open to them to contend that they would suffer any financial loss on account of continuing the highest bidders viz., respondents 6 and 4, by virtue of the amendment of R. 18. Further, as rightly contended by the learned Advocate General that substantial justice is done to respondents 6 and 4 who are the highest bidders and who would have suffered the forfeiture of the deposits made by them and also were liable for the losses that may be sustained by the 1st respondent, which was to be recovered as if it were the arrears of land revenue. If the amended R. 18 of 1969 Rules had not come into force the 6th and the 4th respondents would have incurred heavy financial loss which was of a substantial nature. Therefore, there is no force in the contention on behalf of the petitioners that there is injury of a substantial nature or that there is substantial failure of justice to grant relief in these writ petitions.

22. Thus, it is clear that the petitioners have not made out any case to invoke the provisions of Art. 226 (1) (b) and (c) of the Constitution, to grant reliefs sought for by them.

23. For the reasons stated above all the three writ petitions fail and they are dismissed.

24. Before parting with this case, it is necessary to consider I. A. No. 2 filed by the petitioner in Writ Petition No. 5240 of 1977. His grievance in this application is that the Deputy Commissioner has issued a notice to him informing him that this Court had ordered that the security if furnished shall relate back to 1-7-1977 and hence the petitioner who has furnished Bank guarantee to deposit one month's rental in accordance with the bid for the previous year shall have to deposit the dues of Rs. 44,561-37 ps in respect of the period from 1-7-1977 to 19-7-1977 as per Exhibit G. It is contended that the Deputy Commissioner had wrongly understood the order of this Hon'ble Court in making this demand. This Court while issuing the Rule, granted an interim order sought for by the petitioners in W. P. Nos. 5239 and 5240 of 1977. The 1st respondent on entering appearance asked for vacation of the interim order granted to the petitioner in W. P. No. 5240/1977 on the ground that the petitioner had not paid the highest bid amount for the current year and has not complied with the other terms of agreement. The petitioner was directed to comply with them and if he failed to do so the interim order granted on 30-6-1977 stood vacated without prejudice to his rights.

25. The petitioner sought for modification of the impugned order passed on 13-7-1977 on the ground that he is not liable to furnish Bank guarantee and deposit the rental amount in accordance with the bid of the 4th respondent as in law he is not entitled to continue on funishing the Bank guarantee in accordance with the bid for the previous year. But the Court on 15-7-1977 passed a conditional order. If the petitioner fails to deposit the balance of the highest bid amount for the current year and also furnish the balance of Bank guarantee for three months in the like amount the modified order of July 13, 1977 stands cancelled and the maintenance of status quo granted in his favour stood dissolved. Further, if the petitioner made such deposit and gave such Bank guarantee as ordered above, the same shall be deemed to have been made from Ist July 1977 and the status quo shall continue. The petitioner did not comply with the conditions stipulated in the order dated 15-7-1977 and hence his license to continue as a retail vendor of toddy was stopped. It was thereafter the impugned demand was made by the Deputy Commissioner of Chitradurga.

26. Now the question for determination is whether the petitioner is liable to pay the difference between the previous bid amount and the highest bid for the year 1977-78.

27. What the proviso to unamended R. 18 of 1969 Rules says is that the Deputy Commissioner may continue the license of the previous licensee in respect of the same shop or shops till a fresh disposal is made and fresh licenses are granted. It is not possible to read this proviso as contended by the learned Advocate General that the previous license should be continued on the terms and conditions of the fresh licenses viz., depositing and giving Bank guarantee at the highest bid amount. Continuing the

previous license would mean that the license should be continued on the same terms and conditions on which it was issued in the previous year. On 15-7-1977 the Court directed the petitioner on the objection raised by the Advocate General that 'the Government sustained loss of revenue therefore option was given to the petitioner to continue his previous license on payment of the highest bid amount. But the petitioner was not agreeble to continue the previous license on the terms of the new license to be granted to the 4th respondent and he stopped the retail vend of toddy in respect of the shops taken by him on lease. Therefore, the order of July 15, 1977 did not bind him to make deposit and give bank guarantee of the highest bid amount of the 4th respondent. Therefore, the Deputy Commissioner, is not justified in issuing a demand notice as per Exhibit 'G' and the petitioner is not liable to comply with it. If the 1st respondent had sustained any loss on this account it is open to it to take action under sub-rule (2) of R. 18 of 1969 Rules. In that way no loss of revenue will be sustained by the Ist respondent. Therefore, Exhibit 'G' has become inoperative and shall not be enforced againt the petitioner in W. P. No. 5240 of 1977.

28. I. A. No. 2 is allowed.

Order accordingly.

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G. K. GOVINDA BHAT, C. J. AND M. N. VENKATACHALIAH, J.

Sowcar T. Thimmappa, Appellant v. S. L. Prasad, Respondent.

First Appeal No. 132 of 1973, D/- 14-7-1977.*

(A) Civil P. C. (5 of 1908), S. 34 — Interest — Award of interest for period prior to suit — Legality.

Interest for the period prior to the commencement of the suit is claimable either under an agreement, or usage of trade or under a statutory provision or under the Interest Act. Interest is also awarded in some cases by Courts of equity. It is equally well settled that interest as damages cannot be awarded. Interest also cannot be given by way of damages for detention of a debt. Case law discussed. (Paras 10, 12)

In the case in question no foundation is laid in the pleadings to establish the existence of a state of circumstances which attracts the equitable jurisdiction. Therefore, the award of interest prior to the suit was not justified. (Para 12)

(B) Evidence Act (1 of 1872), S. 18 — Admission by party — Evidentiary value.

It is no doubt true that admissions are not conclusive; but what a party himself admits to be the true state of affairs may reasonably be presumed to be so unless the admission is satisfactorily explained or successfully withdrawn. (Para 9)

Cases Referred: Chronological	Paras
AIR 1969 SC 1349	11
AIR 1966 SC 275	12
AIR 1963 SC 1171	12
AIR 1961 SC 990	9
AIR 1953 SC 235	12
AIR 1938 PC 67	10, 12
AIR 1929 PC 185 : 1929 AC 631	12
1904 AC 817 : 73 LJ PC 113 Johnson v. Rex	12
1893 AC 429 : 63 LJ Ch 93 London Chatham & Dover Rly Co. v. South Eastern Rly. Co.	12

P. Shivanna, for Appellant; B. S. Keshava Iyengar, for Respondent.

VENKATACHALIAH, J.:—This appeal by the defendant is directed against the judgment and decree dated 10-4-1973 in O. S. No. 2 of 1971 on the file of the Court of the Principal Civil Judge, Mysore decreeing respondent-plaintiff's suit for recovery of arrears of rent with interest and costs.

2. The facts necessary for the disposal of this appeal, briefly stated, are:

Respondent having come into possession of a vacant site in Mysore under a lease granted to him by the Nanjaraj Bahadur Chatram Fund Committee, Mysore, granted a sub-lease of the same in favour of the appellant, who took the site for the purpose of running a toddy shop therein. It is not disputed that the appellant commenced his business of vending toddy on the said site from 1-1-1968. It is also common ground that there was an agreement of lease dated 31-12-1967 executed between the parties, which, however, was not registered. After being put into possession of the said site, appellant did not make any payments towards rent to the respondent.

Pursuant to an order of eviction made in H. R. C. 300 of 1970 on the file of the Court of the Munsiff, Mysore, respondent

*Against Judgment and decree passed by Prl. Civil J., Mysore, D/- 10-4-1973.

took possession of the site on 17-12-1972. As to these facts, there is no dispute.

3. On 4-1-1971, respondent instituted the suit from which this appeal arises alleging that the appellant had failed to pay rents for the period between 1-1-1968 and 31-12-1970 and sought recovery of the sum of Rs. 18,000/- in this behalf together with the sum of Rs. 4,320/- claimed as interest prior to suit on the unpaid rents.

4. The appellant while admitting the relationship of landlord and tenant, however, contended that the rent of Rs. 500/- per month was agreed to be paid not for the mere vacant site alone, but in consideration of the promise on the part of the respondent to erect certain structures on the land for the use of the appellant, and that as the respondent had failed to carry out this obligation on his part, appellant was liable to pay only Rs. 150/- per month, which was the rate at which respondent, in turn, had to pay to the said Nanjaraj Bahadur Chatram Fund Committee.

5. On these pleadings, the Court below settled the following issues:

1. (a) Whether the defendant took the schedule property on lease from the plaintiff on a monthly rent of Rs. 500/- as alleged by the plaintiff ?

or

1. (b) Whether the defendant is liable to pay at Rs. 150/- per month for the reasons stated in para 12 of his written statement ?

2. Whether the plaintiff is entitled to recover 18% interest, as claimed ?

3. To what reliefs the parties are entitled ?

In the Court below appellant and respondent tendered evidence as D. W. 1 and P. W. 1 respectively and Exhibits P-1 to P-6 were marked on the side of the respondent. The agreement dated 31-12-1967 which was also sought to be relied upon by the respondent was held inadmissible by the Court below, as, according to it, the said document was compulsorily registrable, but was unregistered. However, on an appreciation of the evidence on record and on the basis of the admitted relationship of landlord and tenant between the parties, the Court below came to record finding on Issue-1 in favour of the respondent and entered a decree in his favour. The Court below also held on Issue No. 2 that respondent was entitled to interest prior to suit under the provisions of the Interest Act and awarded interest in the sum of Rs. 2,880/- at the rate of 12% per annum. The appellant questions the correctness of the judgment and decree in this appeal.

6. We have heard Shri P. Shivanna, learned counsel for the appellant and Sri B. S. Keshava Iyengar, learned counsel for the respondent. We have been taken through the evidence on record and the judgment of the Court below.

7. In support of the appeal Sri Shivanna urged the following contentions:

(a) That the finding of the Court below that the rate of rent was Rs. 500/- p.m. is erroneous and is not supportable on the basis of the evidence on record; and

(b) that award of interest prior to suit was not permissible.

8. These, then are the points that arise for determination in this appeal.

9. Point (a): In reaching the conclusion that the rate of rent was Rs. 500/- p.m. and not Rs. 150/- per month as contended by the appellant, the Court below relied upon two circumstances. The first was that, admittedly, appellant started his business in the demised land with effect from 1-1-1968, and had not caused any notice to be issued to the respondent in the matter of alleged failure on the part of the latter to put up constructions on the site. Secondly, the Court below took note of the fact that the appellant who had been examined as a witness in the said H. R. C. 300 of 1970 on the file of the Additional First Munsiff, Mysore, had admitted that the rent was Rs. 500/- per month for the vacant site alone. The portions of his earlier depositions to which appellant's attention was drawn in the course of his cross-examination were marked Exhibits P-2 and P-3 respectively. It is no doubt true that admissions are not conclusive; but what a party himself admits to be the true state of affairs may reasonably be presumed to be so unless the admission is satisfactorily explained or successfully withdrawn. In the present case, appellant did not come forward with any explanation. Indeed, he went to the extent of totally denying the previous statements. The Court below relying on these admissions held that the rate of rent was Rs. 500 per month. Sri Shivanna is unable to show how this conclusion is erroneous and how on the basis of the material on record, a conclusion different from the one reached by the Court below is warrant-

ed. We, accordingly, hold point (a) against appellant.

10. Point (b): This concerns the award of interest prior to suit. The Court below has awarded a sum of Rs. 2,880/- as interest prior to the suit on the view that grant of such interest, in the circumstances of the case, is warranted by and permissible under the Interest Act, 1839. It was conceded before us by Sri Keshava Iyengar, learned counsel for the respondent, that the provisions of Interest Act were not extended to the then State of Mysore and that no recourse could be had to the provisions of that statute in the present case.

Interest for the period prior to the commencement of the suit is claimable either under an agreement, or usage of trade or under a statutory provision or under the Interest Act. Interest is also awarded in some cases by Courts of equity. It is equally well settled that interest as damages cannot be awarded (See: Bengal-Nagpur Rly. Co. Ltd. v. Ruttanji Ramji, AIR 1938 PC 67 and Mahabir Prasad Rungta v. Durga Dutta, AIR 1961 SC 990). In the present case, admittedly, there is no contract to pay interest; nor is the grant of interest sought to be supported by any usage or under any statutory provision.

11. Sri Keshava Iyengar, learned counsel for the respondent, however, urged that interest on arrears of rent can be granted in equity and the award of interest made by the Court below is supportable on equitable considerations. Sri Keshava Iyengar pointed out that interest on arrears of rent is contemplated by S. 114 of the Transfer of Property Act. He also pointed out that a solatium on arrears of rent is envisaged in S. 21 (2) (iii) of the Karnataka Rent Control Act, 1961. Sri Keshava Iyengar sought to rely on certain observations in the decision of the Supreme Court in R. S. Lala Praduman Kumar v. Virendra Goyal, (AIR 1969 SC 1349) in this behalf. Paragraph 7 of the said decision relied on by Sri Keshava Iyengar relates to the jurisdiction of Courts in the matter of relief against forfeiture for non-payment of rent. Provisions of S. 114 of the Transfer of Property Act and S. 21 (2) (iii) of the Karnataka Rent Control Act are instances of statutory stipulation for the payment of interest and solatium respectively in the context of grant of relief against forfeiture and default. The analogy of the permissibility of interest u/s 114 of the Transfer of Property Act or of the solatium under S. 21 (2) (iii) of the Karnataka Rent Control Act does not appear to us to be apposite in the context of the proposition urged by Sri Keshava Iyengar that in appropriate cases interest can be awarded on arrears of rent on equitable grounds.

12. Sri Keshava Iyengar, however, referred to certain observations of the Supreme Court in Union of India v. Watkins Mayor & Co., (AIR 1966 SC 275), where the Supreme Court, referred with approval, to the passage in Bengal-Nagpur Rly. Company's case (AIR 1938 PC 67), which reads (at p. 70):

"As observed by Lord Tomlin in Maine and New Brunswick Electrical Power Co. v. Hart, (1929) AC 631, at p. 640: (AIR 1929 PC 185 at p. 188). 'In order to invoke a rule of equity, it is necessary in the first instance to establish the existence of a state of circumstances which attracts the equitable jurisdiction, as, for example, the non-performance of a contract of which equity can give specific performance.'"

Relying upon the above observation, Sri Keshava Iyengar contended that in appropriate cases, even in the absence of provision in the contract stipulating payment of interest, award of interest on contractual payments in exercise of equitable jurisdiction is permissible.

Interest is allowed by Courts of equity, for instance, in the case of money obtained and retained by fraud. In M/s Trojan & Co. v. Nagappa Chettiar, (AIR 1953 SC 235), the Supreme Court referred with approval to the following statement of the law by the Privy Council in Johnson v. Rex, (1904) AC 817: (at p. 241 of AIR SC):

"In order to guard against any possible misapprehension of their Lordships' views, they desire to say that, in their opinion, there is no doubt whatever that money obtained by fraud and retained by fraud can be recovered with interest, whether the proceedings be taken in a Court of equity or in a Court of law, or in a Court which has a jurisdiction both equitable and legal....."

In National Insurance Co., Ltd., Calcutta v. Life Insurance Corporation of India, (AIR 1963 SC 1171) interest in equity was held payable on purchase price which belongs to the seller, the reason of the rule, being that the parties 'exchange their characters in a Court of equity, the seller becomes the owner of the money and the purchaser becomes

the owner of the estate' and that "on entering possession the purchaser becomes entitled to rents but if he has not paid the price, interest in equity is deemed payable by him on the purchase price which belongs to the seller."

In the present case no foundation is laid in the pleadings to establish the existence of a state of circumstances which attracts the equitable jurisdiction. If such circumstances had been urged in the pleadings, appellant would have had an opportunity to plead equities on his side. Indeed it was stated in the course of the arguments that a part of the arrears of rent had come to be deposited in Court in the course of the said H.R.C. 300 of 1970. In the state of pleadings in the present case, the grant of interest would amount to award of interest on ground alone — without more — of a mere detention of a debt. In London, Chatham and Dover Rly. Co. v. South Eastern Rly. Co., (1893 AC 429), the the House of Lords held that interest could not be given by way of damages for detention of a debt. A similar view has been taken by the Privy Council in Bengal-Nagpur Rly. Company's case cited above. The present case does not, on the pleadings, attract the equitable jurisdiction of the Court. We, therefore, think that the award of interest prior to the suit was not justified. We, accordingly, hold and answer point (b) in favour of the appellant.

13. In the result, this appeal is allowed in part and while the judgment and decree of the Court below in so far as the arrears of rent of Rs. 18,000/- with pendente lite and future interest at 6% per annum is concerned are affirmed, the award of interest prior to the suit is set aside. Respondent is entitled to costs proportionate to his success in this appeal, while appellant will bear and pay his own costs. Ordered accordingly.

Appeal partly allowed.

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M. S. NESARGI, J.

A. M. Abdul Khader, Petitioner v. Barnard Lobo, Respondent.

Civil Revn. Petn. No. 2357 of 1974, D/- 20-4-1977.

Karnataka Rent Control Act (22 of 1961), S. 29 (1), (2) & (4) — Failure to pay prescribed notice-fee while making deposit of rent in Court — Counsel for tenant, however, notifying landlord's counsel about the deposit made — Non-payment of prescribed notice-fee along with the deposit did not deprive the tenant benefit of provisions of this section. (Para 6)

Cases Referred: Chronological Paras

(1965) 1 Mys LJ 221 3

O. Mahesh for N. Santosh Hegde, for Petitioner; P. Ganapathi Bhat, for Respondent.

ORDER: — This petition under S. 50 of the Karnataka Rent Control Act, 1961 as it stood prior to the amendment by Act 31 of 1975 (hereinafter referred to as the 'Act'), is directed against the order dated 11-9-1974 passed by the District Judge, South Kanara, Mangalore on I. A. No. III in H.R.C. Appeal No. 108 of 1973. By the said order, the learned District Judge has dismissed the appeal of the petitioner tenant.

2. The respondent-landlord filed an application under cls. (h) and (j) of the proviso S. 21 (1) of the Act praying for vacant possession of the schedule premises. The trial Court allowed the application and as against that order, the petitioner tenant filed H.R.C. Appeal No. 108 of 1973. During the pendency of the appeal, the landlord filed I. A. No. III under S. 29 (1), (2) and (4) of the Act contending that the tenant had deposited the rent only upto 31-7-1973 and had not deposited the rent thereafter and as such, the order under S. 29 (4) of the Act dismissing the appeal was to be passed. The tenant contended that the deposit of rent up-to-date had been made, but when notice of the deposit was sought to be served on the counsel for the landlord by the counsel of the tenant, the counsel for the landlord refused to accept the notice and, therefore, I. A. No. III ought to be dismissed.

3. The learned District Judge has observed in the course of his order that the rent up-to-date had been deposited, but it was not accompanied by the prescribed fee for issue of notices. On this basis, he has further on observed that the question whether the counsel for the tenant had notified the counsel for the landlord as and when the deposit was made and that the counsel for the landlord had refused to take notice need not agitate his mind, because the law, according to him, was that a deposit unaccompanied by the prescribed fee was not in law deposit of rent. He has relied

upon the decision of this Court in K. J. Acharya v. L. Ravindra Rao, (1965 (1) Mys LJ 221). He has not gone into the question whether various items of deposit taken into consideration by him had or had not been made within the period prescribed by law for payment of rent.

4. The tenancy in this case is according to English calendar month. Therefore, the law would be that the rent should be paid within 15th of the succeeding month. When that is so, deposit of rent in Court will have to be made within that period and the fact that such deposit has been made will have to be notified to the landlord. It is with the object of securing notice to the landlord that R. 9 of the Rent Control Rules lays down that prescribed fee for issue of notice to the landlord should also be paid along with the deposit. It is not the law that even if the landlord has been notified in some other manner, the tenant should fail for non-payment of the prescribed fee. Therefore, it is clear to my mind that the learned District Judge has mechanically applied the decision in K. J. Acharya's case.

5. It was the duty of the District Judge to find out in the first instance whether various items of deposit had been made within the time allowed by law. If any deposit is made beyond the time allowed by law, then it becomes immaterial whether it is accompanied by the prescribed fee for issue of notice or whether it is not accompanied by such a fee, as it is clear that such a deposit of rent would not be payment of rent according to law so as to take away the case from the ambit of S. 29 (1) of the Act. He has totally ignored this aspect of the matter while it was incumbent upon him to go into this aspect before reaching the conclusion on I. A. No. III.

6. In view of what has been expressed in regard to the position of law, in the paragraph preceding in the above paragraph, the view expressed by the learned District Judge that whether the counsel for the tenant had or had not notified the counsel for the landlord as and when the counsel for the tenant made the deposit in Court need not agitate his mind, is not sound, because if, in fact, after making such deposit, the counsel for the tenant had notified the counsel for the landlord, then it would be sufficient notice to the landlord and as such, non-payment of the prescribed fee along with the deposit would not come in the way of the tenant so far as the provisions of S. 29 (1), (2) and (4) of the Act are concerned.

7. In view of the foregoing reasons, the order dated 11-9-1974 passed by the District Judge, South Kanara, Mangalore on I. A. No. III in H.R.C. Appeal No. 108 of 1973, is set aside. The matter is remitted to the District Judge for fresh disposal according to law bearing in mind the observations made in the body of this order. No order as to costs in the circumstances of the case.

Petition allowed.

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E. S. VENKATARAMIAH, J.

Y. Chandrashekara Hegde, Appellant v. Omayya Shetty, Respondent.

Ex. Second Appeal No. 56 of 1975, D/- 24-3-1977.

Limitation Act (1908), Art. 182—(Limitation Act (1963), Art. 136)—Expression 'appeal' — Appeal against order of remand passed in an appeal against an order dismissing application for final decree — Such an appeal is to be construed as an appeal in final decree proceedings — It cannot be equated with an appeal under O. 43 since rights of decreeholder to passing of final decree are involved — Limitation for filing execution runs from the date such appeal is disposed of. AIR 1950 SC 6; Misc. Appeal No. 374 of 1961, D/- 2-7-1962 (Mys), Dist.; AIR 1937 Mad 421; AIR 1939 Mad 735 and AIR 1951 Mad 962 (FB), Ref. (Civil P. C. (1908), O. 43, R. 1 and O. 41, R. 23). (Paras 6, 8 & 10)

Cases Referred: Chronological Paras

(1962) Misc. Appeal No. 374 of 1961, D/- 2-7-1962 (Mys) 6
AIR 1960 Bom 154 9
AIR 1951 Mad 962: (1951) 2 Mad LJ 245 (FB) 7
AIR 1950 SC 6 6
AIR 1939 Mad 735: (1939) 2 Mad LJ 86 7
AIR 1937 Mad 421: (1937) 1 Mad LJ 407 7
AIR 1933 Mad 315 7
AIR 1932 PC 165 5
AIR 1928 Pat 581 7

M. Gopalakrishna Shetty, for Appellant; Padubidri Raghavendra Rao, for Respondent.

JUDGMENT: — This second appeal arises out of the Execution Petition

No. REP. 387/1960 on the file of the Principal Munsiff, Udupi. The decree-holder was one Muddu Shetty. He instituted the Suit O. S. No. 214/1949 against the judgment-debtor for redemption of a usufructuary mortgage created under the mortgage deed dated 14-6-1935. A preliminary decree for redemption was passed on 7-12-1950. Thereafter, Muddu Shetty filed R. I. A. 508/1953 for passing a final decree after complying with the conditions imposed on him by the preliminary decree. That application was dismissed by the order dated 31-3-1954 by the trial Court. Muddu Shetty filed an appeal against that order in A. S. No. 250/1954 on the file of the District Judge, Mangalore. The learned District Judge set aside the order of the trial Court dismissing the application for the passing of the final decree and remanded the case to the trial Court by his judgment dated 24-2-1955. Against the order of remand, an appeal was filed by the judgment-debtor before the High Court of Madras. On the re-organisation of the States, the said appeal was transferred to the file of this Court under the provisions of the States Reorganisation Act. On transfer, it was numbered as M. A. (M) No. 9/1956 on the file of this Court and it was dismissed by the judgment dated 31-8-1959. Since no order of stay was obtained from the High Court, the trial Court proceeded to dispose of the case in accordance with the order of remand passed by the District Judge. It passed a final decree on 18-4-1955. No appeal was filed against the said final decree. After the appeal M. A. (M) No. 9/1956 was disposed of by this Court on 31-8-1959, the decree-holder filed the execution petition out of which this appeal arises, on 13-7-1960, within one year from the date of disposal of the appeal, and beyond three years from the date on which the final decree was passed by the trial Court pursuant to the order of remand. Several objections were taken by the judgment-debtor and one of them related to the question of limitation. During the pendency of the execution petition, the decree-holder died and his son was brought on record as supplemental decree-holder. The executing Court overruled the objections raised by the judgment-debtor and directed the execution to proceed by its order dated 13-12-1972. It, however, ordered that the decree-holder could claim mesne profits only for a period of three years. Aggrieved by the order of the executing Court, the judgment-debtor filed Execution Appeal No. 1/1975 on the file of the Civil Judge, Udipi, and the legal representative of the decree-holder filed cross-objections. The learned Civil Judge allowed the appeal and dismissed the execution petition holding that it was barred by time. He, however, held that the finding of the executing Court that the decree-holder could claim, if the execution petition was in time, mesne profits only for a period of three years, was erroneous and that the decree-holder was entitled to claim mesne profits in respect of the mortgaged properties till the date of delivery of possession. Aggrieved by the judgment of the learned Civil Judge, Udipi, the legal representative of the original decree-holder has filed this second appeal.

2. In this appeal, two questions arise for consideration.

(1) Whether the execution petition filed on 13-7-1960 was in time; and

(2) Whether the decree-holder is entitled to claim mesne profits only for a period of three years and not till the date of delivery of possession of the mortgaged property.

3. The question of limitation is governed by Art. 182 of the Indian Limitation Act, 1908.

The relevant part of that Article reads:

(For Article See Below)

4. The contention of the judgment-debtor before the executing Court was that the final decree which had been put into execution having been passed on 18-4-1955, the execution petition filed on 13-7-1960 more than three years after the date of the final decree was barred by time as under Art. 182 the petition had

"Description of application.	Period of limitation.	Time from which period begins to run.
For the execution of a decree or order of any Civil Court not provided for by Art. 183 or by S. 48 of the Code of Civil Procedure, 1908 (V of 1908).	Three years or where a certified copy of the decree or order has been registered six years.	1. The date of the decree or order, or 2. (Where there has been an appeal) the date of the final decree or order of the appellate Court, or the withdrawal of the appeal, or * * * *."

to be filed within three years from the date of the decree. The decree-holder contended that the case was governed by cl. (2) of Column 3 of Art. 182 and that the execution petition which was filed within three years from the date of disposal of M. A. (M) No. 9/1956 of this Court (disposed of on 31-8-1959) was in time. In this Court also it is argued by Shri M. Gopalakrishna Shetty, learned counsel for the decree-holder, that the expression 'appeal' found in cl. (2) of Column 3 of Art. 182 included within its meaning not merely an appeal filed against the final decree which was passed on 18-4-1955 but also the appeal filed against the order of remand before this Court in M. A. (M) No. 9/1956. Shri Padubidri Raghavendra Rao, learned counsel for the judgment-debtor, contends that the said expression 'appeal' can only refer to an appeal filed directly against the final decree dated 18-4-1955 and cannot refer to M. A. (M) No. 9/1956.

5. In order to understand the case put forward by the parties, it is necessary to understand the object with which the legislature enacted cl. (2) of Column 3 of Art. 182. The object appears to be that when a decree or order is liable to be set aside in an appellate proceeding it would not be just and proper to compel the decree-holder to execute the decree or order during the pendency of the appeal, by providing that the time to execute the decree or order would commence to run from its date, because if the decree or order is set aside ultimately in appeal, both the decree-holder and the judgment-debtor would be prejudiced by the execution proceedings — the decree-holder would have to spend money and time on an execution proceeding which would ultimately turn out to be useless so far as he is concerned and the judgment-debtor would also suffer by being compelled to comply with the directions in the decree or order before the appeal is disposed of. There would also be necessity for the Court to pass consequential orders of restitution in the event of the decree or order being set aside subsequently. Apparently, having that in view, the Legislature provided that the time for filing an execution application would run from the date of the decree or order of the appellate Court where there has been an appeal. This view receives support from the decision of the Privy Council in Nagendra Nath Dey v. Suresh Chandra Dey, (AIR 1932 PC 165) in which the Privy Council observed as follows (at p. 167):

"Their Lordships think that nothing would be gained by discussing these varying authorities in detail. They think that the question must be decided upon the plain words of the article: "where there has been an appeal," time is to run from the date of the decree of the appellate Court. There is, in their Lordships' opinion, no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it; the words mean just what they say. The fixation of periods of limitation must always be to some extent arbitrary, and may frequently result in hardship. But in construing such provisions equitable considerations are out of place, and the strict grammatical meaning of the words is, their Lordships think, the only safe guide. It is at least an intelligible rule that so long as there is any question sub judice between any of the parties those affected shall not be compelled to pursue the so often thorny path of execution which, if the final result is against them, may lead to no advantage. Nor in such a case as this is the judgment-debtor prejudiced. He may indeed obtain the boon of delay, which is so dear to debtors, and if he is virtuously inclined there is nothing to prevent his paying what he owes into Court. But whether there be or be not a theoretical justification for the provision in question, their Lordships think that the words of the article are plain, and that there having been in the present case an appeal from the mortgage decree of 24th June 1920, time only ran against the appellants from 24th August 1922, the date of the appellate Court's decree. They are therefore in agreement upon this point with the Subordinate Judge, and they think that the order passed by him on 4th August 1924 was right."

6. It is, however, argued by Shri Padubidri Raghavandra Rao that the expression 'appeal' could only refer to an appeal against the final decree and not to M. A. (N) No. 9/1956 which according to him was a collateral proceeding. I do not think that he is right in making that submission. It in not disputed that the final decree in question was passed by the trial Court pursuant to the order of remand passed by the District Judge on 24-2-1955 in A. S. No. 250/1954. It is also not disputed that this Court could have made the final decree passed on 18-4-

1955 ineffective by allowing the appeal M. A. (M) No. 9/1956 and restoring the order of the trial Court dated 31-3-1954 dismissing the application for final decree. The Appeal M. A. (M) No. 9/1956 cannot, therefore, be considered as an appeal against an order passed in a collateral proceeding, but it must be understood on an appeal, the result of which had a direct bearing on the validity or otherwise of the final decree even though it might have been passed by the trial Court pursuant to the order of remand passed by the District Judge. Shri Raghavendra Rao, however, tried to derive some support from the decision of this Court in Rama Naik v. Kodimbady Manjappa Shetty in Mis. Appeal No. 374 of 1961 decided on 2-7-1962 (Mys) in which the Court had held that 'the appeal' referred to in Clause (2) of Column 3 of Article 182 did not refer to an appeal filed under Order 43 of the Code of Civil Procedure against the order passed on an application made under Order 9 R. 13 C. P. C. The decree in question in that case was an ex parte decree passed on 29-2-1956. The defendant made an application for setting aside the said decree under Order 9 R. 13 C. P. C. and that was dismissed. He, however, preferred an appeal under Order 43 C. P. C. against the order dismissing that application. The appeal, was dismissed on July 30, 1957. The first execution application was filed on July 10, 1956 and the second execution application was filed on June 29, 1960 more than three years after the date of disposal of the earlier execution application. The judgment-debtor contended that the second application was barred by time. The decree-holder contended that the time to file the execution petition would commence to run from July 30, 1957 on which date the appeal filed under Order 43 C. P. C. was dismissed and therefore the application made on June 29, 1960 was in time. This Court repelled the contention of the decree-holder holding that the appeal referred to in Cl. (2) of Column 3 of Article 182 did not refer to appeal filed against an order made on an application under R. 13 of O. 9 C. P. C. The reason for taking that view was that the proceeding under R. 13 of O. 9 C. P. C. was only a collateral proceeding and the question for investigation in that case was whether the defendant had not been duly served with the summons issued by the Court or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. The appeal M. A. (M) 9/1956 on the file of this Court cannot be equated with the appeal under O. 43 C. P. C. Since as mentioned earlier in that appeal the right of the decree-holder to the passing of the final decree was directly involved. Hence, the decision in Rama Naik's case is of no assistance to the judgment-debtor. For the same reason, the decision of the Supreme Court in Bhawanipore Banking Corporation Ltd. v. Gouri Shankar, (AIR 1950 SC 6) which was relied on by this Court in Rama Naik's case is also of no assistance, since that again was a case where the appeal in question was one from an order which had been passed in a collateral proceeding which had no direct or immediate connection with the decree under execution.

7. It is necessary at this stage to refer to some of the decisions of the Madras High Court which have been referred to by the lower appellate Court. In Ahammad Kutty v. Kottakkay Kuttu (AIR 1933 Mad 315) it was held that where a preliminary decree was passed in a partition suit and an appeal was filed from such decree, the time for executing the final decree which had been passed during the pendency of the appeal against the preliminary decree would commence to run from the date of the final decree and not from the date of the disposal of the appeal against the preliminary decree. This decision was dissented from in P. P. Koyakutti v. A. Veerankutti (1937 (1) Mad LJ 407): (AIR 1937 Mad 421). In that case it was held that where pending an appeal against the preliminary decree in a mortgage suit, which was confirmed on appeal, a final decree was passed, an application for execution of that final decree filed within three years of the date of the appellate preliminary decree but more than three years after the date of the final decree was in time, within Art. 182 (2) of the Limitation Act and not barred. The expression "where there has been appeal" in Art. 182 (2) was held to mean an appeal which was likely to affect the decree sought to be executed. Against this decision a Letters Patent Appeal was filed before the High Court of Madras in A. Veeran Kutti v. P. P. Koya Kutti (1939 (2) Mad LJ 86): (AIR 1939 Mad 735) and a Division Bench of that Court affirmed the said decision and dismissed the appeal. The correctness of the above decision arose for consideration before a Full Bench of the Madras High

Court in Sivaramachari v. Anjaneya Chetty, (1951 (2) Mad LJ 245): (AIR 1951 Mad 962 (FB)) in which it was contended that the time to execute mortgage decree arose from the date of the dismissal of a Civil Revision Petition against an order of the trial Court declining to bring a person as a legal representative of the judgment-debtor. The Full Bench held that the view expressed in Veeran Kutti's case was too wide and could not be followed. But the following observations made by the Full Bench which are of assistance to the decree-holder in this case, require to be noticed (at p. 967 of AIR):

"In some of the cases to which reference has been made above, there was an appeal against the preliminary decree in a mortgage suit and an appeal therefrom; the question was whether for the execution of the final decree in such a case, time could be computed from the date of the disposal of the appeal against the preliminary decree. I am of opinion that it could be, but not because of the "imperilling" theory. An appeal against the preliminary decree involves an appeal against the final decree which follows that preliminary decree. Though the terminology gives an impression that there are two decrees, I think the correct legal position is that there is only one decree in a suit in the sense that it is the expression of an adjudication determining the rights of the parties with regard to all the matters in controversy in the suit. A preliminary decree is merely a stage in working out the rights of parties which are finally determined by the final decree. An appeal against a preliminary decree would be an appeal within the meaning of the word "appeal" in Clause (2) of Column 3. With respect I agree with the following observations made by Dawson Miller, C. J., in Somar Singh v. Devanandan Prasad (AIR 1928 Pat 581):

"There can be no doubt that the appeal to the High Court from the preliminary decree had it been successful would have had the effect of discharging the final decree passed by the trial Court as well as the preliminary decree. It seems to follow, therefore, as a matter of course that the appeal in this case was not only an appeal from the preliminary decree but an appeal from all that naturally followed by the passing of that decree, namely, the final decree for sale which after all is merely part of the machinery prescribed for carrying out the direction for sale contained in the preliminary decree."

In the case before us there was only an application to bring on record the respondent as the legal representative of the defendant alleged to have died and a petition under Sec. 115 of the Civil Procedure Code to revise the order dismissing that application. Assuming the word "appeal" includes a civil revision petition as decided by the Full Bench in Chidambara Nadar v. Rama Nadar, it is obvious that it is not the order on the civil revision petition that is being executed. That order cannot be the final decree or order of the appellate Court referred to in cl. (2) of Column 3 of Art. 182. The execution petition was therefore rightly dismissed."

8. In the instant case, the appeal M.A. (M) No. 9/1956 was not even an appeal against a preliminary decree but it was an appeal against an order of remand passed in an appeal against an order dismissing the application for final decree. The appeal M. A. (M) No. 9/1956 has, therefore, to be construed as an appeal in the final decree proceedings which had a direct bearing on the validity or otherwise of the final decree passed on 18-4-1955. In the circumstances, it is not necessary for me to say anything more about the views expressed by the decisions of the Madras High Court referred to above.

9. That the expression 'appeal' in Art. 182 (2) would include within its scope an appeal like M. A. (M) No. 9/1956 is clear from the decision of the High Court of Bombay in Sardarsing Amarsing v. Ramkaran Ramnath (AIR 1960 Bom 154) wherein it is observed (at p. 156):

"It must follow by necessary implication from these observations that if an appeal is made from an order which has a direct or immediate connection with the decree under execution, that appeal would be covered by the expression "appeal" in cl. (2) of Art. 182."

10. I am, therefore, of the opinion that the appeal M. A. (M) 9/1956 is an appeal covered by the expression 'appeal' in Art. 182 (2) and that the time to file the execution petition commenced to run from 31-8-1959 on which date the said appeal was disposed of. The execution petition filed on 13-7-1960 was, therefore, in time. The finding of the lower appellate Court that the execution petition was barred by time is liable to be set aside. It is, accordingly, set aside.

11. The next contention relates to the validity of the claim of the decree hol-

der for mesne profits for the period upto the date of delivery of possession of the mortgage property. It is argued by Shri Raghavendra Rao that it was not open to the executing Court to order recovery of mesne profits in respect of the period beyond three years from the date of the decree even though possession of the mortgaged property had not been delivered till now. This argument is not available to the judgment debtor in this case, because the executing Court is bound to execute the decree as it stands and the decree says that the judgment-debtor shall pay mesne profits for the period upto the date of delivery of possession. The judgment-debtor should have questioned the correctness of the said direction in an appeal against the final decree. He has not done so. The executing Court cannot sit in judgment over the correctness of the said direction. It is held that the judgment-debtor is liable to pay mesne profits as directed by the decree, till the date of delivery of possession. No other question arises for consideration

12. In the result, this appeal is allowed, the execution petition filed by the decree-holder is held to be in time and the executing Court is directed to proceed with the execution petition as prayed for. No costs.

Appeal allowed.

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V. S. MALIMATH, J.

Smt. Girija Rudra, Petitioner v. The House Rent and Accommodation Controller, Bangalore City and another, Respondents.

Writ Petn. No. 3504 of 1977, D/- 4-10-1977.

Karnataka Rent Control Act (22 of 1961), Ss. 4 (1) and 8 (4) — Premises notified under S. 4 (1) — Competence of Rent Controller to fix rent and to notify it in the notification published under R. 3 (ii) — State at which such rent can be specified. — (Karnataka Rent Control Rules (1961), R. 3 (ii)).

A reading of sub-sec. (4) of S. 8 and cl. (c) of S. 9 of the Act makes it clear that the Rent Controller has to apply his mind in regard to the rent payable for the premises at the stage when he makes the order under sub-sec. (4) of S. 8 and not earlier. (Para 6)

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Under sub-rule (ii) of R. 3 of the Rules after notice of intimation of vacancy is received, what the Rent Controller has to notify on his notice board, is the information contained in items 1, 2, 4 and 9 of Form-I. Item No. 9 speaks about the rent which the landlord has to specify in his intimation of vacancy to be given in Form-I. It is this information which the landlord furnishes in item No. 9 that the Rent Controller is required to notify on the notice board. The object is to notify the persons interested in taking the premises on lease what the landlord expects as the rent of the premises. Notwithstanding the notification of rent as stated by the landlord in Item No. 9 of Form-I, the Rent Controller, while passing the order under sub-sec. (4) of S. 8 of the Act, is entitled to specify such rent as, in his opinion, is reasonable having regard to the factors which he is required to take into account under the proviso to sub-s. (4) of S. 8 of the Act. What clearly emerges from the scheme of the provisions of Ss. 4 and 8 and R. 3 is that the specification of the rent of the premises can be made by the Rent Controller only at the time of passing the order under sub-sec. (4) of S. 8 of the Act, and not at any earlier stage. (Para 6)

In the instant case the Rent Controller, instead of notifying the rent specified in item No. 9 of form No. 1, proceeded to fix the rent at Rs. 800/- per month and notified the same in his notification.

Held that what the Rent Controller should have done was to specify in his notification the rent mentioned by the landlord in item No. 9 of Form-I. Such procedure having not been followed, the landlord was deprived of the right to press at the stage of making an order under sub-sec. (4) of S. 8 of the Act for the specification of the rent payable by the allottee at a rate which, according to the landlord, was justly payable as stated in item No. 9 of Form-I. The illegality in the procedure followed by the Rent Controller resulted in substantial failure of justice calling for interference under Art. 226 of the Constitution. (Para 8)

Cases Referred: Chronological Paras
(1977) 1 Kant LJ 71 4

B. S. Sundar Raj, for Petitioner; H. N. Narayan, G. P., for Respondents.

ORDER:—The petitioner is the owner of premises No. 4, 9th Cross, Malleswaram, Bangalore-3 which consists of a ground floor and a first floor. With a

view to let out the first floor portion of the premises for non-residential purposes, she approached the House Rent and Accommodation Controller, Bangalore City (hereinafter referred to as the 'Rent Controller'), who is the Ist respondent in this writ petition, for permission to convert the said first floor portion into a non-residential premises. The 1st respondent accorded the necessary permission. Thereafter, the petitioner notified the vacancy in respect of the first floor portion of the premises on 18-11-1976 in the prescribed Form-I, a copy of which is produced in the case as Exhibit-A. The Rent Controller notified the vacancy on the notice board of his office by Notification dated 19-11-1976, a copy of which is produced as Exhibit-B. Among the particulars stated in the said Notification, one pertains to the rent of the premises notified, which has been indicated as Rs. 800 per month. Exhibit-C is the copy of the order made by the Rent Controller, which does not bear any date, directing that the premises in question should be notified showing Rs. 800/- per month as the rent of the premises. Being aggrieved by the notification of the premises showing the rent of the premises at Rs. 800/- per month, the petitioner preferred an appeal before the Special Dy. Commr., Bangalore District Bangalore, which authority by his order dated 25th March, 1977, has dismissed the appeal. It is in this background that the petitioner has approached this Court for appropriate relief under Art. 226 (1) (b) of the Constitution of India.

2. The principal contention urged by Sri. B. S. Sundar Raj, learned counsel for the petitioner is that the Rent Controller, functioning under the Karnataka Rent Control Act, 1961 (hereinafter referred to as the 'Act') and the Rules made thereunder viz. The Karnataka Rent Control Rules, 1961 (hereinafter referred to as the 'Rules'), has no competence to fix the rent of the premises notified under sub-sec. (1) of S. 4 of the Act and to notify the rent so fixed in the notification published under sub-rule (ii) of R. 3 of the Rules. It was maintained that the only appropriate stage at which the rent of the premises can be specified is at the time of making the final order of allotment under sub-s. (4) of S. 8 of the Act.

3. Sub-sec. (1) of S. 4 imposes an obligation on the landlord to notify to the Rent Controller the vacancy within 15 days after the building becomes vacant. Sub-rule (i) of R. 3 requires such intimation to be given by the landlord in Form-I in triplicate. Sub-rule (ii) of R. 3 prescribes the procedure to be followed by the Rent Controller after receiving the notice of intimation in accordance with sub-sec. (1) of S. 4 read with sub-rule (i) of Rule 3. Under sub-rule (ii) of Rule 3, the Rent Controller, after receipt of intimation of vacancy has to specify the date of hearing for considering the causes, if any, shown by the landlord and other persons. He is also required to send a copy of the intimation of vacancy and report the date to which the case is posted for selecting the public authority or the person in whose favour an order may be made under S. 8, to the authority specified therein. Sub-rule (ii) of R. 3 further requires the Rent Controller to notify on the notice board of his office the particulars of the building given in items Nos. 1, 2, 4 and 9 of Form-I and also to notify the date to which the case is posted. He is also required to keep a copy of the intimation in his office for inspection of all persons desiring to see it. The landlord is also required to be notified of the date of the first hearing as fixed by the Rent Controller.

4. Col. No. 9 of Form-I provides for information being given in regard to the monthly rent and if the building became vacant by the termination of a tenancy or eviction of a tenant, the monthly rent paid by the tenant. S. 8 (5) (ii) of the Act provides that no order under sub-sec. (4) of S. 8 shall be made in favour of a person other than a public authority unless such person has deposited or deposits with the Rent Controller for payment to the landlord an amount equal to one month's rent of the building as advance. The said requirement of S. 8 (5) (ii) of the Act has been held to be mandatory by a Division Bench of this Court in Rama Rao T. N. v. Deputy Commr. Chickmagalur reported in (1977) 1 Kant. LJ 71.

5. Sub-sec. (4) of S. 8 of the Act provides that if after considering the causes if any, shown by the landlord or other person in possession of the building, the Rent Controller is satisfied that it is necessary or expedient so to do, he may, by an order in writing, direct the building to be leased to such public authority or other person specified in the notice under sub-sec. (1) of S. 8 at such rent as shall be specified in such order and may make such further orders as appear to him to be necessary or expedient in con-

nection therewith. The proviso to sub-sec. (4) of S. 8 states that the rent specified in the order made under S. 8 (4) of the Act shall not be less than:

(i) the fair rent, if any fixed for the building; or

(ii) if any fair rent has not been fixed for the building, the rent last paid for the building; or

(iii) if no rent was last paid, the rent determined by the Controller on the basis of the rent value of the building as entered in the property tax assessment book of the local authority; or

(iv) if no property tax has been assessed in respect of the building, the rent determined by the Controller on the basis of the prevailing rates of rent in the locality for similar buildings in similar circumstances.

6. The second proviso to sub-sec. (4) of S. 8 of the Act makes it abundantly clear that specification of the rent under sub-sec. (4) of S. 8 will not be final unless such specification is the fair rent of the building. If the landlord or the tenant is aggrieved by the specification of the rent and the same is not fair rent fixed for the building, it may be got fixed by making an application under S. 14 of the Act. What is contemplated by sub-sec. (4) of S. 8 is specification of the rent while passing an order under sub-sec. (4) of S. 8 of the Act. S. 9 (c) of the Act which prescribes the contents of the order directing leasing of a building provides that it should specify the rent, if any, fixed by the Rent Controller under sub-sec. (4) of S. 8. It is clear from a reading of sub-sec. (4) of S. 8 and cl. (c) of S. 9 of the Act that the Rent Controller has to apply his mind in regard to the rent payable for the premises at the stage when he makes the order under sub-sec. (4) of S. 8 and not earlier. This conclusion of mine gets support from sub-rule (ii) of R. 3 of the Rules which provides that after notice of intimation of vacancy is received, what the Rent Controller has to notify on his notice board, is the information contained in items 1, 2, 4 and 9 of Form-I. The particulars specified in items 1, 2 and 4 of Form-I are not necessary for the purpose of disposal of this case. So far as item No. 9 is concerned, the same speaks about the rent which the landlord has to specify in his intimation of vacancy to be given in Form-I. It is this information which the landlord furnishes in item No. 9 that the Rent Controller is required to notify on the notice board. The object is to notify the persons interested in taking the premises on lease what the landlord expects as the rent of the premises. Notwithstanding the notification of rent as stated by the landlord in Item No. 9 of Form-I, the Rent Controller, while passing the order under sub-sec. (4) of S. 8 of the Act, is entitled to specify such rent as, in his opinion, is reasonable having regard to the factors which he is required to take into account under the proviso to sub-sec. (4) of S. 8 of the Act. What clearly emerges from the scheme of the provisions of Ss. 4 and 8 and R. 3 is that the specification of the rent of the premises can be made by the Rent Controller only at the time of passing the order under sub-sec. (4) of S. 8 of the Act, and not at any earlier stage.

7. Though what is required to be done under sub-sec. (4) of S. 8 of the Act is the specification of the rent payable by the allottee of the premises, if there is any dispute in regard to the quantum of rent payable having regard to the stand taken by the parties, it is open to the Rent Controller to make a summary enquiry in this behalf while making a final order under sub-sec. (4) of S. 8 by taking into account the requirements of the first proviso to sub-sec. (4) of S. 8 of the Act. If the parties produce any material in support of their respective contentions, it is obvious that the Rent Controller has to take the same into account for the purpose of specifying the rent payable under sub-s. (4) of S. 8 of the Act.

8. What has been done in this case is clearly contrary to the procedure which the Rent Controller is required to follow. The Rent Controller, instead of notifying the rent specified in item No. 9 of form No. 1, has proceeded to fix the rent at Rs. 800/- per month and to notify the same in his notification dated 19-11-1976. What the Rent Controller should have done is to specify in his notification the rent mentioned by the petitioner in item No. 9 of Form-I. As such a procedure has not been followed, the petitioner has been deprived of the right to press at the stage of making an order under sub-section (4) of S. 8 of the Act for the specification of the rent payable by the allottee at a rate which, according to the petitioner, is justly payable as stated in item No. 9 of Form-I. Therefore, the illegality in the procedure followed by the Rent Controller has resulted in substantial failure of justice calling for interference under Art. 226 of the Constitution.

9. It appears to me that though the information given by the petitioner in item No. 9 of Form-I (Exhibit-A) is capable of being understood as stating that the monthly rent is Rs. 2,935/-, having regard to the way in which item No. 9 has been filed, there is every likelihood of intending applicants being misled. Instead of stating the monthly rent in clear terms, what is stated in item No. 9 of Form-I is:

"Builtarea—1665 S.Ft.@1/60 per S Ft.	2,665.00
Compound—900 S. Ft. 30 P. per S. Ft.	270·00
Total	2,935.00"

In Item No. 10, the petitioner has not stated clearly the rental value of the premises sought to be let out if the same has been entered in the books of the local authority. In order to avoid doubt in the minds of the intending applicants, it is more appropriate to give an opportunity to the petitioner to amend the particulars given in items Nos. 9 and 10 of Form-I in an appropriate manner. If such amendment is made to Form-I, further steps have to be taken by the Rent Controller treating the same as an intimation given as on the date of the amendment. If, however, the petitioner does not amend items Nos. 9 and 10 of Form-I, within a period of 10 days from today, the Rent Controller shall proceed to take further action in the light of the observations made in the course of this order on the basis of the information already furnished in items Nos. 9 and 10 of Form-I.

10. For the reasons stated above, this writ petition is allowed and Exhibits 'B' and 'C' are hereby quashed. The Ist respondent-Rent Controller is directed to permit the petitioner to amend items Nos. 9 and 10 of Form-I within a period of 10 days from today and proceed to take further steps in accordance with law in the light of the observations made in the course of this order. No costs.

11. Let a copy of this order be despatched to the Ist respondent-Rent Controller immediately.

12. Shri H. N. Narayan, learned Government Pleader, who entered appearance and submitted arguments in this case, is permitted to file his memo of appearance within two weeks from today.

Petition allowed.

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FULL BENCH

C. HONNIAH, V. S. MALIMATH, K. JAGANNATHA SHETTY, D. B. LAL & M. K. SRINIVASA IYENGAR, JJ.*

Shivasharanappa Veerabhadrappa Kolar and others, Petitioners v. Asstt. Commr. and Returning Officer, Bidar and others, Respondents.

Writ Petn. No. 9842 of 1977, D/- 18-11-1977.

Karnataka Co-operative Societies Act (11 of 1959), Ss. 121 and 27 (1) — Notification dated 20-9-77 issued under S. 121 — Constitutional validity — It is not invalid on the ground that it modifies the policy and essential character of Act.

Per Majority (K. Jagannatha Shetty and M. K. Srinivasa Iyengar, JJ., Contra).

The only effect of the impugned Notification dated 20-9-1977 issued by the State Government u/s 121 of the Act is the postponement of the annual general meeting of the year 1975-76 by about one year, if such meeting has not already been held. Having regard to the object which the holding of the annual general meeting is to serve, extending the period of holding the general meeting by about one year does not have the effect of changing the legislative policy or the essential character of the Act. (Para 3)

The proviso to sub-s. (1) of S. 27 of the Act itself makes it clear that the Registrar has the power of extending the period for holding the meeting under sub-s. (1) of S. 27 for a period of 6 months. By the impugned Notification, the postponement has been made for a period of about one year. What sub-s. (1) of S. 27 contemplates is the holding of an annual general meeting once in a year to consider the subjects specified in that section. The proviso to the said sub-section empowers the Registrar to extend the period for holding such a meeting by a period not exceeding six months. If the Legislature considered the question of holding an

*(Note : — In this case, the Judges of the Full Bench differ in their views. The majority view is taken by C. Honniah, V. S. Malimath and D. B. Lall, JJ. and the minority, by K. Jagannatha Shetty and M. K. Srinivasa Iyengar, JJ. The judgments in the case are printed in the order in which they are given in the certified copy.—Ed.).

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annual general meeting once in a year as a matter of policy or of essential character, it would not have conferred the power on the Registrar to extend the period for holding such a meeting by a period not exceeding six months. The impugned action is taken not by the Registrar but by a higher authority, viz., the State Government in exercise of its powers conferred by S. 121. (Para 3)

It cannot be said that the notification has been issued only in respect of a particular society. The first part of the Notification shows that it is applicable to every co-operative sugar factory of which a Co-operative Agricultural Credit Society is a member. The Notification applies to all the Societies that answer the description given in the first part of the impugned Notification. (Para 4)

As the impugned notification is limited in its application to the annual general meeting of the year 1975-76 in respect of the specified class of Societies, it cannot be contended that the impugned notification has the effect of permanently substituting sub-s. (1) of S. 27 in respect of the specified class of Societies for all time to come. It is clear from the notification that in respect of the specified class of Societies sub-s. (1) of S. 27 shall apply with the modifications therein in relation to the annual general meeting of such Societies for the Co-operative year 1975-76. The provisions of S. 27 (1) remain intact and do govern annual general meeting of the year 1976-77 as also annual general meetings to be conducted for the subsequent years as well. The impugned notification is analogous to a notification contemplated by the proviso to sub-s. (1) of S. 27, under which the Registrar is entitled to extend the period of holding annual general meeting for a period of six months. The only difference between the notification contemplated by the proviso to sub-s. (1) of S. 27 and the impugned notification issued under S. 121 is that the impugned notification is issued by the State Government and not by the Registrar and extending the period for holding the annual general meeting is by a period of about one year whereas the Registrar can issue such a notification extending the period not exceeding six months. (Para 5)

Cases Referred: Chronological Paras

AIR 1967 Mys 203 : (1967) 2 Mys LJ 256 2

Mohandas N. Hegde, for Petitioners.

MALIMATH, J. (Majority view): — The petitioners claim to be the members of the third respondent the Bidar Sahakara Sakkare Karkhane Ltd., Halliked, Bidar. The general meeting of the third respondent was scheduled to take place on 23-9-1977 as per the calendar of events issued on 6-8-1977. On 20-9-1977 the State Government issued a Notification No. RDC 232 COF 77, Exhibit 'D' under S. 121 of the Karnataka Co-operative Societies Act, 1959 (hereinafter referred to as the Act), applying the provisions of S. 27 (1) of the Act with certain modifications in relation to annual general meeting of a Co-operative Sugar Factory of which a Co-operative Agricultural Credit Society is a member for the Co-operative year 1975-76. The said notification provides that the annual general meeting for the year 1975-76 of a Co-operative Sugar Factory of which a Co-operative Agricultural Credit Society is a member shall, if not already held, be held on the date of its annual general meeting for the year 1976-77. The proviso to sub-s. (1) of S. 27 was omitted. It is on the strength of this notification that the annual general meeting of the third respondent, which was to be held on 23-9-1977, was postponed by the Assistant Commissioner and Returning Officer, Bidar by his order dated 22-9-1977 Exhibit 'F'. The petitioners have challenged Exhibits 'D' and 'F' in this writ petition.

2. The only contention urged by Shri Mohandas N. Hegde, learned counsel appearing for the petitioners, is that the notification Exhibit 'D' issued under S. 121 of the Act is constitutionally invalid on the ground that it has the effect of modifying the policy and esssential character of the Act. The impugned notification Exhibit 'D' was issued under S. 121 of the Act, which gives power to the State Government to issue general or special order published in the official Gazette, exempting any Co-operative Society or any class of Societies from any of the provisions of the Act or to direct that such provisions shall apply to such Society or class of Societies with such modifications as may be specified in the order. It is in exercise of this power that the impugned notification Exhibit 'D' was issued by the State Government. In G. Venkata Naidu v. Bellary Central Co-operative Stores Ltd., reported in (1967) 2 Mys LJ 256 : (AIR 1967 Mys 203), a Division Bench of this Court has held that S. 121 of the Act is not invalid on the ground of excessive delegation without affording any guidance to the

State Government in regard to exercise of the powers conferred by the said section. The Division Bench has further held that delegation of power under S. 121 to modify the provisions of the Act in its application to a Society or a class of Societies would be valid only if such modification does not involve any change of the legislative policy or essential character of the Act. It is relying upon this decision that it was maintained by Shri Mohandas Hegde that the impugned notification Exhibit 'D' is invalid on the ground that it modifies the policy and essential character of the Act. It was maintained that the holding of annual general meeting is not a matter relating to details or ancillary or incidental matters.

3. Sub-section (1) of S. 27 of the Act provides that a general meeting of a Co-operative Society shall be held once in a year, within a period of 3 months after the date fixed for making up its accounts for the year under the rules or bye-laws for the time being in force for the purposes of — (a) approval of the programme of the activities of the society prepared by the committee for the ensuing year; (b) election, if any in the prescribed manner of the members of the committee other than nominated members; (c) consideration of the annual report, the latest available audit report and the disposal of the net profits; and (d) consideration of any other matter which may be brought forward in accordance with the bye-laws. The proviso to sub-section (1) states that the Registrar may, by general or special order, extend the period for holding such meeting by a period not exceeding six months. By the impugned Notification Exhibit 'D', what is done is to postpone the annual general meeting for the year 1975-76, if the same is not already held, so that it can be held on the date on which the annual general meeting for the year 1976-77 is Scheduled to be held. The only effect of the impugned Notification Exhibit 'D' is the postponement of the annual general meeting of the year 1975-76 by about one year, if such meeting has not already been held. The proviso to sub-sec. (1) of Section 27 of the Act itself makes it clear that the Registrar has the power of extending the period for holding the meeting under sub-sec. (1) of S. 27 of the Act for a period of six months. By the impugned Notification, the postponement has been made for a period of about one year. I find it difficult to persuade myself to take the view that the matter regarding postponement of the annual general meeting results in change of the legislative policy or the essential character of the Act. What sub-sec. (1) of S. 27 of the Act contemplates is the holding of an annual general meeting once in a year to consider the subjects specified in that section. The proviso to the said sub-section empowers the Registrar to extend the period for holding such a meeting by a period not exceeding six months. If the Legislature considered the question of holding an annual general meeting once in a year as a matter of policy or of essential character, it would not have conferred the power on the Registrar to extend the period for holding such a meeting by a period not exceeding six months. The impugned action is taken not by the Registrar but by a higher authority, viz., the State Government in exercise of its powers conferred by S. 121 of the Act. Having regard to the object which the holding of the annual general meeting is to serve, I have no hesitation in taking the view that extending the period of holding the general meeting by about one year does not have the effect of changing the legislative policy or the essential character of the Act.

4. It was contended by Shri Mohandas Hegde that the impugned Notification has been issued only in respect of the third respondent-society which is not permissible under S. 121 of the Act. A bare reading of S. 121 of the Act clearly indicates that a Notification under that section can be issued in respect of any society or class of societies. Besides, the impugned Notification does not read as though it is applicable only to the third respondent-society. The first part of the Notification shows that it is applicable to every co-operative sugar factory of which a co-operative agricultural credit society is a member. The Notification applies to all the societies that answer the description given in the first part of the impugned Notification.

5. It was next maintained that by the impugned Notification sub-section (1) of S. 27 having been substituted by another provision, there will be no statutory provision available for holding annual general meeting subsequent to the year 1976-77. It is true that the impugned Notification states that for sub-section (1) of S. 27 the following shall be substituted viz:—

The Annual General Meeting for the year 1975-76 of a Co-operative Sugar

Factory of which a Co-operative Agricultural Credit Society is a Member shall, if not already held, be held on the date of its Annual General Meeting for the year 1976-77."

It further provides that the proviso to sub-section (1) shall be omitted. It was maintained by Shri. Mohandas Hegde that whereas sub-section (1) of Section 27 as it originally stood requires the annual general meeting of a society to be held every year, by the substitution of another provision for sub-section (1) of S. 27 by the impugned Notification, there is now scope for holding annual general meeting in the year 1976-77 in respect of both the years 1975-76 and 1976-77 and that for the subsequent years from 1977-78 onwards there will be no statutory provision available for holding an annual general meeting. This contention would have been well founded if the substitution of sub-sec. (1) of S. 27 of the Act was intended to be a permanent substitution obliterating from the statute book the provisions of sub-sec. (1) of S. 27 altogether. If only the Notification is read as a whole and with some amount of care, one cannot fail to notice that the impugned Notification has limited application in respect of annual general meeting of the year 1975-76 of the specified class of societies. If such meeting has not already been held, the first part of the Notification in express terms states that S. 27 (1) of the Act shall apply with the following modification in relation to an annual general meeting of such societies for the co-operative year 1975-76. It is thereafter that portion of sub-sec. (1) to be substituted and the portions sought to be substituted are quoted. It is clear from the Notification that in respect of the specified class of societies sub-sec. (1) of S. 27 shall apply with the modifications therein in relation to the annual general meeting of such societies for the co-operative year 1975-76. The provisions of S. 27 (1) of the Act remain intact and do govern annual general meeting of the year 1976-77 as also annual general meetings to be conducted for the subsequent years as well. The impugned Notification is analogous to a Notification contemplated by the proviso to sub-sec. (1) of S. 27, under which the Registrar is entitled to extend the period of holding annual general meeting for a period of six months. The only difference between the Notification contemplated by the proviso to sub-sec. (1) of S. 27 and the impugned Notification issued under S. 121 is that the impugned Notification is issued by the State Government and not by the Registrar and extending the period for holding the annual general meeting is by a period of about one year whereas the Registrar can issue such a Notification extending the period not exceeding six months. If the true nature of the impugned Notification is understood, one will not fail to notice the serious fallacy in the argument pressed on behalf of the petitioners. As the impugned notification is limited in its application to the annual general meeting of the year 1975-76 in respect of the specified class of societies, I repel the contention that the impugned Notification has the effect of permanently substituting sub-sec. (1) of S. 27 of the Act in respect of the specified class of societies for all time to come.

6-8. As none of the contentions urged are tenable, this writ petition should be rejected.

C. HONNIAH J.:— I agree.

D. B. LAL. J.:— I agree.

JAGANNATHA SHETTY, J. (for himself and on behalf of M. K. Srinivasa Iyengar, J.) (Minority view): — 9. We regret our inability to agree with the order delivered by our learned brother Malimath, J.

10. The petitioners have questioned the constitutional validity of the Notification dated 20th September, 1977, issued by the State Government under S. 121 of the Karnataka Co.-operative Societies Act, 1959. The Notification reads:

"RURAL DEVELOPMENT AND CO-OPERATION SECRETARIAT.

Notification No. RDC 232 COF 77 Bangalore, dated 20th September, 1977.

S. O. 2428.- In exercise of the powers conferred by S. 121 of the Karnataka Co-operative Societies Act, 1959 (Karnataka Act 11 of 1959) and in partial modification of Notification No. RDC 14 CLM 77 dated the 28th May 1977, the Government of Karnataka hereby order that in the case of a Co-operative Sugar Factory of which a Co-operative Agricultural Credit Society is a Member, S. 27 of the said Act, shall apply with the following modifications in relation to Annual General Meeting of such Societies for the co-operative year 1975-76.

(1) In sub-sec. (1) of S. 27 for the words "A General Meeting of the Co-operative Society shall be held once in a year within a period of three months after the date fixed for making up its accounts for the year under the rules or

bye-laws for the time being in force" the following shall be substituted, namely:—

"The annual General Meeting for the year 1975-76 of a Co-operative Sugar Factory of which a Co-operative Agricultural Credit Society is a Member shall, if not already held, be held on the date of its Annual General Meeting for the year 1976-77."

(2) The proviso to sub-sec. (1) shall be omitted.

Sd/- M. V. Lakshminarasimhaiah,
Under Secretary to Government
Rural Development and Co-operation Dept."

The validity of the above Notification has been assailed on the grounds:

(1) That it has modified the policy and essential character of the Act and as such, the exercise of the power was unconstitutional; and (2) That the action of the Government was motivated and mala fide.

11. We are required to consider only the first ground of attack and not called upon to consider the second, as it is open to the petitioner to raise that ground before a learned single Judge of this Court.

Before proceeding further, we must remember that this petition was set down for preliminary hearing and not for final disposal. Rules 12 and 13 of the Writ Proceedings Rules, 1977, provide procedure and govern the scope of the preliminary hearing. Rule 12 provides:

"12. Every writ petition after it has been admitted to register, shall be posted before the appropriate Bench for preliminary hearing:

Provided that when the constitutional validity of any State Law is challenged, it shall be posted before a Bench consisting of not less than five judges."

Rule 13 provides:

"13. Upon the hearing:—

(a) the Court if satisfied, shall direct a rule nisi to the respondent calling upon him to show cause why the order sought should not be made, and shall adjourn the hearing for the respondent to appear and for being heard;

Provided that, where the court deems fit, it may, before directing issue of a rule nisi, direct notice to the respondent to show cause why rule nisi should not be issued;

(b) the Court, if satisfied, that there are no grounds to issue rule nisi, shall after recording briefly the reasons dismiss the petition."

Rule 13 provides that if the Court is satisfied, upon hearing, it shall direct a rule nisi to the respondent, and if the Court is satisfied that there are no grounds to issue rule nisi, it may dismiss the petition after briefly recording the reasons. The Court, if it deems fit, instead of rejecting the petition, may issue notice to the respondent to show cause why rule nisi should not be issued. But the rejection of the petition could only be when the Court is satisfied that there are no grounds to issue rule nisi. "The grounds to issue rule nisi" in the context must mean that the contentions raised by the petitioner and the case made out by him, require a return from the respondent.

12. We will now examine whether any such case has been made out by the petitioner.

Under S. 27, it is obligatory for a co-operative Society to hold once in a year a General Meeting within a period of three months after the date fixed for making up its accounts for the year. The Registrar, however, may by general or special order, extend the period for holding such meeting by a period not exceeding six months. Now this provision has been modified and the following provision has been substituted by the impugned Notification :

"The Annual General Meeting for the year 1975-76 of a Co-operative Sugar Factory of which a Co-operative Agricultural Credit Society is a Member shall, if not already held, be held on the date of its Annual General Meeting for the year 1976-77."

The power of the Registrar to extend the period for holding such meeting, has been taken away by omitting the proviso to sub-sec. (1).

13. The validity of the impugned notification cannot be judged by the power conferred on the Registrar to extend the period for holding the General Meeting. The power of the Registrar is only to give time to the Society to hold General Meeting, evidently on sufficient grounds; but the power of the Government is to modify the statutory provisions and apply the same to Co-operative Societies of its choice. There is a world of difference between these two powers. The Government by the impugned Notification has amended the provisions of S. 27 and substituted in its place an entirely different provision. By the aforesaid substitution, it appears to us, that

the original S. 27 (1) to the extent set out above, has been wiped out from the statute, and we doubt very much whether what has been removed would revive automatically in future. The substitution normally obliterates the existing provision and in its place the provision substituted will take its place once for all. Whether the case on hand is an exception to this rule has, therefore, to be decided more properly after notice to the other side.

14. In our opinion, a rule nisi should issue in the case.

HONNIAH, J.:—In view of the majority opinion, this writ petition is rejected.

Petition rejected.

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G. K. GOVINDA BHAT, C. J. AND N. D. VENKATESH, J.

Basvagowda, Appellant v. Land Tribunal, Athani and others, Respondents.

Writ Appeal No. 616 of 1976, D/- 1-12-1977.*

Constitution of India, Art. 226 (1) (b) (as amended by 42nd Amendment) — Karnataka Land Reforms Act (10 of 1962), S. 48-A (as introduced by Act 1 of 1974) — Application for registration of occupancy right under Act — Application filed beyond time — Enquiry by Tribunal into merits of claim without first admitting it is without jurisdiction. W. P. No. 9295 of 1976 D/- 25-10-1976 (Kant), Reversed.

Section 48-A as introduced into the Act prescribes a time-limit for making applications by persons claiming registration of occupancy rights under S. 45 of that Act. The time limit is 31-12-1974. Application filed after 31-12-1974 but before 30-6-1977 can be admitted by Tribunal if sufficient cause was shown. In that case landlord must be given an opportunity. The enquiry by the Tribunal into the merits of the claim without admitting the application made beyond the date fixed, viz., 31-12-1974 is clearly without jurisdiction. This error in the exercise of jurisdiction clearly vitiates the order of the Tribunal which affects the property rights of the landholder. Therefore, the case falls under Clause (b) of Art. 226 (1) of the Constitution as the landholder has suffered injury of substantial nature by reason of the contravention of the provision of sub-section (1) of Section 48-A of the Act. (Para 7)

When a law prescribes a period of limitation for an action, such action has to be brought within the prescribed period. The Court or Tribunal has no jurisdiction to entertain an action or proceedings after the expiry of the period of limitation prescribed. Where the law gives discretion to the Court or Tribunal, for sufficient cause, to condone the delay and admit the application, then that discretion has to be exercised in accordance with settled principles of law after affording both parties reasonable opportunity of being heard. Where the application is made beyond the period of limitation and cause is shown for condonation of delay, the Tribunal cannot straightway go into the merits of the application, unless it admits the application after being satisfied that the cause shown is sufficient for condonation of delay. W. P. No. 9295 of 1976, D/- 25-10-1976 (Kant), Reversed. (Para 6)

K. S. Savanur, for Appellant; V. S. Gunjal for Respondent No. 2.

G. K. GOVINDA BHAT, C. J.:— This appeal by a land-holder is directed against the order of Malimath, J., dated 25-10-1976 made in W. P. No. 9295 of 1976 rejecting the Writ Petition at the preliminary hearing stage.

2. The appellant is the land-holder of the land comprised in Survey No. 957/1B of Athni village. The second respondent Ramappa, alleging that he is a tenant of the said land, made an application in Form No. 7 before the Land Tribunal, Athni, for grant of occupancy right. That application is dated 6-10-1975. The second respondent appended a Note to his application stating that for the reasons stated in his affidavit accompanying Form No. 7 application, the delay in making the application may be condoned. The first respondent Land Tribunal did not consider the sufficiency of the cause shown by the applicant to admit the application made beyond 31st December 1974. It straightway went into the merits of the case and held that the second respondent was a tenant of the land and consequently entitled to grant of occupancy right. The said order was challenged by the appellant in W. P. No. 9295 of 1976, which came up before Malimath, J., on 25-10-1976 for preliminary hearing. The learned single

*Against Judgment of Malimath J. in W. P. No. 9295 of 1976 D/- 25-10-1976.

Judge rejected the Writ Petition at that stage being of the view that the finding of the Tribunal is a finding of fact and as such did not call for interference under Article 226 of the Constitution.

3. Aggrieved by the said order, the appellant has come up in appeal.

4. At the very outset, Sri K. S. Savanur, learned counsel for the appellant, sought leave to raise a new ground which was not raised before the learned single Judge and also in the Memorandum of Appeal. The ground sought to be raised, for which leave has been sought, is that the application of the second respondent was made beyond 31-12-1974 and the Tribunal could not have proceeded with the enquiry into the case of the applicant unless it admitted the application after being satisfied that the cause shown for making the application beyond the date fixed, viz., 31-12-1974, was sufficient. The ground raised by the applicant is a pure question of law and it goes to the jurisdiction of the Tribunal to make an order granting occupancy right. In that view, we grant the leave prayed for.

5. Sub-section (1) of S. 48-A of the Karnataka Land Reforms Act. 1961, which is the relevant section, reads thus:

"Every person entitled to be registered as an occupant under S. 45 may make an application to the Tribunal in this behalf. Every such application shall, save as provided in this Act, be made on or before the 31st day of December 1974, provided that the Tribunal may, for sufficient cause shown, admit an application made beyond that date but on or before 30th June 1977."

Section 48-A was introduced into the Act by Act 1 of 1974 which came into force on 1-3-1974. It prescribed a time-limit for making applications by persons claiming registration of occupancy right under S. 45. The time-limit for making such applications was, on or before 31st day of December 1974; Under the proviso to sub-s. (1) of S. 48-A, the Tribunal has discretion, for sufficient cause shown, to admit an application made beyond 31st December 1974 but on or before 30th June 1977. The Tribunal has no jurisdiction to admit an application made after 30th June 1977. The applicant has to show sufficient cause if his application for registration of occupancy right is made after 31st day of December 1974. The landholder should be afforded an opportunity of showing that the cause shown by the applicant is not sufficient. After hearing the landholder as well as the applicant, the Tribunal may, in its discretion, if the cause shown is sufficient, admit the application; but if the cause shown is not sufficient, then the application has to be rejected in limine.

6. When a law prescribes a period of limitation for an action, such action has to be brought within the prescribed period. The Court or Tribunal has no jurisdiction to entertain an action or proceedings after the expiry of the period of limitation prescribed. Where the law gives discretion to the Court or Tribunal, for sufficient cause, to condone the delay and admit the application, then that discretion has to be exercised in accordance with settled principles of law after affording both parties reasonable opportunity of being heard. Where the application is made beyond the period of limitation and cause is shown for condonation of delay, the Tribunal cannot straightway go into the merits of the application, unless it admits the application after being satisfied that the cause shown is sufficient for condonation of delay.

7. In the instant case, though the second respondent, who is the applicant before the Tribunal, had appended a Note to his Form No. 7 application that the delay in making the application may be condoned for the reasons stated in the affidavit accompanying the said application, the Tribunal did not issue any notice to the appellant-landholder on the application for condonation of delay. The order of the Tribunal does not state that the application has been admitted after condoning the delay being satisfied that the cause shown by the applicant was sufficient. The enquiry by the Tribunal into the merits of the claim without admitting the application made beyond the date fixed, viz., 31-12-1974 is clearly without jurisdiction. This error in the exercise of jurisdiction has clearly vitiated the order of the Tribunal which affects the property rights of the appellant-landholder. Therefore, the case falls under cl. (b) of Art. 226 (1) of the Constitution as, in our opinion, the appellant has suffered injury of substantial nature by reason of the contravention of the provision of sub-s. (1) of S. 48-A of the Act.

8. Accordingly, we allow this appeal and reversing the order of the learned single Judge, quash the impugned order of the Tribunal and remit the matter

back to the Tribunal with a direction to consider the application of the second respondent for condonation of delay after hearing the interested parties. If the Tribunal admits the application after condonation of delay, then notice on Form No. 9 has to be issued and the matter heard on merits.

9. Parties to bear their own costs.

Appeal allowed.

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G. K. GOVINDA BHAT, C. J. AND N. D. VENKATESH, J.

Basappa, Petitioner v. The Land Tribunal, Bagalkote Taluk and others, Respondents.

Writ Appeal No. 411 of 1976, D/- 28-11-1977.*

Karnataka Land Reforms Act, 1961 (10 of 1962), S. 48-A (8) — Registration as occupant — Essentials for — Claimant must make application—Order conferring right under S. 45 on a person without his application held without jurisdiction. **(Para 4)**

I. S. Antin, for Petitioner; Umashankar, for B. V. Deshpande. for Respondent No. 2.

G. K. GOVINDA BHAT, C. J.: — This writ appeal brought on behalf of a landholder arises out of proceedings under S. 48-A of the Karnataka Land Reforms Act, 1961, hereinafter called 'the Act', initiated on the application of Umalappa, the third respondent, for grant of occupancy right in respect of 4 acres 1 gunta of agricultural land comprised in Survey No. 66/B of Hiregulbal village of Bagalkot Taluk in the District of Bijapur.

2. Before the Tribunal, the third respondent admitted that he was not personally cultivating the land since about four years before the date of his examination before the Tribunal. The Tribunal held that the second respondent Sagarappa was cultivating the land personally after the applicant Umalappa had ceased to cultivate and, therefore, it conferred occupancy right on Sagarappa. It is relevant to state that the second respondent Sagarappa was not an applicant before the Tribunal for registration of occupancy under S. 48-A of the Act. Exhibit-B, the certified copy of the order of the Land Tribunal, does not show that Sagarappa had made any application and that he was a party to the proceedings.

3. The order of the Tribunal was challenged before this Court by the landholder Basappa in W. P. No. 6539 of 1976 which came up before Bhimiah, J., for preliminary hearing. The learned single Judge rejected the petition at that stage itself without dealing with the main ground urged in the writ petition. The main ground urged in the writ petition was that the Tribunal had no jurisdiction to grant occupancy right to a person who had not made an application to the Tribunal. Grounds 1 and 2 in the writ petition read thus:—

"(1) That the impugned order dated 22-4-76 passed by the first respondent is without jurisdiction inasmuch as the person, who has been registered as occupant of the land in question is not a party to the proceedings before the Land Tribunal.

(2) That the impugned order is ex facie illegal inasmuch as the occupancy rights have been granted in favour of the third party who has not made an application at any point of time for occupancy rights, in respect of the land in question."

The order of the learned single Judge rejecting the writ petition reads thus:—

"Heard. The Tribunal relied upon the instalment, and patta while making the order that respondent 2 is entitled to be registered as occupant of the land in question. The contentions that the order in question is an order passed without jurisdiction is devoid of merit. Hence W. P. is dismissed."

Aggrieved by the said order, the landholder has preferred this appeal.

4. The short question for decision in this appeal is whether the Tribunal has jurisdiction to grant occupancy right to a person who has made no application within the time allowed by sub-s. (1) of S. 48-A of the Act. The relevant provisions on this question are sub-ss. (1) and (8) of S. 48-A of the Act and it is necessary to set out the same. They read:—

"48-A. Enquiry by the Tribunal etc. — (1) Every person entitled to be registered as an occupant under S. 45 may make an application to the Tribunal in this behalf. Every such application shall, save as provided in this Act. be made on or be-

*(To quash order of Bhimiah J. in W. P. No. 6539 of 1976, D/- 10-8-1976).

fore the 31st day of December 1974 provided that the Tribunal may, for sufficient cause shown, admit an application made beyond that date but on or before 30th day of June 1976.

(2) to (7) (omitted as unnecessary).

(8) Where no application is made within the time allowed under sub-s. (1), the right of any person to be registered as an occupant shall have no effect."

Assuming that the second respondent is a person entitled to be registered as an occupant under S. 45 of the Act, the above cited provisions require that he should have made an application within the time allowed by sub-s. (1) of Section 48-A. When he has not made such an application as stated in sub-s. (8) of S. 48-A, the right under S. 45 claimed by him cannot be conferred on him. In other words, where the person, who would otherwise be entitled to claim occupancy right under S. 45 read with S. 48-A, had made no application in the manner provided to the Land Tribunal having jurisdiction, such person loses the right to claim occupancy right. The Tribunal has ignored the provisions of sub-s. (8) of S. 48-A of the Act and the learned Single Judge has also ignored the said provisions. The Tribunal, therefore, had no jurisdiction to grant occupancy right in favour of the second respondent in view of the provisions of S. 48-A (8) of the Act.

5. We, therefore, allow this appeal and, reversing the order of the learned single Judge, quash the impugned order of the Land Tribunal granting occupancy right in favour of Sagarappa, the second respondent.

6. Shri Umashankar, learned counsel for the second respondent, submitted that in order to ascertain whether Sagarappa had made any application before the Land Tribunal within the period of time allowed under S. 48-A (1), he has written three letters but has received no response. The appellant has clearly stated in his writ petition that the second respondent has not made any such application. If the second respondent is able to show that he had made an application before the land Tribunal, then he may move this Court for review of this order.

7. In the circumstances. the parties are directed to bear their own costs. Ordered.

Appeal allowed.

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M. S. NESARGI J.

Mir Fakruddin Sheriff, Petitioner v. The Land Tribunal and others, Respondents.

Writ Petn. No. 7227 of 1975, D/- 11-11-1977.

(A) Constitution of India, Art. 226 — Tribunal not passing speaking order and granting occupancy rights to 31 applicants by common order — Also not following mandatory procedure prescribed in S. 48-A (5) of Karnataka Land Reforms Act — Held order of the Tribunal deserved to be quashed — (Karnataka Land Reforms Act (10 of 1962), S. 48-A (5)).

(Paras 2, 3 & 4)

(B) Karnataka Land Reforms Act (10 of 1962), S. 45 — Occupancy rights — Many persons applying for — Lands in dispute owned by a single landlord — When common order disposing of all the claims be passed.

It has been laid down by this Court that if more than one person claim occupancy rights to the very same area and very same land, such claims should be clubbed by the Tribunal and the same should be disposed of by passing a common order. But it is not the law that if the landlord is common in many applications, though the lands are different and the claimants are different all those applications should be clubbed and common order should be passed. (Para 3)

Shetty for C. Shanthamallappa, for Petitioner; U. Narayanaswami, for Respondents Nos. 2 to 24 and 27 to 31.

ORDER : — The petitioner, who is the owner of many lands, in regards to portions of which Respondents 2 to 32 have succeeded before the Land Tribunal, Kanakapura, in securing occupancy rights in favour of themselves, has challenged the order so granting occupancy rights. That order is dated 6-11-1975 and has been passed by the Land Tribunal in 31 proceedings.

2. The true copy of the order is at Exhibit 'B' : to read the order at Exhibit 'B', leads to a strange experience. The name of the applicant and the land for which he has applied is mentioned in the first column and as against that, it is narrated that his case was considered and his claim was granted. In view of this state of affairs, the learned counsel appearing on both the sides fairly filed a Joint Memo stating that the order in

question is not a speaking order and the law requires that it should be quashed.

3. Apart from the aforementioned fact which makes the order liable to be quashed, it is to be observed that the Tribunal was wrong in clubbing all the 31 cases. In various decisions it is laid down by this Court that if more than one person claim occupancy rights to the very same area and very same land, such claims should be clubbed by the Tribunal and the Tribunal should proceed to dispose of the claims by passing a common order. It is not the law that if the landlord is common in many applications, though the lands are different and the claimants are different, all those applications should be clubbed and common order should be passed. This is another lacuna in the proceedings of the Tribunal.

4. One more lacuna worthwhile noticing is that the Tribunal has ignored the mandatory procedure prescribed by S. 48-A (5) of the Karnataka Land Reforms Act, 1961, in disposing of the cases.

5. In view of the foregoing reasons, I hold that the learned counsel are justified in filing the Joint Memo.

6. In the result, the writ petition is allowed and the impugned order is quashed. The Tribunal is directed to hold a fresh enquiry in all the 31 applications bearing in mind the observations made in the body of the order and then proceed to dispose of the claims of the different claimants according to law.

No order as to costs.

Writ petition allowed.

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G. K. GOVINDA BHAT, C. J. AND M. N. VENKATACHALIAH, J.

N. Marulappa, Appellant v. State of Karnataka and others, Respondents.

Writ Appeal No. 410 of 1976, D/- 24-10-1977.*

Karnataka Land Revenue Act (12 of 1964), S. 133 — Presumption of correctness of Record of Rights — Decision of majority of Land Tribunal against presumption and not giving reasons — Injunction granted on its basis — Interference under Art. 226, Constitution of India, justified—(Constitution of India, Art. 226). (W. P. No. 3326/76 D/- 10-8-76 (Karnataka), Reversed).

In an application for grant of occupancy rights, the Chairman of the Land Tribunal explained to its members that there was no evidence on record to make out a prima facie case that the applicants were in possession and that the Record of Rights showed to the contrary. The majority, however, decided to the contrary without giving any reason and a temporary injunction in favour of the applicant was issued. A writ petition was filed challenging the same.

Held that the order granting the injunction must be quashed. (Para 6)

Writ petition cannot be dismissed only because it is against an interim order. Even an interim order of injunction has to be in accordance with law. (W. P. No. 3326 of 1976, D/- 10-8-1976 (Kant), Reversed). (Para 5)

Anno: AIR Comm. Const. of India (2nd Edn). Arts. 226 & 32 N. 51.

K. N. Shankaralingappa, for Appellant; Anantharaman (for Nos. 3 to 15) and K. S. Puttaswamy, I Addl. Govt. Advocate (for Nos. 1 and 2), for Respondents.

G. K. GOVINDA BHAT, C. J.: — This appeal preferred by a landholder is directed against the order of Bhimiah, J., dated 10-8-1976 made in Writ Petition No. 3326 of 1976 dismissing the appellant's writ petition challenging the order dated 26-3-1976 made by the Land Tribunal, Tiptur Taluk (Respondent-2) granting temporary injunction against the appellant-landholder in respect of about 13 acres of agricultural land comprised in Survey Nos. 329, 330, 331, 336/2 and 337 of Nonavinakere-Amanikere village.

2. Respondents 3 to 15 made separate applications before the Land Tribunal for grant of occupancy rights in respect of separate parcels of agricultural land in the aforesaid survey numbers. The said applications, on notice being served on the appellant, were opposed contending that the applicants before the Tribunal were not tenants and the lands were under the personal cultivation of the appellant and his undivided brother. In the said proceedings, respondents 3 to 15 made applications for grant of temporary injunction against the appellant. The said applications came up before the Land Tribunal for hearing. The Assistant Commissioner of the Sub-Division, who is the Chairman of the Land Tribunal, explained to the Members that there is

*(Against Judgment of Bhimiah, J. in W. P. No. 3326 of 1976, D/- 10-8-1976).

nothing on record to make out a prima facie case that the applicants are tenants in possession of the lands in question. He also pointed out that the Records of Rights do not show their names. The Chairman, therefore, was for dismissing the applications for temporary injunction. One of the Members also agreed with the Chairman, but three out of the five Members of the Land Tribunal differed from the Chairman, and the majority of three Members, without assigning any reasons, ordered that temporary injunction should be issued in favour of the applicants. That order was challenged by the appellant under Art. 226 of the Constitution in Writ Petition No. 3326 of 1976 which was admitted by the learned Single Judge and rule nisi was issued. In the writ petition, the appellant made an application for stay of the operation of the order of the Tribunal. That application for stay came up for hearing before Bhimiah, J. who disposed of the main writ petition itself by making an order which reads thus:—

"Heard Advocates. This writ petition is against the interim order. The order impugned cannot be said to be palpably incorrect or one passed without jurisdiction. Hence W. P. dismissed."

The said order of dismissal has been challenged in this appeal.

3. We have heard the learned counsel on both sides. Shri K. S. Puttaswamy, learned High Court Government Advocate, who appears for the State, was also heard. We asked the learned Government Advocate whether there is any revenue record showing the names of respondents 3 to 15 as persons cultivating the lands in question immediately prior to 1-3-1974. The learned Government Advocate fairly conceded that there were no such records on the file of the Tribunal.

4. The statutory presumption under S. 133 of the Karnataka Land Revenue Act is that the entries in the Record of Rights are correct until the contrary is proved. Respondents 3 to 15 have not produced any material before the Land Tribunal to show that the entries in the Record of Rights are incorrect. The Chairman of the Tribunal rightly pointed out and impressed upon the non-official Members that there is nothing on record to show that the applicants had a prima facie case and yet, without assigning any reasons, the majority of the Members of the Tribunal decided that the order of interim injunction should go in favour of the applicants. The Chairman has given reasons as to why the applications for injunction should not be granted while the majority of Members have not assigned any reasons. In substance, an order is made without any reasons and contrary to the Statutory presumption in favour of the appellant-landholder.

5. The learned single Judge has dismissed the writ petition on the sole ground that it is against an interim order. Even an interim order of injunction must be in accordance with law, particularly when the Chairman of the Tribunal assigns reasons for holding that it is not a fit case for granting an interim order. In the instant case, the majority decision is not a speaking order and, therefore, void. It is not only void but also perverse because the Statutory presumption is in favour of the land-holder. This is one of the innumerable illustrative cases to demonstrate that a Tribunal consisting of Members who are incompetent to understand the law and the facts, is in no way different from a Tribunal composed of Members who are biased against one of the parties.

6. For the reasons stated above, this appeal is allowed, the order of the learned single Judge is reversed and the order of the Land Tribunal granting injunction is hereby quashed.

7. The appellant is entitled to his costs in this appeal as well as in the writ petition, which shall be paid by respondents 3 to 15. Advocate's fee Rs. 250/-.

Appeal allowed.

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G. K. GOVINDA BHAT, C. J. AND M. N. VENKATACHALIAH, J.

Sangappa, Petitioner v. The Land Tribunal and others, Respondents.

Writ Petn. No. 1272 of 1976, D/- 21-11-1977.

Karnataka Land Reforms Act (10 of 1962), S. 48-A and S. 67 (prior to amendment) — Application by tenant under S. 48-A — Jurisdiction of Land Tribunal — Scope and extent of — Procedure to be adopted when the tribunal is of the opinion that the application is a collusive one and made to defeat ceiling provisions.

AV/AV/A42/78/ABO/VSS

The jurisdiction of the Tribunal in proceedings under Chap. III of the Act is restricted to applications for grant of occupancy rights in respect of tenanted lands vesting in the State Government on 1-3-1974. The provisions of S. 44 and other sections in Chap. III of the Act make this position abundantly clear. Chapter III is not concerned with lands under the personal cultivation of the land-holders, irrespective of the fact that the lands so possessed and cultivated are in excess of the ceiling limit fixed by the Act. The jurisdiction of the Tribunal to initiate proceedings under Chap. III arises on an application being made by a person claiming to be the tenant of a land or lands alleged to have vested in the State Government on 1-3-1974 under S. 44 of the Act. It has no jurisdiction to take any proceedings under Chap. III in respect of lands not vested in the State Government on 1-3-1974 under S. 44 (1) of the Act. (Para 5)

When a notice in form No. 9 was issued to landlord on an application by tenant under S. 48-A of the Act, as in the instant case, the case which the land-holder had to meet was whether the land in question is a 'tenanted land'. The question whether the application of the petitioner was a collusive one brought about in order to evade the ceiling provisions, did not arise at all. In the year 1975, the proper authority who had jurisdiction to consider and decide whether a land-holder is in possession of land in excess of the ceiling limit, was the Tahsildar. (Para 5)

Under the S. 67 (as amended in 1976) the competent authority to make out a case that a land-holder in possession of lands in excess of the ceiling limit, in order to defeat the ceiling provisions, has brought about fictitious or collusive tenancies, is the Tahsildar who represents the State. The Tahsildar, while placing the declaration of the land-holder and the connected records before the Tribunal, has to make out such a case and thereupon the Tribunal has to issue notice to the land-holder and also the alleged tenant to meet such a case. The Tribunal is an independent forum set up under the Act to adjudicate upon controversies between two adversaries. The Tribunal suo motu cannot come to the conclusion that the tenancy claimed or set up is collusive, when no such case was put forward by the Tahsildar. (Para 7)

In cases where the Tribunal feels that the application under S. 48-A is collusive what the Tribunal has to do is to club the proceedings arising under Chap. IV, after the land-holder files his declaration under S. 66, with the proceedings initiated on the application of the alleged tenant under S. 48-A of the Act. The Tribunal has to decide, in the first instance, the proceedings arising under Ss. 66 and 67 of the Act after affording reasonable opportunity both to the land-holder and the alleged tenant to meet the case, if one is made out by the Tahsildar, that the alleged tenancy is a collusive one. If the Tribunal rejects the case of the Tahsildar, then it has to make an appropriate order in the proceedings under S. 48-A of the Act. (Para 8)

Held on facts and circumstances of the case that the Tribunal passed the order impugned, on 6-11-1975, i.e., before S. 67 of the Act was amended that at that time, the Tribunal had no jurisdiction to decide the question arising under Chapter IV and the Tahsildar alone could have decided this question. Order quashed. (Para 9)

L. Govindaraju for M. M. Jagirdar, for Petitioner; H. N. Narayan, Govt. Pleader (for Nos. 1 & 3) and G. V. Thimmappaiah (for No. 2), for Respondents.

GOVINDA BHAT C. J.:— This writ petition arising under the Karnataka Land Reforms Act, 1961, hereinafter called 'the Act,' raises an important question of law touching the jurisdiction of the Land Tribunal constituted under the Act.

2. The second respondent Srinivas Rao Kasimpurkar is a land-holder in Bidar Taluk. The petitioner Sangappa made an application in form No. 7 under S. 48-A of the Act for grant of occupancy right over an area of 18 acres 18½ gunthas in Survey No. 77 of Kasimpur village in Bidar Taluk belonging to the second respondent land-holder on 31-12-1974. On the said application having been filed before the Land Tribunal, Bidar Taluk, notices were issued in form No. 9 to the petitioner and the second respondent's wife Susheela Bai. In his application, the petitioner had stated that he has been cultivating the land as tenant since the year 1958. The notice issued in form No. 9 reads thus:

"Whereas the lands mentioned below have vested in the State Government under S. 44 (1) of the Act and whereas the Tribunal has to determine the per-

son who is entitled to be registered as an occupant of the said lands under Section 45.

Now, therefore, notice is hereby given to Shri .....
(here specify the name of the applicant or other person who appears to the Tribunal to be interested in the land) to appear before the Tribunal on 10-4-1975 with documentary evidence, if any.

Description of the land:

Taluk	Village	S. No.	Area Asstt."
Bidar	Kashimpur	77	18-A-18½G.— (Pan)

On the first date of hearing fixed by the Tribunal, both parties were absent and hence fresh notices were issued and a fresh date was fixed for hearing. On the said date, the petitioner and the second respondent appeared before the Tribunal and made their statements. The second respondent conceded that the petitioner has been cultivating a moiety of the land in Survey No. 77 since 1963. Thereafter the matter was adjourned to a further date of hearing and finally on 6-11-1975, the Tribunal passed the impugned order holding that the land claimed by the petitioner was not a tenanted land and the application is a collusive one apparently got up in order to evade the ceiling provisions of the Act as the landholder Srinivasa Rao owns lands in excess of the ceiling limit. The Tribunal rejected the application of the petitioner and directed the Tahsildar, who is the Secretary of the Tribunal, to take action under S. 66 of the Act to vest the land in Government. Aggrieved by the said order, the petitioner has approached this Court for relief under Articles 226 and 227 of the Constitution.

3. The second respondent does not oppose this writ petition. The State has entered appearance through Shri H. N. Narayan, learned High Court Government Pleader.

4. The first argument urged by Shri Govindaraju appearing for Shri M. M. Jagirdar, learned counsel for the petitioner, is that the Tribunal has travelled outside its jurisdiction when it held that the land has vested in the State Government under Chapter IV of the Act and it had no jurisdiction to direct the Tahsildar to take action under S. 66 of the Act. The second ground urged by the learned counsel is that the parties were given no opportunity to meet the new case made out by the Tribunal, viz., that the application is a collusive one and the land is not a tenanted land.

5. In our opinion, both the grounds urged by the learned counsel are well-founded and the order of the Tribunal is clearly vitiated on both grounds. We have set out in the earlier part of this order the notice issued to the parties in form No. 9. The jurisdiction of the Tribunal in proceedings under Chapter III of the Act is restricted to applications for grant of occupancy rights in respect of tenanted lands vesting in the State Government on 1-3-1974. The provisions of S. 44 and other Sections in Chapter III of the Act make this position abundantly clear. Chapter III is not concerned with lands under the personal cultivation of the land-holders, irrespective of the fact that the lands so possessed and cultivated are in excess of the ceiling limit fixed by the Act. The jurisdiction of the Tribunal to initiate proceedings under Chapter III arises on an application being made by a person claiming to be the tenant of a land or lands alleged to have vested in the State Government on 1-3-1974 under S. 44 of the Act. It has no jurisdiction to take any proceedings under Chapter III in respect of lands not vested in the State Government on 1-3-1974 under S. 44 (1) of the Act. The notice in form No. 9 issued to parties stated that "whereas the land has vested in the State Government under S. 44 (1) of the Act," the interested parties are required to appear before the Tribunal with documentary evidence to decide the issue of grant of occupancy right applied for. The notice in form No. 9 has been prescribed under the Rules made under the Act. The rules do not provide for issue of a notice either to the person claiming to be the tenant or to the landholder to meet the case of the State that the alleged tenancy is a collusive one and that the land is actually under the personal cultivation of the land-holder and the application for grant of occupancy right has been got up in order to defeat the ceiling provisions of the Act under Chapter IV. When a notice in form No. 9 is issued pursuant to proceedings taken under S. 48-A of the Act, the case which the land-holder has to meet is whether the land in question is a 'tenanted land.'

6. In the instant case, the question whether the application of the petitioner was a collusive one brought about in order to evade the ceiling provisions, did not arise at all. Neither the petitioner nor the second respondent was required to meet any such case.

7. In the year 1975 when the Tribunal decided the case, the proper authority who had jurisdiction to consider and decide whether a land-holder is in possession of land in excess of the ceiling limit, was the Tahsildar. Chapter IV of the Act contains provisions relating to land-ceilings. After prescribing the ceiling limits in respect of different classes of lands and also exemptions from the ceiling provisions in respect of certain categories, S. 66 provides for filing of declaration of holdings by land-holders in actual possession of lands in excess of the ceiling limits prescribed by the Act. Such declarations have to be filed before the Tahsildar who is required to determine whether the land-holder is in possession of lands in excess of the ceiling limit and if so, which are the lands required to be surrendered to the State Government. Section 67 was amended by Karnataka Act No. 44 of 1976 which was published in the Gazette dated 2-6-1976. Under the amended provisions, the Tahsildar, on receipt of the declaration under S. 66, shall verify the particulars contained therein and thereafter place the declaration and the connected records before the Tribunal and thereupon the Tribunal has to enquire and determine the extent of the holding and the area by which such extent exceeds the ceiling area. The competent authority to make out a case that a land-holder in possession of lands in excess of the ceiling limit, in order to defeat the ceiling provisions, has brought about fictitious or collusive tenancies, is the Tahsildar who represents the State. The Tahsildar, while placing the declaration of the land-holder before the Tribunal, has to make out such a case and thereupon the Tribunal has to issue notice to the land-holder and also the alleged tenant to meet such a case. The Tribunal is an independent forum set up under the Act to adjudicate upon controversies between two adversaries. The Tribunal suo motu cannot come to the conclusion that the tenancy claimed or set up is collusive, when no such case was put forward by the Tahsildar.

8. This is not a solitary case of this type. There are a number of cases which have come to this Court where the Tribunals in the State have suo motu held in proceedings under Chapter III that the alleged tenancy is a collusive one got up in order to defeat or evade the ceiling provisions of the Act. In cases of this type, what the Tribunal has to do is to club the proceedings arising under Chapter IV, after the land-holder files his declaration under S. 66, with the proceedings initiated on the application of the alleged tenant under S. 48-A, of the Act. The Tribunal has to decide, in the first instance, the proceedings arising under Ss. 66 and 67 of the Act after affording reasonable opportunity both to the land-holder and the alleged tenant to meet the case, if one is made out by the Tahsildar, that the alleged tenancy is a collusive one. If the Tribunal rejects the case of the Tahsildar, then it has to make an appropriate order in the proceedings under S. 48-A of the Act. If the land-holder in such a case does not contest the tenancy, there is no option but to grant occupancy right in the proceedings under S. 48-A.

9. The learned Government Pleader was unable to say whether or not, in the instant case, the Tahsildar, in the proceedings arising under S. 66 of the Act, had made out a case that the tenancy set up by the petitioner is a collusive one. The Tribunal passed the order impugned as stated earlier, on 6-11-1975, i. e., before S. 67 of the Act was amended. At that time, the Tribunal had no jurisdiction to decide the question arising under Chapter IV. The Tahsildar alone could have decided this question.

10. It is, therefore, clear that the Tribunal has, in the instant case, travelled outside its jurisdiction.

11. For the reasons stated above, we allow this writ petition, quash the impugned order and remit the matter to the Tribunal to adjudicate afresh upon the application of the petitioner in the light of this order. If the proceedings arising on the declaration of the second respondent under S. 66 of the Act are pending and the Tahsildar, in such proceedings, has made out a prima facie case that the land in question is not a tenanted land, then both the proceedings should be clubbed together and disposed of in the light of this order.

12. The petitioner is entitled to his costs which shall be recovered from the third respondent, State of Karnataka. Advocate's fee Rs. 100/-.

Petition allowed.

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G. K. GOVINDA BHAT, C. J. AND N. D. VENKATESH, J.

Venkatappa Appellant v. L. N. Dattatri and others, Respondents.

Writ Appeal No. 423 of 1977, D/- 6-12-1977*.

(A) Karanataka Land Reforms Act (10 of 1962), Section 45 and Form No. 7 — Karnataka Land Revenue Act (12 of 1964), S. 133 — Application in Form No. 7 — Applicant adducing no evidence to show that entries in favour of respondent in Record of Rights were not correctly recorded — Tribunal gave no reasons for rejecting statutory presumption to be drawn under Section 133 and had not discussed evidence — Held: Order of Tribunal was arbitrary and capricious — Order quashed. (Paras 4, 5)

(B) Karnataka Land Reforms Act (10 of 1962), Sections 48-A (1) (as amended) and 45 (8) and Form No. 9 — Application for grant of occupancy right made beyond period of limitation and no cause shown to condone delay — No order made by Tribunal admitting application — Tribunal has no jurisdiction to issue notice in Form No. 9.

If no application is made within the time allowed by sub-section (1) of Section 48-A of the Act, no person can claim occupancy right under Chapter III. If an application is made after 31st December, 1974, the Tribunal has the jurisdiction to confer occupancy right on the applicant provided it admits the application having satisfied itself that the cause shown for making the application belatedly, is sufficient for condonation. (Para 8)

The applicant in his application for grant of occupancy right made on 26-12-1975 showed no cause whatever for condonation of delay. The Tribunal made no order admitting the application but issued notice in Form No. 9 to respondent without attaching a copy of application and without giving any notice prior to issue of notice in Form No. 9.

Held: that (i) it could not be contended that by issue of notice in Form No. 9. the Tribunal should be deemed to have admitted the application though there was no express order made in writing.

(ii) As the notice in Form No, 9 did not disclose the date of application, the respondent could not have raised the bar of limitation before the Tribunal, and

(iii) the notice issued by Tribunal in Form No. 9 was without jurisdiction and that the commencement of the proceedings for grant of occupancy right was illegal and without jurisdiction. W. P. No. 1995 of 1977, D/- 9-8-1977 (Kant) Affirmed on different ground. (Paras 9, 10, 11)

Cases Referred: Chronological Paras

(1874) 2 Ind App 58 (PC) 6

M. S. Gopal, for Appellant; A. V. Albal, (for No. 1) and V. C. Brahmarayappa, Govt. Pleader, (for Nos. 2 and 3) for Respondents.

G. K. GOVINDA BHAT C. J. :— The appellant, Venkatappa made an application in Form No. 7 to the Land Tribunal, Tarikere, on 26th December 1975 for grant of occupancy right in respect of 3 acres 12 guntas of agricultural land in S. No. 141 of Hulsoor village, Lakkavalli Hobli, Tarikere Taluk. Respondent-1, Dattatri is the holder of the said land. Though the said application was made after the expiry of the period of limitation prescribed under sub-section (1) of S. 48-A of the Karnataka Land Reforms Act, 1961 (hereinafter called the Act), no cause was shown for condonation of delay in making the application.

2. The Tribunal straightway issued notice in Form No. 9, Parties and their witnesses were examined and the Tribunal by its order in LRT 3/1975-76 allowed the application and granted occupancy right to the appellant. That order was challenged by respondent-1, before this Court in Writ Petition No. 1995 of 1977 in which Rule Nisi was issued. The appellant did not appear to contest. The matter came up for final disposal before Bhimiah, J., who, by his order dated 9-8-1977 allowed the writ petition and quashed the order of the Tribunal. The reason given by the learned Judge for quashing the order of the Tribunal is that it is based on no evidence.

3. Aggrieved by the said order, the appellant has come up in appeal. The main ground urged in this appeal is that the learned Single Judge ought to have remitted the matter back to the Tribunal for adjudication afresh. When this appeal came up for hearing on 1st December, 1977, Sri A. V. Albal, learned counsel for respondent-1 raised the contention that the entire proceedings before the Tribunal commencing with the issue of notice in Form No. 9 was without jurisdiction as the application for grant of occupancy right was made beyond the period of time prescribed under sub-section (1) of Sec. 48-A

*(To set aside order passed by this Court in W P. No. 1995 of 1977, D/- 9-8-1977.)

of the Act, that the appellant had shown no cause for condonation of delay, for making the application beyond the time provided and that the Tribunal had not admitted the application. Since the question thus raised is an important question of law we directed that the State of Karnataka should be impleaded as a party-respondent and notice should be issued to the High Court Government Advocate.. The matter was adjourned to this day for further hearing. Today we heard learned counsel for the parties including Sri V. C. Brahmarayappa for the State.

4. The reason given by the learned Single Judge that the order of the Tribunal is based on no evidence, is not correct. Sri Albal, learned counsel for respondent-1 did not attempt to support that reasoning of the learned Single Judge. The question of sufficiency of evidence is different from a case where there is no evidence. In the instant case, the appellant and his witnesses were examined, in support of his claim. The statutory presumption is in favour of respondent-1 under Section 133 of the Karnataka Land Revenue Act, as the entries in the Record of Rights show that the land was cultivated personally by the landholder during the period immediately prior to 1st March 1974.

5. We have perused the order of the Tribunal. It has referred to the fact that the Record of Rights does not show the name of the appellant as cultivator of the land during the relevant period. Having noticed that fact, the Tribunal has not given any reason for rejecting the statutory presumption to be drawn under Section 133 of the Karnataka Land Revenue Act, The appellant has not adduced any evidence before the Tribunal to show that the entries in the Record of Rights were not correctly recorded and no reliance should be placed thereon. The Tribunal has not discussed the relevant evidence, oral and documentary, bearing in mind the relevant provisions of law. Its conclusion that the appellant is a tenant of the land, is therefore arbitrary and capricious. Therefore, the order of the Tribunal was liable to be quashed.

6. The next question is whether the matter ought to be remitted back to the Tribunal for adjudication afresh. The application of the appellant, as stated earlier, was made on 26th December 1975, beyond the period of limitation prescribed under sub-sec. (1) of Section 48-A of the Act. In that application he did not show any cause for preferring the application beyond time. Where a period of limitation is prescribed for any action, such action has to be brought within the prescribed time and if, one is brought beyond the time, the Court or the Tribunal, has no jurisdiction to entertain the same, unless, by law, the Court or the Tribunal has the power to condone the delay. In Luchmun Singh v. Shumshere Singh (1874) 2 Ind App 58 (PC)) the Judicial Committee of the Privy Council held that an order of a Civil Court admitting an application for review of judgment after the expiration of ninety days from the date of its decree without stating that there was or that it had been shown to its satisfaction that there was sufficient cause or excuse for the delay, was improperly granted. and ought to be set aside.

7. Sub-sec. (1) of Sec. 48-A of the Act was introduced by the Karnataka Act No. 1 of 1974. The said provision has undergone a number of amendments. As it originally stood, it read thus:

"Every person entitled to be registered as an occupant under Sec, 45 may make an application to the Tribunal in this behalf. Every such application shall, save as provided in this Act, be made within six months from the date of commencement of the Amendment Act, provided that the Tribunal may, within one year from that date for sufficient cause shown admit an application made beyond six months."

The said sub-section as it now stands, reads thus:

"Every person entitled to be registered as an occupant under Section 45 may make an application to the Tribunal in this behalf. Every such application shall, save as provided in this Act be made on or before the 31st day of December 1974 provided that the Tribunal may, for sufficient cause shown admit an application made beyond that date but on or before 30th day of June 1977."

It is necessary to make a reference to sub-section (8) of Sec. 48-A of the Act, which states that where no application is made within the time allowed under sub-sec. (1), the right of any person to be registered as an occupant shall have no effect.

8. The right to claim occupancy is a right conferred by the Act. Such an application has to be made within the time allowed by sub-sec, (1) of Section 48-A. If no application is made within the time allowed, the right of every person entitled to claim registration of occupancy, is lost. In other words, if no application is made within the time allowed by sub-sec. (1) of Sec. 48-A of

the Act, no person can claim occupancy right under Chapter-III of the Act. If an application is made after 31st December 1974, the Tribunal has the jurisdiction to confer occupancy right on the applicant provided it admits the application having satisfied itself that the cause shown for making the application belatedly, is sufficient for condonation. The proviso to sub-section (1) of Section 48-A of the Act is in pari materia with Section 5 of the Limitation Act, 1963.

9. In the instant case, the appellant who is the applicant before the Tribunal showed no cause whatever for condonation of delay. The Tribunal made no order admitting the application. It was argued by Sri M. S. Gopal learned counsel for the appellant that when the Tribunal issued notice in Form No. 9 to respondent-1 by implication it should be deemed to have admitted the application though there is no express order made in writing. This argument is clearly untenable.

10. It was also argued by Sri M. S. Gopal that respondent-1 did not raise this objection before the Land Tribunal and that he ought to have raised the same before the Tribunal. It is not disputed that no notice was issued to respondent-1 before the issue of notice in Form 9. No copy of the application dated 26th December 1975 was served on respondent-1. The notice in Form No. 9 did not state the date of the application either. Respondent-1 could have had no knowledge of the date of the application when the notice in Form No. 9 did not disclose the date of the application and consequently respondent-1 could not have raised the bar of limitation before the Tribunal.

11. In our judgment the notice issued by the Tribunal in Form No. 9 was one without jurisdiction as the application of the appellant was made beyond the time allowed by law and he had not shown any cause for condonation of delay. The commencement of the proceedings for grant of occupancy right was, therefore, clearly illegal and without jurisdiction. The learned Single Judge should have quashed the entire proceedings commencing with the issue of notice in Form No. 9 including the order of the Tribunal and it was unnecessary to go into the other grounds urged in the writ petition. Therefore, there is no ground to remit the matter back to the Tribunal for adjudication afresh.

12. Accordingly this appeal fails and is dismissed, but in the circumstances, without costs.

13. Sri V. C. Brahmarayappa, learned High Court Government Pleader is permitted to file his memo of appearance within two weeks.

Appeal dismissed.

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G. K. GOVINDA BHAT, C. J. AND N. D. VENKATESH, J.

Shiddappa Kariyappa Gouda and another, Appellants v. The Land Tribunal, Ranebennur and others, Respondents.

Writ Appeal No. 489 of 1976. D/- 30-11-1977*.

Constitution of India, Art. 226 — Error apparent on face of record — Speaking order — Karnataka Land Reforms Act (10 of 1962), S. 2 (a) (18) — Land — Contention by landholder that land is not agricultural land within Section 2 (a) (18) — Order passed by Tribunal that land was not agricultural without looking into definition of law in the Act — Order cannot be considered as a 'speaking order' and was void in law. W. P. No. 7623 of 1976 D/- 6-9-1976 (Kant), Reversed.

Where there is dispute between the parties whether any land is or is not an agricultural land coming within the purview of the Karnataka Law Reforms Act, that question should be decided by the Tribunal as a jurisdictional fact. If the Tribunal comes to the conclusion on the basis of the material before it, that it is not an agricultural land coming within the purview of the Act, then it will have no jurisdiction to proceed further. If, on the contra, it comes to the conclusion that it is an agricultural land, that decision, being a jurisdictional fact, is open to review by the High Court under Art. 226 of the Constitution of India. As that adjudication is not conclusive since it relates to a jurisdictional fact, the High Court is entitled to scrutinise the evidence, on the basis of which the adjudication is based. (Para 5)

Where the Tribunal had rejected the application of the appellants on the ground that the land in question did not come within the definition of Section 2 (a) (18) of the Karnataka Act, as according to pahanies, the land was fallow, apparently, the Tribunal has not looked into the definition of the word 'land' in Sec. 2 (a) (18) of the Act. It has

*(Against order of Bhimiah J. in W. P. No. 7623 of 1976 D/- 6-9-1976.)

AV/BV/A351/78/VBB

not considered whether the land in question is or is not capable of being used for agricultural purposes. It has not also considered the contention raised by the owners whether the land is merely a house-site. The mere subjective satisfaction of the Tribunal, is not sufficient. The decisions of the Tribunals are subject to review by this Court and therefore, any conclusion reached by the Tribunals, should be supported by reasons and those reasons should be based on the scrutiny of the material on record and the evidence adduced by the parties. The impugned order of the Tribunal in the instant case cannot be considered as a speaking order. It is void in law. W. P. No. 7623 of 1976 D/-6-9-1976 (Kant) Reversed. (Para 5)

Anno: AIR Comm. Const. of India (2nd Edn.), Art. 226, N. 171.

V. S. Gunjal, for Appellants; M. Rama Bhat, for Respondents Nos. 2 and 4.

BHAT, C. J.:— This appeal, directed against the order of Bhimiah, J., made in Writ Petition No. 7623 of 1976, arises out of the applications of the appellants for grant of occupancy right in respect of a part of the land comprised in R. S. No. 303/B1 of Ranebennur. Respondents 2 to 4 were the owners of the said land. The Land Tribunal, Ranebennur, rejected the applications of the appellants, who are brothers and aggrieved by the said order, the appellants approached this Court for relief under Arts. 226 and 227 of the Constitution of India in Writ Petition No. 7623 of 1976, which came up for preliminary hearing before Bhimiah, J. The learned Single Judge rejected the Writ Petition at that stage itself. This appeal is directed against the said order.

2. We heard the learned counsel on both sides. The ground urged by Sri V. S. Gunjal, learned Counsel for the appellants is that the order of the Tribunal, is not a speaking order and that the Tribunal has not given reasons for the conclusion it has reached, viz., that the land in question does not come within the definition of the word 'land' as defined in Section 2 (a) (18) of the Karnataka Land Reforms Act, 1961, hereinafter referred to as the Act. Sri M. Rama Bhat, learned counsel for the contesting respondents, contended that the Tribunal has rejected the applications of the appellants on two grounds and not on one ground. According to the learned counsel, the first ground on which the applications have been rejected is that the appellants were not cultivating the land personally as is the requirement under Section 45 of the Act.

3. We have perused the order of the Tribunal. The Tribunal has given the summary of the respective contentions of the parties The contention of the land-holders was that the land in question is not 'land' coming within the purview of the Act, as it is not used for agricultural purposes, but, on the contra, it was a house site. They denied the alleged tenancy claimed by the appellants. The appellants alleged that the land in question is agricultural land and that they were cultivating it for the past several years

4. The statement of appellant-1 was recorded by the Tribunal. On behalf of the owners, respondent-4 was examined. The relevant portion of the order of the Tribunal after referring to the summary of the respective contentions of the parties, reads thus:

(Original in canarese omitted—Ed.)

Section 2 (a) (18) of the Act defines the word 'land' thus:

"'land' means agricultural land, that is to say, land which is used or capable of being used for agricultural purposes or purposes subservient thereto and includes horticultural land, forest land, garden land, pasture land, plantation and tope but does not include house-site or land used exclusively for non-agricultural purposes".

Chapter-III of the Act, which provides for vesting of 'tenanted lands' in the State Government and conferment of ownership on tenants, applies only to land as defined in Section 2 (a) (18) of the Act. The land in question is situated within the municipal limits of Ranebennur Municipality. The Act does not exclude from its purview land situated within the limits of Municipalities or Corporations, if the land comes within the definition of the word 'land' as defined under Section 2 (a) (18) of the Act.

5. When an application is made before the Tribunal for grant of occupancy right under Chapter-III of the Act, the Tahsildar, who is the Secretary of the Tribunal, has to verify the correctness of the particulars mentioned in the application filed in Form-7 with reference to the entries in the Revenue records. If according to the revenue records, the land applied for is a house-site or converted land for non-agricultural purposes, prima facie, the Tribunal will have no jurisdiction over the subject-matter. But, if the land is not shown as house-site or as land converted for non-agricultural purposes, then the Tribunal has to decide the question, where a contention is raised by the land-holder that it is not land coming within the

definition of Section 2 (a) (18) of the Act, whether the land is agricultural land which is used or capable of being used for agricultural purposes or purposes subservient thereto. In order to come within the scope of the said definition, it is not necessary that the land should have been used for agricultural purposes, but, it is sufficient if it is capable of being used for agricultural purposes. It has to be noted that the Act is an enactment made to settle agrarian relations in the State of Karnataka. If the land is not agricultural land, no question of any agrarian relationship would arise. Where there is dispute between the parties whether any land is or is not an agricultural land coming within the purview of the Act, that question should be decided by the Tribunal as a jurisdictional fact. If the Tribunal comes to the conclusion on the basis of the material before it, that it is not an agricultural land coming within the purview of the Act, then it will have no jurisdiction to proceed further. If, on the contra, it comes to the conclusion that it is an agricultural land, that decision, being a jurisdictional fact, is open to review by this Court under Art. 226 of the Constitution of India. As that adjudication is not conclusive since it relates to a jurisdictional fact, this Court is entitled to scrutinise the evidence, on the basis of which the adjudication is based. The Tribunal has nowhere held that the land in question is not capable of being used for agricultural purposes. It has said that it has not been used for agricultural purposes. If it had held that the land is not capable of being used for agricultural purposes, and had given reasons, its finding on the jurisdictional fact that the land in question does not come within the purview of the Act, could have been supported. The Tribunal has not rejected the applications of the appellants on two grounds, but only on one ground viz. that the land does not come within the definition of Section 2 (a) (18) of the Act. To support that conclusion it has stated that on a perusal of the pahanies, it is seen that the land has been fallow. Apparently, the Tribunal has not looked into the definition of the word 'land' in Section 2 (a) (18) of the Act. It has not considered whether the land in question is or is not capable of being used for agricultural purposes. It has not also considered the contention raised by the owners whether the land is merely a house-site. The mere subjective satisfaction of the Tribunal, is not sufficient as has been laid down by this Court in several decisions. The decisions of the Tribunals are subject to review by this Court and therefore, any conclusion reached by the Tribunals, should be supported by reasons and those reasons should be based on the scrutiny of the material on record and the evidence adduced by the parties. In our opinion, the impugned order of the Tribunal cannot be considered as a speaking order. It is void in law.

6. The learned Single Judge's observation that there is a finding of the Tribunal that the land was used as a thrashing floor, is patently erroneous. Learned counsel on both sides submitted that the Tribunal has not given any such finding. The learned Single Judge has not considered whether the order of the Tribunal is a speaking order.

7. For the reasons stated above, we allow this appeal and reversing the order of the learned Single Judge, allow the writ petition and quash the order of the Tribunal dated 12-8-1976, and remit the matter back to the Tribunal for adjudication afresh. When the matter goes back to the Tribunal, it has to, at the very out-set, decide whether or not the land claimed by the appellants is 'land' falling within the definition of the land under the Act. If it comes to the conclusion that it is 'land' within the purview of the Act, then it has to decide the further question whether the land is tenanted land which has vested under Section 44 of the Act and the appellants are the persons entitled to claim occupancy right under Section 45 of the Act.

8. R. S. No. 303/B1, it was submitted by both sides, measures 1 acre 6 guntas, out of which the appellants claimed only 26 guntas. They have not demarcated the portion of the land claimed by them by giving boundaries. The notice issued to the land-owners does not demarcate the land. Before the Tribunal proceeds in the matter, the appellants should demarcate the portion of the land claimed by them by giving correct boundaries. Thereafter, the Tribunal has to issue fresh notice in Form-9 demarcating the land claimed by the appellants. If the appellants fail to demarcate the portion of the land claimed by them within six weeks from the date of receipt of this order by the Tribunal, the appellants' applications shall be rejected for non-compliance with the order of this Court. Parties to bear their own costs. Ordered accordingly.

Appeal allowed.

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G. K. GOVINDA BHAT, C. J. AND D. B. LAL, J.

Nagappa Devanna Naik, Appellant v. Venkatramana Thimmanna Naik and another,, Respondents.

Writ Appeal No. 580 of 1976, D/- 23-11-1977.*

Karnataka Land Reforms Act (10 of 1962), Ss. 44 and 45 — Grant of occupancy rights — Determination of— Relevant fact. W. P. No. 10554 of 1976, D/- 16-11-1976 (Kant) Reversed.

What is relevant for the purpose of the Act and determination by the Tribunal is whether the lands in respect of which proceedings are taken under Chapter III, were tenanted lands being cultivated personally by the alleged tenants immediately prior to 1-3-1974. If there was any dispossession after 1-3-1974 by the landlord or by the main tenant or a sub tenant, it is wholly immaterial and will not affect the right of the tenant personally cultivating the land immediately prior to 1-3-1974, W. P. No. 10554 of 1976 D/- 16-11-1976 (Kant), Reversed. (Para 9)

B. V. Acharya, for Appellant; Jayaprakash, (for No. 1) and H. N. Narayan, Govt. Pleader (for No. 2), for Respondents.

G. K. GOVINDA BHAT, C. J.:— This appeal arises out of the proceedings initiated under Chapter III of the Karnataka Land Reforms Act, 1961 (hereinafter called the Act), for grant of occupancy right in respect of two lands comprised in Block Nos. 253 and 455 of Mogta village of Ankola taluk in the District of North Kanara.

2. The first respondent-Venkataramana Thimmanna Naik is a land-holder in respect of Block No. 253 measuring 15 guntas. He was also the tenant of the land comprised in Block No. 455 measuring 17 guntas. The appellant-Nagappa Devanna Naik alleging that he has been the tenant of both these lands under the first respondent immediately prior to 1-3-1974, prayed for grant of occupancy right under Section 48-A of the Act. The first respondent who was the main tenant of Block No. 455, filed an application for grant of occupancy right in respect of the said land in his favour under Section 48-A. On both the applications, the Tribunal issued notice to the interested parties in Form No. 9 and the matters were taken up for hearing. The parties were examined and the Tribunal rejected the application of the appellant and granted the application of the first respondent. The ground stated by the Tribunal for rejection of the appellant's application is that in his statement before the Tribunal he has stated that he had no objection to grant occupancy right in respect of Block Nos. 253 and 455 in favour of the first respondent. This is what the Tribunal has stated in its order.

"The applicant admits that S. Nos. 253 and 455 were under cultivation and enjoyment by Shri Venkataramana Thimmanna Naik (Respondent) and he has no objection in respect of S. Nos. 253 and 455 in favour of Shri Venkatraman Timmana Naik....."

3. It is relevant to observe that when the first respondent-Venkataramana Thimanna Naik is admittedly a landlord, there is no question of grant of any occupancy right in his favour so far as Block No. 253 is concerned. The question the Tribunal is called upon to adjudicate is whether the land comprised in Block No. 253 was a tenanted land immediately prior to 1-3-1974.

4. So far as the land comprised in Block No. 455 is concerned, there is no dispute that the said land has vested in the State Government under Section 44 of the Act, as it is a common ground that it was a tenanted land. With respect to Block No. 455, the case is one of rival tenancy between the appellant on the one hand and the first respondent on the other.

5. The appellant has challenged the orders of the Tribunal rejecting his application for grant of occupancy right and the grant of occupancy right in respect of Block No. 455 in favour of the first respondent in Writ Petn. No. 10554 of 1976 (Kant), which came up for preliminary hearing before Nesargi, J., who rejected the same at that stage itself. The learned single Judge has based his order on the admission contained in the statement of the appellant made before the Tribunal to the effect that since two years prior to his deposing, respondent-1 was cultivating the land personally. This order is challenged before us in this appeal.

6. Sri B. V. Acharya, learned counsel for the appellant submitted that the order of the Tribunal is based wholly on the erroneous assumption made by it that the appellant had no objection to the grant of the lands to the first respondent, and, further that even assuming, but without admitting, that the

*(To set aside order passed by this Court in W. P. No. 10554 of 1976, D/- 16-11-1976.)

statement of the appellant was correctly recorded by the Tribunal, the admission that the first respondent has been cultivating the lands for the two years prior to the date of making the deposition will not be a valid ground for rejecting his application and granting occupancy right in favour of the first respondent.

7. Both grounds urged by the learned counsel, in our opinion, are well-founded. We have perused the statement stated to have been made by the appellant before the Tribunal. Nowhere he has stated that he has no objection to the grant of the lands in favour of the first respondent. What he has stated is that he was cultivating the land but during two years immediately prior to making his statement, the first respondent was cultivating. The statement of the first respondent was recorded on 10-8-1976, which means that the first respondent was cultivating the land during the agricultural years 1974-75 and 75-76. But, prior to the commencement of the agricultural year 1974-75, the appellant was cultivating.

8. The appellant has challenged the statement recorded by the Tribunal alleging that it has not been correctly recorded. It is not necessary for the purpose of this appeal to decide that question, since the matter can be disposed of without deciding that question on the assumption that the statement was correctly recorded.

9. The Tribunal as also the learned single Judge have not bestowed their attention to the provisions of Ss. 44 and 45 of the Act. S. 44 provides for vesting all tenanted lands in the possession of tenants immediately prior to the date of commencement of the Amendment Act, The Amendment Act was brought into force on 1-3-1974. So, what is relevant for the purpose of the Act and determination by the Tribunal is whether the lands in respect of which proceedings are taken under Chapter III, were tenanted lands being cultivated personally by the alleged tenants immediately prior to 1-3-1974. If the land or lands were tenanted lands, to which S. 44 is attracted, such lands vest in the state Government on 1-3-1974. S. 45 provides that the land or lands which have vested in the State Government under S. 44 shall be registered in the name of the tenant as occupant of the land provided that person was cultivating the land personally immediately prior to the date of vesting viz., 1-3-1974. If there was any dispossession after 1-3-1974 by the landlord or by the main tenant or a subtenant, it is wholly immaterial and will not affect the right of the tenant personally cultivating the land immediately prior to 1-3-1974. Therefore, even assuming that the statement of the appellant was correctly recorded by the Tribunal, his application could not have been rejected on the ground that he had ceased to cultivate the land immediately prior to 10-8-1974.

10. The Tribunal as also the learned single Judge have failed to notice the relevant provisions of the Act, viz., Ss. 44 and 45 and that has vitiated the adjudication by the Tribunal as also the decision by the learned Single Judge.

11. It was contended by the learned counsel for the first respondent that the sublease alleged to have been granted in respect of the lands comprised in Block Nos. 253 and 455 was subsequent to 2-10-1965 and therefore void in law and cannot be relied upon. We are not called upon to decide that question as that is not the ground on which the Tribunal or the learned single Judge have dismissed the application and the writ petition respectively of the appellant. That question is left open for adjudication afresh when the matter goes back to the Tribunal.

12. For the reasons stated above, we allow this appeal and reversing the order of the learned single Judge, we quash the impugned orders of the Land Tribunal dated 10-12-1975 in No. KLR-SR-40/20/8491 (Ext. 'A') and 10-8-1976 in No. KLR-SR-46/39/5123 (Ext. 'B), so far as Block Nos. 253 and 455 are concerned, and the matter is remitted to the Tribunal with a direction to dispose of both the applications afresh and in the light of this order after affording all interested parties reasonable opportunity of leading further evidence and of being heard. The order of the Tribunal, so far as the other lands are concerned, is left undisturbed, Parties are directed to bear their own costs.

Ordered accordingly.

Appeal allowed.

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V. S. MALIMATH AND D. B. LAL, JJ.

N. Venkataramanappa, Petitioner v. D. K. Naikar and another, Respondents.

Contempt of Court Case (Criminal) 2 of 1977, D/- 7-11-1977.

(A) Contempt of Courts Act (70 of 1971), Section 20 — Section 20 operates as an absolute bar to initiation of contempt proceed-

ing whether suo motu or at the instance of complainant after expiry of one year's limitation — Starting point of limitation is the date on which contempt is 'alleged to have been committed' and not date of knowledge of complainant. (Para 5)

(B) Contempt of Courts Act (70 of 1971), Section 15 — Grant or refusal of consent by Advocate-General under Sec. 15 (1) (b) is in his absolute discretion and is not justiciable. (Para 6)

(C) Contempt of Courts Act (70 of 1971), Sections 2 (c) (ii) and 20 — Criminal contempt — Interference with due course of justice — Ministers of State involved in a criminal revisional petition approaching judge of High Court before whom it was pending — Held that although the allegations amounted to criminal contempt of gravest order action could not be taken on it after expiry of limitation either on basis of complaint or suo motu by High Court. (Paras 8, 9)

Cases Referred: Chronological Paras
1975 Cri LJ 1367 (Kant) 2, 4, 8

G. N. Seshagiri Rao, for Petitioner; R. N. Byre Reddy, for Respondents.

MALIMATH, J. :— The complainant in this case is an Advocate practising at Bangalore who has filed this petition under the Contempt of Courts Act, 1971 (hereinafter referred to as the Act) praying that the two accused be punished under Section 12 of the Act read with Article 215 of the Constitution of India.

2. The facts stated by the complainant are as follows: Cr. R. P. No. 665 of 1973 was filed by one Nagawwa against V. S. Koujalgi and A. K. Kottarashetti and the same was pending on the file of this Court. It was disposed of by Mr. Justice D. Noronha on 16-12-1974. On 11-4-1977 the Chief Justice of this Court made a speech referring to the sad demise of the retired Judge Mr. Noronha. Appreciating the qualities and judicial independence of Justice Noronha, the Chief Justice observed as follows:

"I will be failing in my duty if I do not place on record an incident which may never be known to the public. There was a criminal case pending in this Court in which some of the Ministers of the State Government were personally involved. On the basis of intelligence reports received, I directed the Registrar to post the case before one of my colleagues. As foreseen by me, that learned Judge was approached by one or more Ministers and therefore the learned Judge saying that he would not like to hear the case, directed the office to post it before some other Judge. When this matter came to my notice, I sent for Mr. Justice Noronha whose health was not at all good then. I asked him whether he will hear and dispose of the case even if pressures were brought by Ministers. Mr. Noronha agreed to hear the case. He heard and decided the matter and the decision went against the interested Ministers. Justice Noronha later told me that as I had rightly warned him, he was approached by one of the Hon'ble Ministers but he told the Minister that he has taken the oath of office. I brought this fact to the notice of the then Chief Justice Mr. A. N. Ray." 1977 (1) Kant LJ (Journal) 97.

But, in the speech the names of two Ministers who approached the Judges of this Court were not disclosed. In the Rajya Sabha Sri. Mulka Govinda Reddy, M. P., asked the following question to the Union Law Minister:

"(a) whether the Chief Justice of Karnataka is reported to have made a statement to the effect that some Ministers of Karnataka allegedly interfered in the dispensation of justice by the High Court; and

(b) if so, what are the details in this regard? (Exhibit B).

The Minister of Law, Justice and Company Affairs gave reply in the Rajya Sabha on the 25th July, 1977 as is clear from the proceedings of the Rajya Sabha, a copy of which has been prodcued in the case as Exhibit-C. The answers given by the Minister read as follows:

"(a) Yes, Sir.

(b) A statement is laid on the Table of the House."

The Statement laid on the Table of the House reads as follows:

"In April 1977, the Chief Justice of Karnataka High Court at a Reference, while paying a tribute to Shri D. Noronha, a retired Judge of the Karnataka High Court who had died, stated that in a criminal case pending in the High Court, one or more Ministers had approached the Judges before whom the case had been posted for hearing. The Chief Justice thereupon asked Justice Noronha if he would hear the case even if pressures were brought by Ministers. Justice Noronha agreed and after deciding the case told the Chief Justice that he had been approached by a Minister.

2. According to the information now furnished by the Chief Justice of the Karnataka High Court, 8 persons had been committed

to the Court of Session, Belgaum as a result of an incident on 19-8-1973, in which one Nagappa was way-laid and assaulted by a group of persons. Nagappa died after the police Patil had recorded his dying declaration. During the pendency of the Sessions case (No. 30 of 1974), Nagawwa, mother of the deceased Nagappa, filed a private complaint under Section 200 Cr. P. C., arraying two more persons as accused. One of the two was Shri V. S. Koujalagi, Minister of State in the Karnataka Government. The Magistrate recorded the statement of the complainant and examined some witnesses. Arguments were heard and the case posted for orders on 16-10-1973. In the meanwhile the Magistrate was transferred on 11-10-1973 and relieved of his charge on 15-10-1973. The successor Magistrate made an order directing an enquiry into the complaint by the Superintendent of Police under Section 202 Cr. P. C. This order of the Magistrate was challenged by the complainant before the High Court in Criminal Revn. Petn. No. 665 of 1973: (1975 Cri LJ 1367) (Kant). The revision petition was posted for hearing before a succession of judges, one of whom directed that the matter be posted before some other Bench and told the Chief Justice, on confidential enquiry being made, that some Minister had talked to him about the case.

3. Thereafter, the matter was posted before Shri Justice D. Noronha. The State supported the stand of the accused. Justice Noronha allowed the complainant's revision petition by his order dated 16-12-1974, remitting the case to the Magistrate with the direction to proceed with the case according to law and to examine other witnesses, if any, himself. In his judgment, Shri, Justice Noronha made the following observation: 'Within the sacred precincts of the Court Hall, politics and influence have no entry.. .....' Shri Justice Noronha later disclosed to the Chief Justice the name of the Minister who had tried to influence him in the decision of case.

4. On receipt of the record of the case from the High Court, the Magistrate, after hearing arguments, made an order directing the issue of summons to accused Nos. 9 and 10, i. e., Shri V. S. Koujalagi and Shri. Kotra Shetty. This order was challenged before the High Court in Criminal Petitions Nos. 50 and 51 of 1975. They were admitted by Shri. Justice Noronha and subsequently listed before another Judge who quashed the order of the Magistrate. The Supreme Court. on appeal, set aside the order of the High Court observing that they had not found any error of law committed by the Magistrate and that the High Court in quashing his order had completely failed to consider the limited scope of an enquiry under Section 202.

5. The Chief Justice, Karnataka High Court has now disclosed to the Minister of Law, Justice and Company Affairs, the names of the Ministers of Karnataka who had tried to influence the Judges as being—

(1) Shri D. K. Naiker.

(2) Smt. Eva Vaz."

3. It is on the basis of this information that the complainant filed this petition in this Court on 30th July 1977 for taking action under the Act.

4. When this matter came up before us on 5th October, 1977, we found that action on the petition cannot be taken at the instance of the complainant unless he obtains consent in writing from the Advocate-General as required by Section 15 (1) (b) of the Act, the alleged contempt being criminal contempt. We, therefore, gave time to the complainant to approach the Advocate-General for grant of permission under Sec. 15 (1) (b) of the Act. The complainant, thereafter, approached the Advocate-General for grant of permission whereupon the Advocate-General, by his letter dated 15/17-10-1977, produced in the case as Exhibit-E, declined to accord consent as prayed for by the complainant. This is what the learned Advocate-General has stated in his letter while refusing consent:

"I have ascertained that Justice Noronha has pronounced orders in Criminal Revn. Petn. No, 665 of 1973 on 16-12-1974 : (1975 Cri LJ 1367) (Kant). It is obvious therefore that the alleged contempt has been committed some time prior to 16-12-1974. It is evident that Section 20 of the Contempt of Courts Act is a clear bar for the initiation or the prosecution of the contempt petition. I further find from the petition that there is no legally admissible evidence in proof of the alleged contempt, and no specific grounds are made about the locus standi of the petitioner to initiate contempt proceedings.

On a consideration of the above factors and all other relevant circumstances, I do not consider it proper to exercise my discretion to give the consent asked for. The consent asked for is therefore declined."

5. It was explained to us by Sri G. N. Seshagiri Rao learned Counsel appearing for the complainant, that what is alleged against

D. K. Naiker and Smt. Eva Vaz is that they interfered with the due course of the judicial proceedings in Cr. R. P. No. 665 of 1973. Interference with the course of any judicial proceedings constitutes criminal contempt as defined in Section 2 (c) (ii) of the Act. Section 20 provides that no court shall initiate any proceedings for contempt, either on its own motion or otherwise, after the expiry of a period of one year from the date on which the contempt is alleged to have been committed. The bar contained in Section 20 of the Act is an absolute bar. It bars initiation of any proceedings for contempt after the expiry of the period of one year from the date on which the contempt is alleged to have been committed. The bar is applicable not only for initiation of contempt at the instance of the complainant but also against suo motu initiation of proceedings by the High Court. The language of Section 20 makes it clear that the period of one year commences from the date on which the contempt is alleged to have been committed, After the expiry of the said period of one year, no court can initiate any proceedings for contempt either suo motu or otherwise. It is not possible to accede to the contention of Sri Seshagiri Rao, learned counsel appearing for the complainant, that it is the date of knowledge of the contempt that is the starting point for the limitation prescribed by Section 20, and not the date on which the contempt is alleged to have been committed. Having regard to the clear language employed in Section 20 of the Act, namely, "from the date on which the contempt is alleged to have been committed" it is impossible to take the view that the date of knowledge of the complainant has any relevance for the purpose of computing the period of limitation.

6. Though Sri Seshagiri Rao contended that the learned Advocate-General declines to give consent sought by the complainant under S. 15 of the Act he is entitled to maintain the petition on the ground that the refusal of consent by the learned Advocate-General is unjustified. It appears to us that absolute discretion is vested in the Advocate-General in the matter of according consent under Section 15 (1) (b) of the Act. Grant or refusal of consent by the Advocate-General under Section 15 of the Act, in our opinion, is not justiciable.

7. But it was rightly maintained by Sri Seshagiri Rao that even if the complainant cannot maintain the petition under the Act he not having obtained consent from the Advocate-General he can persuade us to take action suo motu to initiate contempt proceedings against the accused. Though we can take action suo motu on the information being laid before us that contempt has been committed, it has to be pointed out that even for suo motu action to be taken by this Court the bar contained in Section 20 of the Act applies.

It is clear from Section 20 of the Act that whether action is taken at the instance of the complainant or suo motu by the Court, the bar contained in Section 20 of the Act is attracted. As the Advocate-General has refused consent stating that initiation of contempt proceedings is barred by limitation under Section 20 of the Act, we have to examine whether Section 20 is a bar to our taking suo motu action in the matter.

8. For the purpose of determining whether action can be taken to initiate proceedings under the Act, we have to find out the date on which the contempt alleged was committed. In the letter refusing consent the Advocate-General has stated that Cr. R. P. No. 665 of 1973 was disposed of on 16-12-1974: (1975 Cri LJ 1367) (Kant), and that the contempt alleged in this case must have been committed prior to 16-12-1974. If the contempt was committed prior to 16-12-1974 it is obvious that no action can be taken under Section 20 of the Act after the expiry of one year from that date. We have also perused the original records in Cr. R. P. No. 665 of 1973 and the order-sheet of that case. The same clearly disclose that final order was pronounced by Justice Noronha in Cr. R. P. No. 665 of 1973 on 16-12-1974. Sri Seshagiri Rao also explained that the alleged contempt was committed by the accused when Cr. R. P. No. 665 of 1973 was pending on the file of this Court and not after its disposal. It is clear from the speech of the Chief Justice made on 11-4-1977 and the statement of the Union Law Minister dated 25-7-1977 made on the basis of the information furnished by the Chief Justice which we have extracted in paragraph 2 above that the two accused are alleged to have approached the Judges in connection with Cr. R. P. No. 665 of 1973. We also see from the order-sheet of Cr. R. P. No. 665/73 that the case was earlier posted for hearing on 18-11-1974, on which date Justice Range Gowda directed that it should be posted before some other Bench for hearing. It is, therefore, that the Chief Justice posted the case before Justice Noronha who heard and disposed of the same by order dated 16-12-1974. If as alleged two learned judges were

approached by the two Ministers in connection with Cr. R. P. No, 665/73, it is obvious that such approach could have been made when Cr. R. P. No. 665 of 1973: (1975 Cri. LJ 1367) (Kant), was pending and before it was finally disposed of on 16-12-74. In the circumstances, it is impossible to expect the ministers to approach the Judge or Judges after 16-12-1974. The materials before us clearly establish that the alleged contempt must have been committed before 16-12-74, the date on which the final order was pronounced, As already stated the case as put forward by the complainant is that it is for the first time when the Chief Justice of this Court made a reference to this aspect of the matter on 11-4-1977 while speaking on the occasion of the demise of Justice Noronha, that the complainant came to know of the alleged contempt. But even on that date, more than a year had elapsed from the date on which the alleged contempt was committed It is for the first time on 11-4-1977 that the Chief Justice publicly disclosed that Judges of this court were approached by ministers in connection with a pending criminal case. Till then the facts constituting the alleged contempt could have been known only by the two Judges who are alleged to have been approached, the Chief Justice of our Court and the Chief Justice of India who was informed about it. Though we do not have any positive material in regard to the actual date on which Justice Noronha informed about this matter to our Chief Justice, it is reasonable to infer that the said information must have been conveyed to our Chief Justice within a short time after Justice Noronha disposed of Cr. R. P. No. 665 of 1973 on 16-12-1974: (1975 Cri LJ 1367) (Kant). It was therefore possible to initiate proceedings under the Act within the prescribed period of limitation, We would, however, like to make it clear that for the purpose of computing the period of limitation under Sec 20 of the Act what is relevant is the date on which the alleged contempt was committed and not the date on which the Chief Justice was informed about it by the concerned Judges. As the alleged contempt must have been committed on or before 16-12-1974, we cannot initiate proceedings against the accused having regard to the statutory bar of limitation contained in Section 20 of the Act.

9. It is true, as maintained by Sri. Seshagiri Rao, that if the facts alleged by the complainant are true the contempt committed in this case would be a criminal contempt of the gravest order. We are not unmindful of the fact that by not taking action on the ground of limitation, the alleged contempt will remain without being enquired into.. For this situation we have to blame ourselves and not the complainant. We are constrained to close this case expressing our hope that there will be no such occasion in the future when such serious cases of contempt go without prompt action being taken within the period of limitation prescribed by Section 20 of the Act.

10. As we cannot initiate contempt proceedings in this case, we drop the proceedings and dismiss the petition.

Petition dismissed.

AIR 1978 KARNATAKA 61

V. S. MALIMATH AND D. B. LAL, JJ.

Kallanagouda Somanagouda Patil, Petitioner v. Rudragouda, and others, Respondents.

Writ Petn. No. 5695 of 1974, D/- 4-11-1977.

Karnataka Prevention of Fragmentation and Consolidation of Holdings Act (1 of 1967), Sections 5 (1) (a), 2 (g), 4 — Piece of land declared "fragment" under Bombay Prevention of Fragmentation and Consolidation of Holdings Act — Sale after commencement of Karnataka Act — Not void. (Karnataka General Clauses Act (3 of 1899), S. 6.

Where a piece of land in Dharwar District which was declared as a "fragment" under the Bombay Prevention of Fragmentation and Consolidation of Holdings Act (62 of 1947) was sold after the commencement of the Karnataka Prevention of Fragmentation and Consolidation of Holdings Act (1 of 1967), the sale would not be void as offending Section 5 (1) (a) of the Karnataka Act. The land was not entered in the Record of Rights as "fragment" as required by S. 4 of the Karnataka Act, no notice of any such entry as required by Sub-section (2) of Section 4 had also been given and no determination of the standard area as required by Section 3 of the Karnataka Act had been made, and therefore the land could not be regarded as a 'fragment' as defined in Section 2 (g) of the Karnataka Act and therefore, the bar against alienation of a fragment contained in Section 5 (1) (a) was not attracted.

(Paras 4, 7)

The sale of the land itself when took place after the Karnataka Act came into force and

not when the repealed Bombay Act was in force, the question of incurring any liability or obligation under the repealed enactment did not arise in this case. But, even assuming that by the determination under the Bombay enactment that the land in question is a 'fragment' a liability or obligation can be deemed to have been incurred such legal effect does not flow, having regard to the fact that Section 3 of the Karnataka Act discloses a different intention. The opening part of Sec. 6 of the Karnataka General Clauses Act indicates that the consequences specified in that section shall not flow if a different intention appears in the repealing enactment. The Scheme of Section 3 makes it clear that the legislature has expressed its intention not to treat the determination of the standard area made in respect of the lands situate in the districts of Belgaum, Bijapur and Dharwar as standard area for the purpose of the Karnataka Act. The consequences specified in Section 6 of the Karnataka General Clauses Act will not be attracted to the lands situate in the said three districts even if determination of standard area was made under the Bombay Act before the Karnataka Act came into force. Therefore the bar contained in Section 5 (1) (a) is not applicable to the sale of the land which was made after the Karnataka Act came into force.

(Paras 6, 7)

R. H. Chandangoudar, for Petitioner; B. S. Raikote, for Respondent No. 1.

MALIMATH, J. :— This Writ Petition has come to us on a reference made by Jagannatha Shetty' J., on the ground that this Writ Petition raises an important question of law for determination.

2. The First respondent sold Survey No. 76/3B of Rayanal village, Hubli Taluk, in the district of Dharwar to the petitioner on the 13th of June 1969. The Karnataka Prevention of Fragmentation and Consolidation of Holdings Act, 1966, came into force on the 1st of May 1969 (hereinafter referred to as 'the Karnataka Act'). By Section 47 of the Karnataka Act, the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947, (hereinafter referred to as 'the Bombay Act') was repealed, expressly providing that Section 6 of the Karnataka General Clauses Act, 1899, shall be applicable in respect of such repeal and S. 24 of the said Act shall not be applicable. The first respondent made an application to the Special Deputy Commissioner, Dharwar, under Sec. 5 (1) of the Karnataka Act for a declaration that the sale of the Land in favour of the petitioner is void, the said sale having been made in contravention of the mandatory prohibition contained in Sub-sec. (1) of S. 5 of the Karnataka Act. The case put forward by the first respondent before the Special Deputy Commissioner was that though the sale has taken place after the Karnataka Act came into force, the sale is void as the land in question was determined as a fragment under the Bombay Act before it was repealed. The land measures an extent of 2 acres 23 guntas and it is not disputed that it was a 'fragment' as defined in Section 2 (4) of the Bombay Act, the same having been so determined under the provisions of the Bombay Act. The Special Deputy Commissioner, Dharwar, by his order dated 29-1-1974 (Exhibit 'A'), declared that the sale of the land in favour of the petitioner is void, it having been effected in contravention of S. 5 (1) of the Karnataka Act, imposed a fine of Rs. 50/- and directed summary eviction of the petitioner on the ground that he is in unauthorised possession of the land. The said order was challenged by the petitioner before the Karnataka Revenue Appellate Tribunal, Bangalore, in revision under S. 37 of the Karnataka Act. The revenue Appellate Tribunal by its order dated 27-9-1974 (Exhibit 'B') dismissed the revision petition and affirmed the order of the Special Deputy Commissioner. It is the said orders of the Special Deputy Commissioner and the Tribunal that have been challenged by the petitioner in this writ petition.

3. The only question for consideration in this is as to whether the sale of the land in question effected on 13-6-1969, after the Karnataka Act came into force, is void as offending S. 5 (1) (a) of the Karnataka Act. The view taken by the Special Deputy Commissioner and the Tribunal is that the land in question is a fragment and that therefore the prohibition contained in S. 5 (1) (a) is attracted. The said provision provides that no person shall sell any fragment in respect of which a notice has been given under sub-sec. (2) of S. 4, except in accordance with the provisions of Cl. (b). As it is nobody's case that Cl. (b) is applicable, we consider it unnecessary to refer to the same. The word 'fragment' defined under S. 2 (g) of the Karnataka Act, means a holding of land of less extent than the appropriate standard area determined under S. 3 and the proviso to that Section, however, provides that no holding shall be deemed to be a fragment by reason of any diminution in its area by diluvion. S. 3 of the Karnataka Act provides

for the determination of standard area, It reads as follows:

"For the purpose of this Act, standard area means the area specified in column (3) of the Schedule to this Act, in respect of the class of land specified in the corresponding entry of column (2) of the said schedule;

Provided that—

(a) in the district of North Kanara, standard area means the area determined to be the standard area for different classes of land in different local areas in the said district under the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 (Bombay Act 62 of 1947), and in force before the commencement of this Act.

(b) in the District of South Karnara, standard area means in respect of.

(i) dry crop land, one acre,

(ii) paddy or rice crop land, fifteen guntas,

(iii) garden crop land, ten guntas".

Section 4 of the Karnataka Act provides for the entry of all fragments in village in the record of rights. It reads as follows:

"(1) As soon as may be after the commencement of this Act, all fragments in a village shall be entered as such in the Record of Rights, or where there is no Record of Rights in such village record as the State Government may prescribe.

(2) Notice of every entry made under Sub-s. (1) shall be given in the manner prescribed for the giving of notice under Chapter II of the Karnataka Land Revenue Act, 1964 (Karnataka Act 12 of 1964), of an entry in the Register of Mutations".

4. The Schedule contemplated by the S. 3 of the Karnataka Act indicates the extent of area that is declared as standard area in regard to different classes of lands. The lands have been classified in the said schedule into seven classes depending upon the rainfall and the irrigation facilities. It is clear from the scheme of the Karnataka Act that 'fragment' means holding of land of less extent than the standard area determined under S. 3 of the Karnataka Act. The determination of the said standard area has to be made with reference to the class of the land having regard to the specification in the Schedule to the Karnataka Act. After the standard area is so determined under Sec. 3, all fragments in a village are required to be entered in the Record of Rights or where there is no Record of Rights, in such village record as the State Government may prescribe. Notice of every such entry which is required to be made under S. 4 (1) is required to be given in the prescribed manner. It is not disputed that the land in question has not been entered in the Record of Rights as 'fragment' as required by S. 4 of the Karnataka Act and that no notice of any such entry as required by sub-sec. (2) of S. 4 has also been given. It is also admitted that no determination of the standard area as required by S. 3 of the Karnataka Act has been made. It is, therefore, clear that the land in question cannot be regarded as a "fragment as defined in S. 2 (g) of the Karnataka Act. The bar contained in Cl. (a) of sub-sec. (1) of S. 5 is that no person shall sell any fragment in respect of which notice has been given under Sub-sec. (2) of S. 4, except in accordance with the provisions of Cl. (b). As admittedly, no notice has been given under Sub-sec (2) of S. 4 of the Karnataka Act in respect of the land in question, the bar against alienation of a fragment contained in S. 5 (1) (a) is not attracted. But, what was maintained by the learned Counsel for the first respondent is that we should not look to the provisions of the Karnataka Act for the purpose of finding out whether the land in question is a fragment and for the purpose of determining as to whether the sale of the land in question has been effected in contravention of S. 5 (1) (a) of the Karnataka Act. It was maintained by the learned Counsel for the first respondent that the land in question having already been declared as 'fragment' under the repealed Bombay Act, the same continues to be a fragment under the Karnataka Act and therefore, the prohibition contained in S. 5 (1) (a) is attracted to the facts of the present case. For this argument, reliance was placed on the language of Section 6 of the Karnataka General Clauses Act which has been expressly made applicable by the repealing S. 47 of the Karnataka Act. It is also necessary to point out at this stage that the same S. 47 provides that S. 24 of the General Clauses Act shall not be applicable in respect of the repeal of the Bombay Act, and other enactments specified in S. 47 of the Karnataka Act, S. 6 of the Karnataka General Clauses Act, 1899, reads as follows.

"Where this Act or any Karnataka Act made after the commencement of this Act repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

(c) affect any right, privilege, obligation or liability — acquired, accrued or incurred under any enactment so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed."

5. Relying on S. 6 of the Karnataka General Clauses Act, it was maintained by the learned Counsel for the first respondent that when the land in question was declared as 'fragment' under the Bombay Act, an obligation or liability was incurred under the repealed Bombay Act and that the same is therefore, enforceable under S. 5 (1) (a) of the Karnataka Act.

6. It is necessary to point out that the sale of the land in question itself took place after the Karnataka Act came into force and not when the repealed Bombay Act was in force. Therefore, it appears to us that the question of incurring any liability or obligation under the repealed enactment does not arise in this case, But, even assuming for the sake of argument that the learned Counsel for the first respondent is right in maintaining that by the determination under the Bombay enactment that the land in question is a 'fragment' a liability or obligation can be deemed to have been incurred it has to be pointed out that such legal effect does not flow, having regard to the fact that S. 3 of the Karnataka Act discloses a different intention. The opening part of S. 6 of the General Clauses Act indicates that the consequences specified in that section shall not flow if a different intention appears in the repealing enactment. The question for consideration is as to whether it can be said that a different intention is discernible from the provisions of the Karnataka Act.

7. Section 3 of the Karnataka Act provides for determination of standard area, which is necessary for determining a fragment. It provides that 'standard area' means the area specified in column (3) of the Schedule to the Karnataka Act, in respect of the class of land specified in the corresponding entry of column (2) of the said Schedule. It is clear from the same that the standard area has to be determined under Section 3 only with reference to the Schedule to the Karnataka Act and not with reference to the provisions of the repealed enactment. The proviso (a) to S. 3 of the Karnataka Act, in express terms, provides that in the district of North Kanara, standard area means the area determined to be the standard area for different classes of land in different local areas in the said district under the Bombay Act, and in force before the commencement of the Karnataka Act. The land in question is situate in the district of Dharwar. The Bombay Act was in force in the four districts of the Bombay Area including the district of Dharwar, which became part of the New State of Mysore on reorganisation of States with effect from 1-11-1956. By proviso (a) to S. 3 of the Karnataka Act, it is expressly declared that notwithstanding anything contained in the first part of S. 3, standard area means the area determined under the Bombay Act so far as the lands situate in the district of North Kanara are concerned. The proviso is applicable to the lands situate in the District of North Kanara and is not applicable to lands in other districts such as Bijapur, Belgaum and Dharwar which were also governed by the Bombay Act till the said Act was repealed by the Karnataka Act in the year 1966. Proviso (a) to S. 3 clearly indicates the intention of the legislature of accepting the determination of standard area made under the repealed Bombay Act only in regard to the lands situate in the District of North Kanara, In other words, the determination of the standard area made under the Bombay Act in respect of the lands situate in the district of Belgaum, Bijapur and Dharwar is not required to be deemed to be the standard area for the purpose of the Karnataka Act. The Scheme of S. 3 makes it clear that the legislature has expressed its intention not to treat the determination of the standard area made in respect of the lands situate in the districts of Belgaum, Bijapur and Dharwar as standard area for the purpose of the Karnataka Act. The consequences specified in S. 6 of the Karnataka General Clauses Act will not be attracted to the lands situate in the said three districts even if determination of standard area was made under the Bombay Act before the Karnataka Act came into force. We have therefore no hesitation to take the

view that the bar contained in Section 5 (1) (a) is not applicable to the sale of the land in question, which was made on 13-6-1969, after the Karnataka Act came into force. Hence, the Special Deputy Commissioner, Dharwar, as also the Karnataka Revenue Appellate Tribunal, Bangalore, were clearly in error in declaring the sale of the land in question in favour of the petitioner, as void.

8. For the reasons stated above, this writ petition is allowed and the impugned orders (Exhibits 'A' and 'B') passed by the Special Deputy Commissioner, Dharwar and Karnataka Revenue Appellate Tribunal, Bangalore, are hereby quashed and the original petition filed by the first respondent is dismissed. The petitioner is entitled to his costs from the first respondent. Advocate's fee Rs. 200/-.

9. As admittedly the first respondent has obtained the possession of the land on the strength of the impugned orders, we direct him to restore the possession of the land to the petitioner immediately.

Petition allowed.

AIR 1978 KARNATAKA 65

S. R. RANGE GOWDA, J.

K. Ramalingam, Petitioner v. M. V. Ramanathan, Respondent.

Civil Revn. Petn. No. 1024 of 1976, D/- 26-8-1977.*

Civil P. C. (5 of 1908), O. 26, R. 10 — Second commission — Issue of — When permissible.

Where a particular matter has already been the subject of investigation and a report has been submitted by a Commissioner in that behalf, another commission for the same purpose should not ordinarily be issued unless upon valid grounds made out by the parties concerned and the previous report is unreliable and therefore should be set aside.

Where there was already a report in respect of the same matter, the Court passing the order, for issuance, of second commission did not consider whether there were valid grounds therefor, the reasons for passing the order were not given by the Court and the opposite party was not given an opportunity to challenge the application for issuing a second commission, the order was held to be invalid and was set aside. (Para 4)

Anno: AIR Comm., C. P. C. (8th Edn.), O. 26, R. 10, N. 8-A.

N. S. Satyanarayana Gupta, for Petitioner; B. Subba Rao, for Respondent.

ORDER: — This petition is directed against the order dated 26-5-1976 passed by the Principal, Ist Munsiff, Bangalore, allowing I. A. No. III filed under O. 26, R. 9 r/w S. 151, C. P. C. by the defendant in O. S. No. 1782 of 1972 on his file. The prayer made in I. A. No. III and the impugned order read:—

Prayer made in I. A. III :

"The defendant above named prays that another Commissioner may be appointed to examine the handwriting and the signature of the defendant preferably a Seniormost handwriting expert and to give evidence in that behalf in the interest of justice."

Impugned order :

"Objection to I. A. III not filed. I. A. III allowed. Superintendent of Forensic Laboratories is appointed as Commissioner as prayed."

2. The facts relevant for the disposal of this revision petition may briefly be stated: The petitioner is the plaintiff in that suit and the respondent is the defendant. The suit is for recovery of certain amounts said to be due from the respondent under two promissory-notes. The respondent is resisting the suit on more than one ground, and paras 2 and 3 of his written statement read thus:—

"2. The allegation made in para 2 that the defendant executed pronotes for valuable consideration he had from the plaintiff on 12-2-1964 and on 15-2-1964 for a sum of Rs. 2,000/- each agreeing to pay interest at the rate of 12% per annum is hereby denied and the plaintiff is put to strict proof of the same.

3. The defendant submits that there was no payment whatsoever and the so-called payments made under the so-called signatures of the defendant is equally incorrect and false. Without prejudice to the above contention the defendant submits further that the pronote is void inasmuch as there is a material alteration made by the plaintiff and it is hit by S. 87 of the Negotiable Instruments Act. It is submitted that the 10 paise stamps which are put on the two pronotes were not there when the documents came into being. The

*(Against order of Principal, 1st Munsiff, Bangalore, D/- 26-5-1976).

plaintiff has deliberately affixed the two 10 paise stamps on each of the pronotes and has forged the signature of the defendant. In this view of the matter also the documents are void and the suit is consequently liable to be dismissed."

On an application filed by the petitioner under O. 26, R. 9, C. P. C. requesting to send the disputed and admitted signatures in the promissory notes to the Director, Forensic Science Institute, Bangalore, for comparison, the learned Munsiff made an order accordingly, and on comparison of those signatures a report was submitted and the person who compared those signatures and submitted the report was also examined in Court. It was at that stage the respondent filed I. A. III and the impugned order was passed.

3. It was contended by Sri N. S. Sathyanarayana Gupta, learned counsel for the petitioner that no opportunity was given to the petitioner to oppose I. A. III and he was not heard before passing the impugned order, and besides it is not a speaking order, and in view of the report already submitted on comparison of the admitted and disputed signatures it was not proper to make the impugned order.

4. Now the principle is that where a particular matter has already been the subject of investigation and a report has been submitted by a Commissioner in that behalf, another commission for the same purpose should not ordinarily be issued unless upon valid grounds made out by the parties concerned and the previous report is unreliable and unhelpful and therefore should be set aside. In the present case, the learned Munsiff has completely overlooked this principle and has acted in a casual manner. He has not given any reason as to what propelled him to make the impugned order. When there is already a report submitted in respect of the same matter, he should have considered whether or not there were valid grounds to act in the manner he did. But it is obvious he has not addressed himself to this aspect of the matter before passing the impugned order. In the view I take, the impugned order must be and is accordingly set aside and the matter is remitted to the learned Munsiff to dispose of I. A. III afresh after allowing the petitioner to file his objections to it and after hearing him and in the light of the observations made above. In this petition, parties to bear their own costs.

Petition allowed.

AIR 1978 KARNATAKA 66

K. S. PUTTASWAMY, J.

Dr. Y. Shantha, Petitioner v. The Selection Committee for Post Graduate Degree and Diploma Courses in Govt. Medical College and others, Respondents.

Writ Petn. No. 7647 of 1977, D/- 18-1-1978.

(A) Karnataka Medical College (Selection for Post Graduate Course) Rules (1977) Rr. 3, 6 and 9 — Scheme for selection — Selection in one subject — Does not disentitle for selection in other subjects.

Under sub-rule (2) of Rule 6 when a candidate applies for more than one course or subject, he is required to send a separate application in respect of each course or subject along with the prescribed fee in respect of each application. Sub-rule (ii) of Rule 3 directs reservations to the various categories enumerated in sub-rule (i) to be made subject-wise as far as possible. Sub-rule (1) of Rule 8 directs the Selection Committee to make selection on the basis of merit of candidates. In the allotment of candidates to Colleges also under Rule 9 the Selection Committee shall have regard to the merit of the candidates in addition to other factors enumerated in sub-rule (1) of R. 9. Sub-rule (2) of R. 6 requiring candidates to make a separate application in respect of each subject or course is not without significance. By directing the candidates to make a separate application for each course Government really intended and provided that the Selection Committee should make a selection subject-wise. A combined reading of all the Rules contemplates selections to be made subject-wise. In view of these provisions the Selection Committee would be required to make selection subjectwise and the fact of selection of a candidate for one subject would not defeat his right for selection in other subjects. AIR 1977 Kant 213 (FB), Dist. (Para 4)

(B) Constitution of India, Art. 14 — Admission to educational institution — Denial on the ground of selection in another subject — Denial held violative of Art. 14.

In all cases of selection whether it be a Civil Post or in a College or in any other institutions maintained by the State, the most meritorious candidate if he does not suffer from any other disability is required to be selected by the appropriate selecting authority and if the same is not done, it would result in violation of Art. 14 of the Constitution. Therefore where a candidate was denied the admission in a subject of her choice because she had been selected in another subject Art. 14 would be violated. AIR 1970 SC 35 and AIR 1968 Mys 189 Dist. (Para 5)

Anno: AIR Comm. Constitution of India (2nd Edn.) Art. 14 N. 34.

Cases Referred: Chronological Paras

AIR 1977 Kant 213 : (1977) 2 Kant LJ 293 (FB) 2
AIR 1970 SC 35 5
AIR 1968 Mys 189 5
AIR 1951 SC 41 5

K. R. D. Karanth, for Petitioner; R. N. Byra Reddy, A. G., for Respondent No. 1.

ORDER:— Dr. Y. Shanta, petitioner before me having completed M.B.B.S. and Senior Housemanship was an applicant for selection to a Post Graduate Degree in Paediatrics, Micro Biology and five other subjects, the selection of which is regulated by the Karnataka Medical Colleges (Selection for Post Graduate Course) Rules, 1977 (hereinafter referred to as 'The 1977 Rules'). She has been selected for a Post Graduate Course in Micro Biology by the Selection Committee. But, her case is that she should have been selected to Post Graduate Course in Paediatrics having regard to her merit in preference to respondents Nos. 2, 3 and 4 who are less meritorious than herself. In this writ petition under Art. 226 of the Constitution. she has challenged her non-selection to the subject of Paediatrics and the selection of respondents Nos. 2 to 4 as violative of Art. 14 of the Constitution. In the Statement of Objections filed, respondent No. 1 has not denied the assertion of the petitioner that she is more meritorious to respondents Nos. 2 to 4. At the hearing of the writ petition, Shri S. G. Doddakalegowda, learned Government Advocate, did not also contest the above assertion of the petitioner. In the Statement of Objections and also at the hearing, respondent No. 1 resisted the claim of the petitioner for selection to the subject of Paediatrics principally on the ground that she has been selected to one of the subjects viz., Micro Biology and therefore I should not interfere with the selection made to the subject of Paediatrics.

2. Shri R. N. Byra Reddy, learned Advocate General, who later argued the case for respondent No. 1, at the forefront urged that the petitioner was enforcing 'the 1977 Rules' which undoubtedly have been framed by the Government in exercise of its executive powers meant for the guidance of its officers or the Selection Committee as ruled by a Full Bench of this Court in Gokula Education Foundation v. Sree Siddaganga Education Society (1977) 2 Kant LJ 293 : (AIR 1977 Kant 213) and therefore the writ petition was not maintainable and was liable to be thrown out on that ground. In her writ petition the petitioner is not enforcing her right under 'the 1977 Rules'. On the other hand, she is enforcing the right guaranteed by Art. 14 of the Constitution. Her case is that in all cases of selection which equally applies to selection to the subject of Paediatrics, the most meritorious candidate unless otherwise disqualified, should be selected and the Selection Committee by ignoring such a mandate has violated the equality clause enshrined in Article 14 of the Constitution. It is only incidentally that the petitioner is relying on 'the 1977 Rules' in support of her case. In my view, the Government has framed 'the 1977 Rules' in exercise of its executive powers only to give effect to the mandate of Article 14 of the Constitution. An examination of 'the 1977 Rules' would show that the Selection Committee has to make selection having regard to the merit of candidates and the reservations provided and is not conferred with arbitrary and unguided discretion. In Gokula Education Foundation's case, the Educational Institutions had challenged the validity of an analogous set of rules unlike a candidate seeking to enforce her constitutional right under Art. 14 of the Constitution. It is in that view, the Full Bench of our High Court ruled that those rules were not 'law' and were not required to be dealt by a Constitution Bench under Art. 228A of the Constitution. In my view, the principles enunciated in Gokula Education Foundation's case have no application in examining the claim of the petitioner who is enforcing her constitutional right. I therefore hold that there is no merit in the contention of the learned Advocate General and reject the same.

3. Shri K. R. D. Karanth, learned counsel for the petitioner, contended that

the Selection Committee is required to prepare a merit list for each subject and select the most meritorious candidates to the number of seats available and if that principle had been adhered to, the petitioner should have been selected in preference to respondents Nos. 2 to 4 from the reserved category of Backward Communities. Shri S. G. Doddakalegowda, learned Government Advocate, while admitting that the Selection Committee had not made a selection for each subject, and had made selections treating all the Post Graduate Courses as one unit and allocating candidates to different subjects contended that the same was in accordance with the 1977 Rules and was not violative of Art. 14 of the Constitution.

4. Under sub-rule (2) of Rule 6 when a candidate applies for more than one course or subject, he is required to send a separate application in respect of each course or subject along with the prescribed fee in respect of each application Sub-rule (ii) of Rule 3 directs reservations to the various categories enumerated in sub-rule (i) to be made subjectwise as far as possible. Sub-rule (1) of R. 8 directs the Selection Committee to make selection on the basis of merit of candidates. In the allotment of candidates to Colleges also under Rule 9 the Selection Committee shall have regard to the merit of the candidates in addition to other factors enumerated in sub-rule (1) of Rule 9. Sub-rule (2) of Rule 6 requiring candidates to make a separate application in respect of each subject or course is not without significance. By directing the candidates to make a separate application for each course, Government, in my view, really intended and provided that the Selection Committee should make a selection subjectwise. A combined reading of all the Rules and the Rules referred to by me earlier in particular contemplates selections to be made subjectwise. Shri S. G. Doddakalegowda, learned Government Advocate, strenuously contended that the subjectwise selection was extremely difficult and was almost impossible of compliance and therefore a construction as would create serious difficulties to the Selection Committee should be avoided by the Court. In my view, the apprehension or the difficulty envisaged by the learned Government Advocate is totally unfounded. It is not as if when a candidate makes an application for more than one subject, his case cannot be considered for more than one subject and selection for more than one subject cannot be made. Such a mode of selection is neither insurmountable nor causes any unmanageable difficulty as pleaded by the learned Government Advocate. In selections by the Public Service Commission to a class of service consisting of more than one cadre where preferences are indicated by candidates, the Public Service Commissions dealing with a very large number of posts and candidates in our country easily make selections to each cadre of service for which preferences are indicated by the candidates. In this case, it is not even a case of preference to a course or subject. Under the 1977 Rules, a separate application is required to be made for each subject. In that view, I do not see any difficulty for making selection to each course or subject that too where the number of seats for which candidates have to be selected does not exceed 15 or 20 in each subject and the total number of candidates for all the subjects does not exceed 150. I, therefore, hold that the Selection Committee was required to make a selection subjectwise and the fact that the petitioner had applied for Micro Biology and has been selected in that subject does not and cannot defeat her rights for selection to the Post Graduate Course in Paediatrics. On such a conclusion, it follows that the petitioner who did not suffer from any other disability was entitled for selection in the subject of Paediatrics in preference to the least meritorious candidate viz., respondent No. 4 or in addition to the candidates already selected by the Selection Committee.

5. In all cases of selection whether it be a Civil Post or in a College or in any other institutions maintained by the State, the most meritorious candidate if he does not suffer from any other disability is required to be selected by the appropriate selecting authority and if the same is not done, it is well settled that the same would result in violation of Art. 14 of the Constitution of India. I have already pointed out that there has been an infraction of Art. 14 of the Constitution in the case of the petitioner. Notwithstanding the same, Shri R. N. Byra Reddy, learned Advocate General, strenuously contended that the Selection Committee having regard to the scheme and object of the rules, the preferences of candidates and their merit has selected the petitioner to the subject of Micro Biology and therefore there is no real infraction

of Art. 14 of the Constitution of India. In support of his contention, the learned Advocate General relied on several passages in Charanjit Lal Chowdhury v. The Union of India (AIR 1951 SC 41); Kumari Chitra Ghosh v. Union of India (AIR 1970 SC 35) and Dr. R. Narayana Swamy v. State of Mysore (AIR 1968 Mys 189). In my view, many of the well-known general principles enunciated by the Supreme Court and our Court on classification in the cases relied on by the learned Advocate General has no bearing on the real question that arises for determination in the case viz., when a candidate applies for more than one subject whether he is entitled to be considered for more than one subject and whether there should be subjectwise selection or not.

6. Learned counsel for respondent No. 1 vehemently contended that as the petitioner has been selected to Micro Biology, I should not examine her claim for Paediatrics and interfere with the selection of candidates to Paediatrics. According to the petitioner, she has completed her Housemanship in Paediatrics, a clinical subject and that she was keen to continue her studies only in Paediatrics and that she was not keen on joining Micro Biology and studying Micro Biology Course. I cannot compel the petitioner to join a particular course. When I find that the claim of the petitioner for a particular subject is justified, I cannot refuse to uphold her claim merely on the grounds that she has been selected to another subject and that it would cause some difficulty to the Selection Committee and the authorities. For the foregoing reasons the petitioner was entitled for selection to the Post Graduate Course in Paediatrics and the same has been illegally and arbitrarily denied by the Selection Committee. I therefore direct the issue of a writ in the naure of mandamus to respondent No. 1 to provide a seat to the petitioner in the Post Graduate Course of Paediatrics in any of the Government Medical Colleges for the academic year 1977-78 if necessary by unseating respondent No. 4 or any other least meritorious candidate arrayed as a party respondent in this writ petition expeditiously and in any event within 15 days from the date of receipt of the order of this Court. I make it clear that my order does not prevent respondent No. 1 to accommodate the petitioner without disturbing any of the respondents by taking such steps as are necessary in that behalf.

7. Rule made absolute.

8. In the circumstances of the case, I direct the parties to bear their own costs.

Writ petition allowed.

AIR 1978 KARNATAKA 69
SPECIAL BENCH

V. S. MALIMATH,
E. S. VENKATARAMIAH AND
N. VENKATACHALA, JJ.

B. Ignatius Anthoney Jayaraj, Petitioner v, Immy Margaret Florence, Respondent.

Civil Referred Case No. 2 of 1977 D/-13-1-1978.*

Divorce Act (4 of 1869), Ss. 18, 19 — Scope of — Petition for decree of nullity of marriage on ground of force or fraud — District Court, if can entertain it.

Under Ss. 18 and 19 the District Court and the High Court have concurrent jurisdiction for entertaining a petition for nullity of marriage on the grounds stated in sub-secs.(1) to (4) of S. 19 (Para 2)

So far as the decree of nullity of marriage on the ground of force or fraud is concerned, the same can be obtained only by presenting a petition to the High Court which has a residuary jurisdiction to deal with a petition for dissolution of marriage on the ground that consent of either party was obtained by force or fraud. Thus, the District Court has no jurisdiction to entertain a petition for declaration of nullity of marriage on the ground that the consent of either party to the marriage was obtained by force or fraud. AIR 1966 Andh Pra 178 and (1973) 1 Mys LJ 414 Followed. (Para 3)

Ann: AIR Manual (3rd Edn.) Divorce Act S. 18, N. 1 and S. 19, N. 5.

Cases Referred: Chronological	Paras
(1973) 1 Mys LJ 414	3
AIR 1966 Andh Pra 178	3

M. P. Eswarappa, for Petitioner.

V. S. MALIMATH, J.:— The petitioner and the respondent are Indian Christians. The petitioner filed a petition for a declaration that the marriage between him and the respondent is null and void on the ground of fraud by invoking Ss. 18

* Against order of Dist. J. Shimoga D/-22-2-1977.

and 19 of the Indian Divorce Act, 1869 (hereinafter called the 'Act'). The learned District Judge, holding that the fraud alleged by the petitioner has been proved, made a decree nisi of nullity of marriage, which has come up for confirmation before us.

2. The question for consideration is as to whether the learned District Judge who has made the decree nisi of nullity of marriage had jurisdiction to entertain the petition for declaration of nullity of marriage on the ground of fraud. S. 18 of the Act provides that any husband or wife may present a petition to the District Court or to the High Court, praying that his or her marriage may be declared null and void. The grounds on which such a decree can be made are stated in S. 19 which provides that a decree of nullity of marriage may be made on the following grounds:

(1) that the respondent was impotent at the time of the marriage and at the time of the institution of the suit.

(2) that the parties are within the prohibited degrees of consanguinity (whether natural or legal) or affinity;

(3) that either party was a lunatic or idiot at the time of the marriage;

(4) That the former husband or wife of either party was living at the time of the marriage, and the marriage with such former husband or wife was then in force.

It is further provided in S. 19 that nothing in the Section shall affect the jurisdiction of the High Court to make decrees of nullity of marriage on the ground that the consent of either party was obtained by force or fraud. It is clear from the reading of Ss. 18 and 19 together that the District Court and the High Court have concurrent jurisdiction for entertaining a petition for nullity of marriage on the grounds stated in sub-secs. (1) to (4) of S. 19 of the Act.

3. So far as the decree of nullity of marriage on the ground of force or fraud is concerned, the same can be obtained only by presenting a petition to the High Court which has a residuary jurisdiction to deal with a petition for dissolution of marriage on the ground that consent of either party was obtained by force or fraud. This view of ours receives full support from a decision of the Andhra Pradesh High Court reported in T. Saroja David v. Christie Francis (AIR 1966 Andh Pra 178), wherein Justice Jaganmohan Reddy has observed as follows (at p. 179):

"It may be observed that in so far as dissolution of marriage and nullity of marriage on the specific grounds stated in S. 19 are concerned both the District Court and the High Court have concurrent jurisdiction and when the case is one for declaration of nullity of marriage on the ground of force or fraud, the exclusive jurisdiction of the High Court is saved. In order to understand what this jurisdiction is, it is necessary to refer to the history of that jurisdiction. Originally, the Ecclesiastical Courts in England were empowered to deal with matrimonial matters. The Supreme Courts in India which were administering the English law as it was on a particular date had inherited this jurisdiction from the Ecclesiastical Courts. Ultimately by statute the High Courts have inherited their jurisdiction direct from the Supreme Courts. Thus the power to make decrees of nullity of marriage on the ground of duress or fraud was inherited by the Supreme Courts from the Ecclesiastical Courts and the High Courts inherited that power from the Supreme Courts. This Court has, therefore, clear jurisdiction to entertain this petition."

We may also incidentally refer to a decision of this Court reported in D. Michael Raju v. Sarah Janaki (1973) 1 Mys LJ 414 from which it is clear that a petition for declaration of nullity of marriage on the ground of fraud was entertained and disposed of by this Court. We have therefore no hesitation in taking the view that the District Court has no jurisdiction to entertain a petition for declaration of nullity of marriage on the ground that the consent of either party to the marriage was obtained by force or fraud. As the learned District Judge had no jurisdiction to entertain the petition, we cannot confirm the decree nisi passed by him.

4. For the reasons stated above, we set aside the decree nisi passed by the learned District Judge and direct return of the petition to the petitioner for presentation to the proper court.

Order accordingly.

AIR 1978 KARNATAKA 71

E. S. VENKATARAMIAH AND N. VENKATACHALA, JJ.

Melegowda, Petitioner v. Gaibu Sab and another, Respondents.

Civil Revn. Petn. No. 1017 of 1976, D/- 3-1-1978.*

(A) Transfer of Property Act (4 of 1882), S. 101 — Merger — Doctrine of merger does not apply in case of a lease followed by a mortgage to the tenant. 1975 (2) Kant LJ 107 held no longer good law in view of AIR 1976 SC 1565.

(Para 4)

Anno: AIR Manual (3rd Edn) T. P. Act S. 101 N. 1.

(B) Karnataka Land Reforms Act (10 of 1962), Ss. 26 & 133 — Effect of S. 26 — Lease does not become extinct — It is existing but in abeyance — Question whether there is such dormant tenancy or not regarding agricultural land has to be decided under S. 133 by the Land Tribunal and not by the Civil Court.

The true effect of S. 26 of the Act is that the anterior lease of agricultural land would not become extinct by reason of the creation of a mortgage in favour of the tenant but would become dormant. The said provision confers a right on the mortgagee, who was a tenant earlier, to continue to hold the land after the extinguishment of the mortgage on the terms and conditions on which he held it before the mortgage was created. The principles laid down in (1975) 2 Kant LJ 387 that the scope of enquiry by the tribunal constituted under the Act is limited to the existing tenancy in dispute and not to the tenancy that existed at remote past is inapplicable to a case of lease followed by a mortgage because by virtue of S. 26 the tenancy continues to be in existence though in abeyance and does not become extinguished on the execution of the mortgage. (Para 7)

Under S. 133 of the Act the question whether there is a tenancy which may be either active or dormant in respect of an agricultural land or not has to be decided by the Land Tribunal and not by the Civil Court. (1975) 2 Kant LJ 387 Referred. AIR 1976 Kant 192 Rel. on. (Para 8)

Cases Referred: Chronological Paras

AIR 1976 SC 1565 4

AIR 1976 Kant 192 : (1976) 1 Kant LJ 369 8

(1975) 2 Kant LJ 107 4, 5

(1975) 2 Kant LJ 387 7

(1963) 65 Bom LR 449 5

Mohandas N. Hegde, for Petitioner; M. S. Gopal, for Respondent No. 2.

E. S. VENKATARAMIAH, J.:— On a reference made by the learned Chief Justice, the above petition has come up before us for disposal.

2. This petition arises out of the suit O. S. No. 573 of 1974 on the file of the Principal Munsiff, Mandya. The petitioner is the defendant in the said suit and respodents are the plaintiffs. The first respondent was the owner of a piece of agricultural land which is the subject-matter of the suit and he mortgaged the same with possession in favour of the petitioner under registered mortgage deed dated 3-7-1967. After the said mortgage was executed, he sold the equity of redemption in the land in favour of respondent No. 2. The respondents instituted the suit, out of which this petition arises, for redemption of the mortgage and for a decree for possession in favour of respondent 2 on redemption. The petitioner contested the suit in so far as the relief for possession was concerned. He, however, had no objection for the mortgage being redeemed. His case was that he was a tenant of the land prior to the mortgage and during the subsistence of the said tenancy the mortgage had come into existence. It was contended by him relying upon S. 26 of the Karnataka Land Reforms Act (hereinafter referred to as the "Act") that he was entitled to remain in possession of the land as a tenant after the mortgage was redeemed. It was also urged that in view of the said tenancy, the sale of the equity of redemption by the 1st respondent in favour of the 2nd respondent was void. On the basis of the above pleadings, the trial Court framed three issues i. e. issues 3, 4 and 5 which read as follows:

"Issue No. 3: Whether the defendant proves that he was the tenant of the suit property under the 1st plaintiff prior to mortgage in favour by the 1st plaintiff?

Issue No. 4: Whether the defendant proves that the 2nd plaintiff is not an agriculturist as defined under the Land Reforms Act and as such the sale dated 13-3-1971 in her favour by the 1st plaintiff is void?

* Against order of Prl. Munsiff, Mandya D/- 5-6-1976

Issue No. 5: Whether the defendant proves that the sale in favour of the 2nd plaintiff is also void as the same was carried out during the continuation of tenancy of the defendant?"

After the above issues were framed, the petitioner filed an application I. A. No. 5 in the suit, requesting the court to refer issues 3, 4 and 5 to the Land Tribunal under S. 133 of the Act as the suit involved the question whether the petitioner was a tenant under the first respondent and whether the tenancy was in abeyance by virtue of the provisions of S. 26 of the Act. The respondent contested the said application on two grounds, (1) that the tenancy even, if it was true, had come to an end on the execution of the mortgage deed by reason of the merger of the lease which was a smaller estate in the mortgage which was a larger estate and (2) that it was not open to the Tribunal to determine whether the sale of equity of redemption by the 1st respondent in favour of 2nd respondent was void. Incidentally, it was also contended by the respondents that the Tribunal had no jurisdiction to decide whether the tenancy in question, which was a past tenancy, was in existence before the mortgage deed came into existence or not. The learned Munsiff dismissed the said application holding that the tenancy in question, even if it was true, had come to an end on the execution of the mortgage deed on the ground that there was a merger of the lease in the mortgage and that the Tribunal was not competent to decide whether the tenancy prior to the mortgage was in existence or not. He also held that issues 4 and 5 which related to the validity of the sale executed by respondent-1 in favour of respondent-2 could not be decided by the Land Tribunal. Aggrieved by the order of the Tribunal the petitioner has filed the above petition.

3. At the outset it should be stated that Sri Mohandas N. Hegde, learned counsel for the petitioner, conceded that the questions covered by issues 4 and 5 relating to the validity of the sale could not be referred to the Land Tribunal. In view of the above submission, we do not propose to deal with that aspect of the case. The only question which survives for consideration is whether issue No. 3 which relates to the question whether the petitioner was a tenant before the mortgage and whether the said tenancy was only in abeyance under S. 26 of the Act should be referred to the Land Tribunal or not.

4. The learned Munsiff came to the conclusion that on the execution of the mortgage deed in favour of the petitioner the lease in favour of the petitioner, even if it is true, became merged in the mortgage and therefore extinguished on the basis of the decision of this Court in Srinivasa Setty v. Muniyappa ((1975) 2 Kant LJ 107) rendered by a Single Judge of this Court. It is no doubt true that the enunciation made in the said decision supports the view taken by the learned Munsiff; but we have to hold that the view expressed in that decision is no longer good law in view of the decision of the Supreme Court in Shah Mathuradas Maganlal and Co. v. Nagappa Shankarappa Malaga (AIR 1976 SC 1565) wherein it has been held that the doctrine of merger would not apply to case of a lease followed by a mortgage. The relevant part of the decision of the Supreme Court reads as follows:

"16. The contention of the appellant was that there was no surrender and there was merger of the interest of the mortgagee and the tenant. Ordinarily, the doctrine of merger applies to extinction of mortagage security. This occurs by the merger of a lower in a higher security and by the merger of a lesser estate in a greater estate. Where the capacity in which a person in possession of the mortgagee's rights is something quite different from the capacity in which he is in possession of the equity of redemption, the mere fact that the two capacities are united in the same physical person cannot result in a merger.

17. For a merger to arise, it is necessary that a lesser estate and a higher estate should merge in one person at one and the same time and in the same right, and no interest in the property should remain outside. In the case of a lease the estate that is in the lessor is a reversion. In the case of a mortgage the estate that is outstanding is the equity of redemption of the mortgagor. Therefore, there cannot be a merger of lease and mortgage in respect of the same property since neither of them is a higher or lesser estate than the other. The view expressed in Narayan v. Ramachandra, (1963) 65 Bom LR 449 is correct."

5. Hence it has to be held that the view expressed in Srinivasa Setty's case (1975-2 Kant LJ 107) stands overruled. It is no doubt true that in the course of the above decision of the Supreme Court

it has been held that the lease in question, however, came to an end by reason of implied surrender contemplated under S. 111 of the Transfer of Property Act. It is not open to the respondents to plead in the instant case that there has been such an implied surrender by reason of S. 26 of the Act which reads:

"26. Tenancy in abeyance during usufructuary mortgage in favour of tenant: If any land is mortgaged by a landlord by way of a usufructuary mortgage to tenant cultivating such land, the tenancy of such land shall be in abeyance during the period the mortgage subsists. After the expiry of the said period it shall be lawful to the tenant to continue to hold the land on the terms and conditions on which he held it before the mortgage was created."

6. Section 26 of the Act modifies the provisions of Section 111 of Transfer of Property Act in so far as agricultural lands are concerned, to the extent it declares that the tenancy in the circumstances referred to therein would be in abeyance during the period the mortgage subsists.

7. The true effect of S. 26 of the Act is that the anterior lease of agricultural land would not become extinct by reason of the creation of a mortgage in favour of the tenant but would become dormant. The said provision confers a right on the mortgagee, who was a tenant earlier, to continue to hold the land after the extinguishment of the mortgage on the terms and conditions on which he held it before the mortgage was created. In view of the above express provision found in the statute it has also to be held that no support can be derived by the respondents from the decision of this court in Radhabai Balakrishna Deshpande v. Raghavendra Hanumantha Deshpande ((1975) 2 Kant LJ 387) in which it has been held that the scope of enquiry by the Tribunal constituted under the Act is limited to the existing tenancy in dispute and not to the tenancy that existed at remote past, because by virtue of S. 26 the tenancy continues to be in existence though in abeyance and does not become extinguished on the execution of the mortgage.

8. Sri M. S. Gopal, learned counsel for the 2nd respondent, however, argued that the application before the court below was premature as the occasion for enquiry into the existence of the tenancy in question had not yet arisen. According to him such a case would arise only after the mortgage is redeemed. We do not think that in the context of the present suit the application was a premature one. The question whether the 2nd respondent was entitled to the possession of the property on redemption has to be decided before a preliminary decree for redemption is passed because one of the directions to be given in the course of the preliminary decree for redemption relates to the delivery of possession of the mortgaged property by the mortgagee to the mortgagor, on the mortgagor satisfying the conditions imposed on him. The determination of the question whether delivery of possession on redemption should be ordered or not cannot therefore be relegated to a stage subsequent to the stage of the preliminary decree. We, therefore, reject the above contention of Sri M. S. Gopal. Under S. 133 of the Act the question whether there is a tenancy which may be either active or dormant in respect of an agricultural land or not has to be decided by the Land Tribunal and not by the Civil Court (Vide Malliah Murigayya v. Puttappa Shivappa ((1976) 1 Kant LJ 369) : (AIR 1976 Kant 192).

9. In view of the foregoing, we allow the above revision petition in part and direct the learned Munsiff to refer issue No. 3 to the Land Tribunal and to dispose of the suit in accordance with law after the receipt of the finding of the Land Tribunal on that issue. The decision of the learned Munsiff in so far as Issues Nos. 4 and 5 are concerned is affirmed.

Revision partly allowed.

AIR 1978 KARNATAKA 73
FULL BENCH

V. S. MALIMATH, K. JAGANNATHA SHETTY AND P. P. BOPANNA, JJ.

Ballesha Rama Khot and others, Appellants v. The Land Tribunal, Chikodi and others, Respondents.

Writ Appeal No. 404 of 1977, D/- 20-12-1977.*

(A) Karnataka Land Reforms Act (10 of 1962), S. 44 (1) — Scope — The expression "all lands held" — Meaning of.

*(Against Judgment of Single Judge of this Court in W.P. No. 3519 of 1977 D/- 9-9-1977.)

(Karnataka Land Revenue Act (1964), S. 2 (11)). AIR 1976 Kant 205, Overruled.

The expression "all lands held" used in S. 44 (1) has to be understood in the light of the expression "to hold land" or to be "a land owner or holder of land" under S. 2 (11) of the Karnataka Land Revenue Act, 1964, as meaning thereby, the lands in lawful possession of a tenant, whether such possession is actual or not. Therefore, even if the land was not in actual possession of the tenant immediately prior to first March, 1974, if it was a tenanted land, it vests in the State Government. AIR 1976 Kant 205 Overruled; AIR 1978 Kant 56 Rel. on. (Para 4)

(B) Karnataka Land Reforms Act (10 of 1962), S. 45 — Registration of occupancy rights — Conditions precedent.

Section 45 conferring occupancy rights lays down two conditions: (i) the person claiming must have been either a permanent tenant, protected tenant, other tenant or sub-tenant immediately before first March, 1974; and (ii) that such person must have been personally cultivating the land immediately before first March, 1974. The primary requirement for registration of occupancy rights, therefore, is that the person claiming such right must have been cultivating the land personally immediately prior to first March, 1974. If he was then out of possession by wrongful or illegal act of others, he cannot be registered as occupant. He is not entitled to occupancy right merely on the proof that the land was tenanted and so vested in the State Government. (Para 4)

Cases Referred: Chronological Paras

AIR 1978 Kant 56 3

AIR 1976 Kant 205 : (1976) 1 Kant LJ 219 1, 3

W. K. Joshi, for Appellants; N. A. Mandagi, for Respondent No. 4.

JAGANNATHA SHETTY, J.:— While disagreeing with the view taken in Rayappa Basappa Killed v. Land Tribunal (1976) 1 Kant LJ 219 : (AIR 1976 Kant 205) a Division Bench of this court has referred to a Full Bench, the following two questions of law for decision under Section 7 of the Karnataka High Court Act, 1961:

1. Whether a land held by a person in his capacity as a tenant, immediately prior to the date of commencement of the Amendment Act, which was not in his actual possession before the said date stands transferred to and vests in the State Government under sub-sec. (1) of S. 44 if the land is not held by him under a lease permitted by S. 5 of the Act?

2. Whether a tenant who was lawfully entitled to cultivate the land personally immediately prior to the commencement of the Amendment Act but was wrongfully or illegally prevented from doing so, is entitled to registration of occupancy rights under S. 45 of the Act?

2. The decision on these questions depends upon the meaning and scope of the following provisions of the Karnataka Land Reforms Act 1961 (hereinafter referred to as "the Act"). Section 2 (11) defines "to cultivate personally" as follows:

"Cultivate land on one's own account:

i) By one's own labour, or

ii) by the labour of any member of one's family, or

iii) by hired labour or by servants on wages payable in cash or kind but not in crop share, under the personal supervision of one self or by member of one's family.".

Section 2 (34) defines "tenant". It means:

"An agriculturist who cultivates personally the land he holds on lease from a landlord and includes —

i) a person who is deemed to be a tenant under S. 4;

ii) a person who was protected from eviction from any land by the Karnataka Tenants (Temporary Protection from Eviction), Act, 1961;

iii) a person who is a permanent tenant; and

iv) a person who is a protected tenant."

Chapter III of the Act deals with conferment of ownership on tenants.

Section 44 thereunder, so far as it is material, provides:

"44. Vesting of land in the State Government — (1) All lands held by or in the possession of tenants (including tenants against whom a decree or order for eviction or a certificate for resumption is made or issued) immediately prior to the date of commencement of the Amendment Act, other than lands held by them under leases permitted under Section 5, shall, with effect on and from the said date, stand transferred to and vest in the State Government."

Section 45 (1) provides:

"45. Tenants to be registered as occupants of land on certain conditions — (1) Subject to the provisions of the succeeding sections of this Chapter, every person who was a permanent tenant, pro-

tected tenant or other tenant or where a tenant has lawfully sublet, such sub-tenant shall, with effect on and from the date of vesting, be entitled to be registered as an occupant in respect of the lands of which he was a permanent tenant, protected tenant or other tenant or sub-tenant before the date of vesting and which he has been cultivating personally.

xx xx xx xx"

The Amendment Act referred to in Section 44 came into force with effect from first March, 1974, that is, the date of vesting of land in the State Government.

3. We will now refer to the decision in Rayappa's case, (1976) 1 Kant LJ 219 : (AIR 1976 Kant 205). While dealing with the scope of Ss. 44 (1) and 45, it was observed at page 220 (of Kant LJ) : (at p. 206 of AIR) :

"In a case like this where the alleged tenant has not been in possession of the Agricultural land and he has not been cultivating it personally immediately prior to the date of vesting, viz., 1-3-1974, such land does not vest in the State Government under S. 44, and if it does not vest in the State Government, the tenant is not entitled to be registered as occupant."

It is thus laid down that the land which has not been in possession of the alleged tenant, and has not been personally cultivated by him immediately prior to the date of vesting, does not vest in the State Government under S. 44. In our view, the first part of the above observation appears to be not correct. It does not reflect the true scope of Section 44 (1). That Section commences with the words "All lands held by or in the possession of tenants stand transferred to and vest in the State Government." It provides that the lands not only in the actual possession of tenants but also those held by them immediately prior to first March, 1974, shall vest in the State Government. The land held by a tenant may not be in his actual possession. The words "To hold land" although not defined under the Act, but we can take their meaning from the Karnataka Land Revenue Act, 1964, as S. 2 (B) of the Act provides that words and expressions used, but not defined shall have the meaning assigned to them in the Karnataka Land Revenue Act. Under S. 2 (11) of the Karnataka Land Revenue Act, 1964 the expression "to hold land" or to be "a land owner or holder of land" to mean "to be in lawful possession of land whether such possession is actual or not". It is clear from this definition that the expression "all lands held" used in S. 44 (1) has to be understood as meaning thereby, the lands in lawful possession of a tenant, whether such possession is actual or not. Therefore, even if the land was not in actual possession of the tenant immediately prior to first March, 1974, if it was a tenanted land, it vests in the State Government. That the land cannot be registered in favour of the tenant who was not in actual possession immediately prior to first March, 1974, is not relevant for the purpose of deciding the question as to whether the land stands vested in the State Government under S. 44 of the Act. A Division Bench of this Court in Nagappa Devanna Naik v. Venkatramana Thimanna Naik, W.A. No. 580 of 1976, disposed of on 23-11-1977 : (AIR 1978 Kant 56) has also observed to the same effect. The learned Chief Justice speaking for the Bench, said (at p. 57 of AIR) :

"The Amendment Act was brought into force on 1-3-1974. So, what is relevant for the purpose of the Act and determination by the Tribunal is whether the lands in respect of which proceedings are taken under Chapter III, were tenanted lands being cultivated personally by the alleged tenants immediately prior to 1.3.1974. If the land or lands were tenanted lands, to which Section 44 is attracted, such lands vest in the State Government on 1.3.1974.".

We, however, emphasise here that the land must have been tenanted immediately prior to first March, 1974, and not at any time in the past.

We answer the first question in the affirmative.

4. This takes us to the second question. It envisages the case of a tenant who was lawfully entitled to cultivate the lands personally immediately prior to first March, 1974, but was wrongfully or illegally prevented from doing so. The question is whether such person is entitled to registration of occupancy rights under Section 45. The answer to the question, in our view, should be in the negative. Section 45 conferring occupancy rights lays down two conditions:

(i) the person claiming must have been either a permanent tenant, protected tenant, other tenant or sub-tenant immediately before first March, 1974; and (ii) that such person must have been

personally cultivating the land immediately before first March, 1974. The primary requirement for registration of occupancy rights, therefore, is that the person claiming such right must have been cultivating the land personally immediately prior to first March, 1974. If he was then out of possession by wrongful or illegal act of others, he cannot be registered as occupant. He is not entitled to occupancy right merely on the proof that the land was tenanted and so vested in the State Government.

In this context, it may not be out of place to observe that the Act provides procedures to recover possession from an unauthorised occupant by a person entitled to such possession. Sections 41, 121 and 129 provide for such remedies. The tenant who was lawfully entitled to cultivate the land personally immediately prior to first March, 1974, but was wrongfully or illegally prevented from doing so, may take recourse to any one of the remedies provided under the above Sections, and may request the Land Tribunal to defer consideration of his application till the possession of the land is restored to him. If he recovers possession in accordance with law, he may then ask the Tribunal to proceed with his application on the merits. When possession is so recovered. the Tribunal has to proceed on the basis that the tenant must be deemed to have been personally cultivating the land from the date of his dispossession till the date of restoration of possession. This clarification may, in our opinion, be sufficient to safeguard the interests of such tenants.

5. In the circumstances, we make no order as to costs.

Answer accordingly.

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V. S. MALIMATH AND D. B. LAL, JJ.

Shivaramaiah, Appellant v. Mallikarjunaiah and others, Respondents.

I. A. No. 1 in First Appeal No. 52 of 1970, D/- 8-11-1977.

(A) Civil P. C. (5 of 1908), O. 20, R. 18 — Composite partition decree in respect of revenue payable properties as also other properties — Before final decree is passed or before Deputy Commissioner effected partition, death of a party — Dispute between surviving parties as to devolution of share of deceased sharer — Procedure — If and when Civil Court can adjust shares.

Though the decree passed under O. 20 R. 18 (1) is not described as a preliminary decree, whereas, the decree passed under O. 20 R. 18 (2) is a preliminary decree, so far as the essential character of the two decrees is concerned, there is no real difference. The decrees falling under both the clauses of O. 20 R. 18 merely declare the rights of the parties in the two types of properties. The decrees passed under both the clauses contemplate partition or separation to be made to enable the parties to realise the fruits of the decree. This is done by passing a final decree if the decree for partition is made under O. 20 R. 18 (2) in respect of properties other than those in respect of which revenue is payable to the Government. The same object is achieved in respect of the partition decree made under O. 20 R. 18 (1), by sending the said decree to the Deputy Commissioner for effecting partition in respect of the estate assessed to payment of the land revenue to the Government. There is no bar for making more than one preliminary decree under O. 20 R. 18 (2) of the C. P. C. No such bar for passing more than one decree is found under O. 20 R. 18 (1) of the C. P. C. either. (Para 6)

In the case of a composite partition decree in respect of revenue payable properties as well as non-revenue payable properties falling both under O. 20 R. 18 (1) and O. 20 R. 18 (2), (as in the present case), steps for deciding disputes as to devolution of share of deceased party and adjustment of shares can be taken before Deputy Commissioner has effected partition as required by S. 54 or before a final decree has been passed. (Para 6)

If after the decree is made under O. 20 R. 18 (1) of the C. P. C., and before the Deputy Commissioner effects partittion as required by S. 54 (or before final decree is passed in the case of a partition decree made under O. 20 R. 18 (2)), any party who has been allotted a share dies, necessary adjustment of the shares and the resolution of disputes arising in that behalf can be made by the Civil Court. The Civil Court can make appropriate adjustment and draw a further preliminary decree modifying the shares of the parties consequent upon the devolution of interest resulting from the death of one of the parties to the suit. This can only be done so long as the Deputy Commissioner has not completed the pro-

cess of effecting partition in accordance with the decree of the Civil Court. If the shares get altered as a result of the death of any of the parties after the Deputy Commissioner completes the process of partition, the Civil Court which made the decree under O. 20 R. 18 of the C. P. C. cannot be approached for the purpose of the adjustment of the shares of the parties in the very same proceeding. In such a case, the parties may have to seek relief in a separate suit. AIR 1967 SC 1470 and AIR 1957 Bom. 59 Rel. on. (Para 7)

Anno: AIR Comm., C. P. C. (8th Edn), O. 20, R. 18, N. 5, 5 A.

(B) Civil P. C. (5 of 1908), S. 151 and O. 20, R. 18 — Decree in partition suit modified by appellate court — Death of one of the plaintiffs — Application under S. 151 for modifying shares — Proper court in which it has to be filed.

Where the decree in a partition suit was modified by the appellate court and subsequently one of the plaintiffs died and there was a dispute as to the devolution of deceased person's shares and the surviving plaintiff filed an application under S. 151 for adjustment of shares.

Held that the proper court to which such an application can be made is the court of first instance and not the appellate court even if the decree of the court of first instance was modified by the appellate court. What is prayed for is the passing of a further decree in the light of the events that have taken place subsequent to the passing of the decree under O. 20 R. 18 (1) of the C. P. C. Therefore, when the court is approached with such an application, it is not asked to sit in judgment over the decree already made under O. 20 R. 18. What it is called upon to do is to adjust the right of the parties in view of the subsequent events that have taken place. (Para 9)

Anno: AIR Comm., C. P. C. (8th Edn), O. 20 R. 18, N. 5, S. 151, N. 4, 2 (R).

Cases Referred: Chronological	Paras
AIR 1967 SC 1470	6, 9
(1965) 2 Mys LJ 768	8
AIR 1959 Mys 233	8
AIR 1957 Bom 59	9

V. Krishnamurthy, for Appellant; Nagaraj for R. S. Mahendra, for Respondents Nos. 1 and 2.

V. S. MALIMATH J.:— This application is by the original first plaintiff made under S. 151 of the Civil P. C. praying for a direction that he be put in possession of 1/4th share in the suit schedule properties after partition by metes and bounds.

2. The undisputed facts of the case are that the applicant in I. A. No. I Mallikarjunaiah and his sister Sarojamma instituted original suit No. 7 of 1965 for partition and possession of the suit schedule properties. The court of first instance made a decree declaring that the first plaintiff is entitled to 2/9th share and the second plaintiff is entitled to 1/9th share in the suit schedule properties. The said decree was challenged by Shivaramiah, defendant 2 in R. F. A. No. 52 of 1970 in this Court. This Court partly allowed the appeal and modified the decree made by the court of first instance. This Court declared that the two plaintiffs together are entitled to 1/4th share; that defendant 1 is entitled to 1/4th share; and that defendant 2 is entitled to half share in the suit schedule properties. The suit schedule consists of the properties paying land revenue as also other properties. As regards properties assessed to payment of land revenue to the Government, the decree was sent to the Deputy Commissioner for effecting partition in accordance with the decree made by the Court as required by Order 20 Rule 18 (1) read with Section 54 of the Civil P. C. Before the Deputy Commissioner could effect the partition in accordance with the decree of the civil court, the second plaintiff died leaving behind her husband Nanjamari and a minor son Lokesh.

3. It was explained to us by the learned counsel for the applicant in I. A. No. 1 that when the Deputy Commissioner was apprised of the death of the second plaintiff, he felt that it will not be possible for him to effect partition by metes and bounds in accordance with the decree made by the Civil Court in the suit. The learned counsel also submitted that the Deputy Commissioner, therefore, has written a letter to the Registrar of this Court seeking a clarification on the question as to who should be considered as the legal heirs of Smt. Sarojamma, the deceased original second plaintiff. It is in this background that the first plaintiff filed I. A. No. I in R. F. A. No. 52 of 1970 for a direction that he being the surviving plaintiff should be put in possession of the 1/4th share in the suit properties which had been allotted under the decree of the court to him and the deceased second plaintiff together. In support of the application, an affidavit has been filed by Nanjamari, the husband of the deceased second plaintiff, in which he

appears to have stated that having regard to the fact that he resides at a distant place he has no objection for delivery of possession of the entire 1/4 th share to the first plaintiff. But, during the course of the argument, learned counsel for the first plaintiff had to concede that this application is misconceived and is not maintainable in this court and that the proper course to be adopted by the parties is to file an appropriate application in the court of first instance for bringing the legal representatives of the deceased second plaintiff on record and seeking a further preliminary decree in favour of the legal representatives of the original second plaintiff who have become entitled to succeed to her share in the suit schedule properties. As we have heard the learned counsel for both the parties at length and as we find that there is no direct authority on the question involved, we consider it appropriate to deal with the question of appropriate steps that can be taken and the forum which can be approached for that purpose.

4. The undisputed facts are that the decree was made by the court of first instance declaring the respective shares of the parties to the suit in the suit schedule properties. The suit schedule properties consisted of the properties assessed to land revenue as also other properties. The decree was modified by the appellate court by modifying the shares to which the parties are entitled to. Admittedly, no final decree has been passed so far as items 16 and 17 in Schedule "A" are concerned which are not the properties liable to pay land revenue to the State Government. So far as the other properties are concerned, which are assessed to land revenue, the decree was sent to the Deputy Commissioner for effecting partition by metes and bounds. But, before the Deputy Commissioner could effect partition by metes and bounds, the second plaintiff who has been allotted 1/4th share along with the first plaintiff died leaving behind her the two heirs referred to above. This is therefore a case of devolution of interest after declaration of the rights of the parties to the suit for partition and before the partition by metes and bounds was completed by the Deputy Commissioner by taking appropriate steps as required by S. 54 C. P. C.

5. The question for consideration is as to whether in these circumstances the parties who claim that they have become entitled to certain shares as a result of the death of one of the parties to the suit are entitled to approach the Deputy Commissioner who is seized of the matter or whether they are entitled to approach the civil court for the purpose of drawing up an appropriate preliminary decree in favour of the persons who claimed that there has been devolution of interest in their favour after the declaration of the rights of the parties is made by the civil court.

6. Sri V. Krishnamurthy, learned counsel for original defendant-2, submitted that with a view to avoid multiplicity of suits and to see that the parties reap the benefits of the decree, it is more appropriate that the civil court itself should be approached for the purpose of drawing up further preliminary decree consequent upon devolution of interest having taken place after the declaration of the rights of the parties and before they are put in possession of the respective shares by the Deputy Commissioner functioning under S. 54 of C. P. C. For this purpose he sought sustenance for his argument by relying on the decision of the Supreme Court in Phoolchand v. Gopal Lal (A. I. R. 1967 S. C. 1470). In particular, Sri V. Krishnamurthy, relied on the observations made by the Supreme Court in paragraph 7 of the judgment which reads as follows:—

"We are of opinion that there is nothing in the Civil P. C. which prohibits the passing of more than one preliminary decree if circumstances justify the same and that it may be necessary to do so particularly in partition suits when after the preliminary decree some parties die and shares of other parties are thereby augmented. We have already said that it is not disputed that in partition suits the court can do so even after the preliminary decree is passed. It would in our opinion be convenient to the court and advantageous to the parties, specially in partition suits, to have disputed rights finally settled and specification of shares in the preliminary decree varied before a final decree is prepared. If this is done, there is a clear determination of the rights of parties to the suit on the question in dispute and we see no difficulty in holding that in such cases there is a decree deciding these disputed rights; if so, there is no reason why a second preliminary decree correcting the shares

in a partition suit cannot be passed by the court. So far therefore as partition suits are concerned we have no doubt that if an event transpires after the preliminary decree which necessitates a change in shares, the court can and should do so; and if there is a dispute in that behalf, the order of the court deciding that dispute and making variation in shares specified in the preliminary decree already passed is a decree in itself which would be liable to appeal. We should however like to point out that what we are saying must be confined to partition suits, for we are not concerned in the present appeal with other kinds of suits in which also preliminary and final decrees are passed. There is no prohibition in the Civil P. C. against passing a second preliminary decree in such circumstances and we do not see why we should rule out a second preliminary decree in such circumstances only on the ground that the Civil P. C. does not contemplate such a possibility. In any case if two views are possible—and obviously this is so because the High courts have differed on the question—we would prefer the view taken by the High Courts which hold that a second preliminary decree can be passed particularly in partition suits where parties have died after the preliminary decree and shares specified in the preliminary decree have to be adjusted. We see no reason why in such a case if there is dispute, it should not be decided by the Court which passed the preliminary decree, for it must not be forgotten that the suit is not over till the final decree is passed and the Court has jurisdiction to decide all disputes that may arise after the preliminary decree, particulary in a partition suit due to deaths of some of the parties. Whether there can be more than one final decree does not arise in the present appeal and on that we express no opinion. We therefore hold that in the circumstances of this case it was open to the Court to draw up a fresh preliminary decree as two of the parties had died after the preliminary decree and before the final decree was passed. Further as there was dispute between the surviving parties as to devolution of the shares of the parties who were dead and that dispute was decided by the trial court in the present case and thereafter the preliminary decree already passed was amended, the decision amounted to a decree and was liable to appeal. We therefore agree with the view taken by the High Court that in such circumstances a second preliminary decree can be passed in partition suits by which the shares allotted in the preliminary decree already passed can be amended and if there is dispute between surviving parties in that behalf and that dispute is decided, the decision amounts to a decree. We should however like to make it clear that this can only be done so long as the final decree has not been passed. We therefore reject this contention of the appellant."

It is no doubt true that though the observations of the Supreme Court referred to above generally govern such situations arising in a partition suit, it appears, what the Supreme Court dealt with is a situation arising in respect of a partition decree made under O. 20 R. 18 (2) of the C. P. C. in respect of properties other than properties assessed to land revenue. That appears to be the position having regard to the fact that after the preliminary decree was passed by the civil court a Commissioner was appointed to effect partition as stated in the first para of the judgment. Though the observations of the Supreme Court relied upon by Shri Krishnamurthy, govern situations arising in respect of preliminary decrees falling under O. 20 R. 18 (2) of the C. P. C. it was maintained by the learned counsel that there is no justification why the said principles should not be extended to similar situations arising in respect of decrees made under O. 20 R. 18 (1) of the C. P. C. i. e., decrees relating to the estates assessed to payment of land revenue to the Government. If the scheme of the two provisions under O. 20 R. 18 (1) and under O. 20 R. 18 (2) is analysed, it will be clear that the essential nature and character of both the types of the decrees is the same. Though the decree passed under O. 20, R. 18 (1) is not described as a preliminary decree, whereas, the decree passed under O. 20 R. 18 (2) is a preliminary decree, in our opinion, so far as the essential character of the two decrees is concerned, there is no real difference. The decrees falling under both the clauses of O. 20 R. 18 merely declare the rights of the parties in the two types of properties. The decrees passed under both the clauses contemplate partition or separation to be made to enable the parties to realise the fruits of the decree. This is done by passing a final decree if the decree for partition is made under O. 20 R. 18 (2) in respect of properties other

than those in respect of which revenue is payable to the Government. The same object is achieved in respect of the partition decree made under O. 20 R. 18 (1), by sending the said decree to the Deputy Commissioner for effecting partition in respect of the estate assessed to payment of the land revenue to the Government. There is no bar for making more than one preliminary decree under O. 20 R. 18 (2) of the C. P. C. We do not find any such bar for passing more than one decree under O. 20 R. 18 (1) of the C. P. C. either. One of the reasons given by the Supreme Court is that if there is need for alteration of the shares before the final decree is made there is no reason why the same should not be done by passing appropriate further preliminary decree and that there is no reason why the parties should be driven to a fresh suit. Same thing can be said with equal justification in regard to decrees made under O. 20 R. 18 (1), as well. The only clarification that is necessary to be made is that whereas steps as indicated by the Supreme Court in paragraph 7 of its judgment can be taken only so long as final decree is not passed if the partition decree is made under O. 20 R. 18 (2) such steps can be taken in respect of decree made under O. 20 R. 18 (1) of the C. P. C. So long as the Deputy Commissioner has not effected partition as required by S. 54 of the C. P. C.

7. It is necessary to point out that the Supreme Court in Para 7 of its judgment approved the view taken by the High Court of Bombay in Parashuram Rajaram Tiwari v. Hirabai Rajaram Tiwari (AIR 1957 Bom 59). The decree dealt with by the High Court of Bombay was a composite decree like the present one in respect of the revenue payable properties as well as non-revenue payable properties falling both under O. 20 R. 18 (1) and O. 20 R. 18 (2) of the C. P. C. That is another reason which persuades us to take the view that the principles laid down by the Supreme Court in paragraph 7 of its judgment can be followed in respect of the decrees falling under O. 20 R. 18 (1) as well. We hold that if after the decree is made under O. 20 R. 18 (1) of the C. P. C. and before the Deputy Commissioner effects partition, any party who has been allotted a share dies, necessary adjustment of the shares and the resolution of disputes arising in that behalf can be made by the Civil Court. The Civil Court can make appropriate adjustment and draw a further preliminary decree modifying the shares of the parties consequent upon the devolution of interest resulting from the death of one of the parties to the suit. It is, however, necessary to emphasise that this can only be done so long as the Deputy Commissioner has not completed the process of effecting partition in accordance with the decree of the Civil Court. If the shares get altered as a result of the death of any of the parties after the Deputy Commissioner completes the process of partition, it is obvious that the Civil Court which made the decree under O. 20 R. 18 of the C. P. C. cannot be approached for the purpose of the adjustment of the shares of the parties in the very same proceeding. In such a case, the parties may have to seek relief in a separate suit.

8. Before concluding, we may refer to two decisions of this Court. In Narasu v. Narayan Krishnaji (AIR 1959 Mys 233), a Division Bench of this Court has taken the view that a decree made under O. 20 R. 18 (1) cannot be regarded as a preliminary decree. That was a case in which the question for consideration was as to whether any application is contemplated for sending the decree made under O. 20 R. 18 (1) of the C. P. C. to the Deputy Commissioner and if so whether any limitation is prescribed for it. The Division Bench held that no such application is contemplated and that the question of limitation does not arise for reminding the court of its ministerial duty of sending the papers to the Deputy Commissioner. It is in that context that it was observed that the decree under O. 20 R. 18 (1) is so far as Civil Courts are concerned final though the partition may remain to be effected by the Deputy Commissioner. Having regard to the scheme of the O. 20 R. 18, we have already pointed out that the real nature of the decree is the same whether it is made under O. 20 R. 18 (1) or under O. 20 R. 18 (2). The other decision is of the Full Bench in Ganpatrao Raojirao Desai v. Balavant Krishnaji Desai (1965-2 Mys LJ 768). The full Bench has held that after a decree is made under O. 20 R. 18 (1) it becomes functus officio and that it has no power to correct any errors that may be committed by the Deputy Commissioner in the matter of giving effect to the decree under O. 20 R. 18 (1). What has been laid down by the Full Bench is that the Civil Court after it passes the decree has not been

clothed with the power of correcting mistakes that may be committed by the Deputy Commissioner functioning under S. 54 of the C. P. C. It is necessary to note that the Full Bench has not laid down that the Civil Court has no power to modify or review the decree made by it under O. 20 R. 18 (1) of the C. P. C. It is impossible to take the view that the Civil Court will not have the power to amend its own decree or to make a further preliminary decree or to review its own decree. The view taken by the Full Bench in the aforesaid case therefore, does not, in any way, conflict with the view which we have taken in this case.

9. The only other question that survives for consideration is as to whether the application for adjustment of the shares consequent upon the death of the second plaintiff in this case, can be made to this court or to the court of first instance. It is clear from the facts of Phoolchand's case (AIR 1967 SC 1470) that the decree for partition ultimately stood merged in the decree made by the Mahkma Khas (Privy Council) of the State of Jaipur. But, before the final decree could be made some of the parties died and an application for adjustment of the shares was made to the court of first instance and not to the appellate court or the court of Mahkma Khas. It is the decision of the court of first instance on such an application that was challenged in the High Court which ultimately came before the Supreme Court. It is clear from these facts that though the preliminary decrees stood merged in the decree of the superior court, the application was made to the court of first instance. It is no doubt true that this question was not directly debated before the Supreme Court. But, it appears to us, having regard to the view taken by the Supreme Court in para 7 of its Judgment, the proper court to which such an application can be made is the court of first instance and not the appellate court even if the decree of the court of first instance was modified by the appellate court. The reason for this view of ours is that the Court in such a case is not called upon to review the decree or to amend the decree. It is only the court which made the decree that can amend or review its own decree. But, in a case like this, what is prayed for is the passing of a further decree in the light of the events that have taken place subsequent to the passing of the decree under O. 20 R. 18 (1) of the C. P. C. Therefore, when the court is approached with such an application, it is not asked to sit in judgment over the decree already made under O. 20 R. 18. What it is called upon to do is to adjust the right of the parties in view of the subsequent events that have taken place. We, therefore, see no reason why the court of first instance cannot be approached with such an application. Besides, the court of first instance will be in a better position to deal with the case as it may have to take evidence if the circumstances of the case so demand. An application for a further decree adjusting the rights of the parties consequent upon the death of the second plaintiff can be filed in the court of first instance and not in this court. As the learned counsel for the applicant in I. A. No. 1 submitted that he withdraws the application I. A. No. 1 and that he proposes to file an appropriate application in the court of first instance in the light of the observations made in this order, it is enough to dismiss the application I. A. No. I as withdrawn. No costs.

Application dismissed.

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G. N. SABHAHIT, J.

Palthur Raja Saheb, Petitioner v. Noor Mohemed Saheb (Deceased) and others, Respondents.

Civil Revn. Petn. No. 611 of 1976, D/- 20-12-1977.*

Civil P. C. (5 of 1908), O. 22. R. 1 — Decree of eviction — Revision against — Death of decree-holder pending revision —Rights of legal representatives — Legal representatives are entitled to defend the benefit that has accrued to the estate. Case law discussed. **(Para 7)**

Anno: AIR Comm. C. P. C. (8th Edn.) O. 22, R. 1, Notes 4, 18 A

Cases Referred: Chronological	Paras
AIR 1976 SC 2358	5, 6
AIR 1973 SC 2110	4, 6
(1973) CRP No. 2495 of 1973 (Kant)	3, 4, 5

M. R. Achar, for Petitioner; T. S. Ramachandra, for Respondents.

ORDER:— The Landlord obtained a decree in H.R.C. No. 65 of 1975 against the tenant for eviction in the Court of

*(Against order of Dist J. Bellary D/- 27-1-1976).

the Munsiff, Bellary, under Cl. (j) of S. 21 (1) of the Karnataka Rent Control Act, 1961, on 31-7-1975. The tenant went up in Revision to the District Judge, Bellary, in H.R.C. Revision Petition No. 9 of 1975 and the learned District Judge, on hearing, dismissed the Revision Petition as devoid of merits by his order dated 27-1-1976. Aggrieved by the said order, the tenant has presented the present Revision Petition. After the Revision Petition was filed, the landlord Noor Mohemed Saheb died and his legal representatives, viz., the widow and sons, were brought on record.

2. The learned Advocate for the Revision Petition vehemently contended that since the original landlord was no more the cause of action did not survive in favour of his legal representatives and without more, the Revision Petition should be allowed.

3. The learned Advocate relied on a decision of this Court rendered in C. R. P. No. 2495 of 1973 (Kant) wherein this Court held on the facts of that case that cause of action under Cl. (j) did not survive in favour of the legatees. The learned Advocate submitted that the same holds good in the present case also and that the Revision Petition should be allowed holding that the benefit of the decree obtained by the landlord does not enure to the benefit of his widow and sons — the legal representatives.

4. On going through the order passed in C.R.P. No. 2495 of 1973 (Kant), it becomes clear that in that case, the L. Rs brought on record were legatees who got the assets of the landlord by will. It was submitted before His Lordship in that case that the legatees could not sue and defend the benefit accrued to the estate of the deceased. His Lordship Justice Venkataswami, relying on the observations made in the case of Smt. Phool Rani v. Sh. Naubat Rai Ahluwalia (AIR 1973 SC 2110) held that the cause of action did not survive in favour of the legatees and that they were not entitled to defend the benefits accrued to the estate of the deceased.

5. The learned Advocate appearing for the respondents submitted that the ruling rendered by the Supreme Court in Phool Rani's case has been subsequently set aside in the case of Shantilal Thakordas v. Chimanlal Maganlal Telwala (AIR 1976 SC 2358) and he further distinguished the facts of the present case from the facts of the case in C. R. P. No. 2495 of 1973 (Kant). He submitted that in C. R. P. No. 2495 of 1973 (Kant), the L. Rs brought on record were legatees who claimed under a will, whereas in the instant case, they are the widow and sons of the deceased who succeeded to the property on the death of the landlord.

6. Moreover, he invited my attention to the observations of the Supreme Court in Phool Rani's case (AIR 1973 SC 2110) wherein the Supreme Court has observed (at p. 2113):

"Cases of the first category are distinguishable because the decisions therein are explicable on the basis, though not always so expressed, that the estate is entitled to the benefit which, under a decree has accrued in favour of the plaintiff and therefore the legal representatives are entitled to defend further proceedings, like an appeal, which constitute a challenge to that benefit."

The Supreme Court has put in the first category, the cases in which the death of the plaintiff occurred after a decree for possession was passed in his favour, say, during the pendency of an appeal filed by the unsuccessful tenant. In such cases, the Supreme Court clearly held, that the estate of the deceased is entitled to the benefit which under a decree has accrued to the deceased plaintiff. Therefore, the legal representatives are entitled to defend the further proceedings. These observations of the Supreme Court in Phool Rani's case, are left undisturbed in the case of Shantilal Thakordas v. Chimanlal Maganlal Telwala (AIR 1976 SC 2358).

7. The present case falls in that category. Here, the deceased-plaintiff had already obtained a decree for eviction of the tenant from the suit premises. The decree was confirmed by the learned District Judge. It is the tenant who has come up in revison before this Court and it is during the pendency of this Revision Petition, that the landlord died. That being so, it becomes obvious that the L. Rs, who are none else than the widow and sons of the deceased, are entitled to defend the benefit that has accrued to the estate and the present Revision Petition which constitutes a challenge to that benefit, can be resisted by the legal representatives. The question of survival of cause of action, as such, does not arise in cases like the present one.

8. That being so, I hold that there is no substance in the plea raised by the learned Counsel for the Revision Peti-

tioner that the legal representatives of the deceased landlord cannot defend the benefit accrued to the estate of the deceased landlord during his lifetime. No other point was submitted for my consideration. The Revision Petition, therefore, is dismissed as devoid of merits. The petitioner, however, is granted three months' time to vacate. No costs.

Revision dismissed.

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K. S. PUTTASWAMY, J.

M. Nagaraj and another, Petitioners v. The Controller of Customs and Central Excise, Bangalore, Respondent.

Writ Petn. No. 7836 of 1977, D/- 13-12-1977.

(A) Customs Act (52 of 1962), Section 115 (2) — Non-return of car after payment of redemption fine, for non-payment of penalty levied separately — Action of authorities held unjustified and illegal.

The Central Excise Authorities instituted proceedings against the owner of the car on seizing the smuggled goods and the car in which they were carried. The Collector of Central Excise directed confiscation of the car and its redemption on payment of certain fine. The Collector also ordered confiscation of the smuggled goods and the amount of Indian currency seized from the owner. The Collector further imposed heavy personal penalty on the owner. The owner deposited the fine which was ordered to be adjusted towards redemption of the car. The owner of the car moved the Collector for return of the car. As the owner had not paid the penalty, the Collector did not comply with the demand:

Held, that, so far as the car was concerned, the Collector's order was an independent order and was clearly severable from the other orders made by him against the owner. Secondly, the owner was permitted to redeem the car on payment of certain redemption fine which admittedly had been paid by him. On the exercise of the option and the payment of redemption fine, the owner had become the absolute owner of the car and therefore, he became entitled for its return from the Collector notwithstanding the failure to pay the personal penalty imposed on him or any other proceeding pending against him or by him before any other authority. Therefore, there was no justification whatsoever for the collector for not returning the car to the owner when once he had become the absolute owner and was entitled for its return under the very order of the Collector. (Paras 4, 6)

Anno: AIR Manual (3rd Edn.) Customs Act, S. 115 N. 1.

(B) Constitution of India, Art. 226 — Alternative Remedy — Customs Act (52 of 1962), S. 128 — Order of Collector for confiscation of car carrying smuggled goods and option of its redemption on payment of fine — Payment of fine by the owner and appeal filed against order of Collector — Refusal of Collector to return the car even after payment of fine — Writ petition by owner for return of car — Held that owner was not pursuing parallel remedy by appeal and writ petition was not barred on that ground.

The owner would be entitled to the return of the car even if he does not succeed in his appeal as he was depending on the very order of the Collector and the fulfilment of the terms thereof by him to claim relief in writ petition. Therefore, he was not pursuing parallel remedies one before the appellate authority and another before the High Court for one and the same relief. Therefore it cannot be contended that the High Court should decline to exercise discretion in favour of the owner of the car. (Para 6)

Anno: AIR Comm. Constitution of India, Art. 226, N. 19.

J. Jeshtmal, for Petitioners; U. N. Narayana Rao, Sr. Central Govt. Standing Counsel, for Respondent No. 1.

ORDER:— Petitioner No. 1 is the transferee of an Ambassador car bearing Registration No. MYO 1605 that was originally owned by petitioner No. 2. As the said transfer has no bearing and as the interests of the petitioners are common, I will refer to them as petitioner in the course of my order.

2. In connection with the alleged smuggling activities of petitioner No. 2, the Central Excise Authorities acting under the Customs Act of 1962 (Central Act No. 52 of 1962) (hereinafter referred to as 'the 1962 Act') instituted proceedings against him for seizure of Metallic yarn and Fabrics of foreign origin and a car bearing Registration No. MYO. 1605. In order No. C. No. VIII/10-11-12/74 cus. O. R. 8-9/74) dated 28-2-1977 issued on 28/29-6-1977, the Collector of Central Excise, Bangalore, inter alia directed the confiscation of car bearing Regisration No. MYO. 1605 and its redemption by the petitioner on payment of a fine of Rs. 5,000/- under S. 115 (2) of the Act. In this Writ Petition I am concerned only with the release of Car No. MYO. 1605. It is necessary to set out the operative portion of the order of the Collector for a proper understanding and determination of the case and the same reads thus:—

"Accordingly ordered as follows:—

(1) I order the outright confiscation of 6,210 bobbing of metallic yarn, 4,861 yards, 17.40 metres and 6 tagas of synthetic fabrics of foreign origin totally valued at Rs. 2,05,630/- under S. 111 (d)/111(p) of the Customs Act, 1962.

(2) I also order confiscation of Car MYO 1605 now in departmental custody and Car MYQ. 4345 which was released provisionally to its owner through B. Srinivas and was not produced before me for adjudication under S. 115 (2) of the Customs Act, 1962. In lieu of confiscation, the owner is permitted to redeem the Car MYO-1605 on payment of a fine of Rs. 5,000 (Rupees Five thousand only). The said fine now adjudged may be adjusted out of the security deposit of Rupees Rs. 10,000 (Rupees ten thousand only) and the car be restored to the owner if he so desires. The car bearing registration No. MYQ-4345 having not been produced before me in terms of the conditions of Bond, I order appropriation of the cash Security in a sum of Rs. 5,000/- (Rupees five thousand only) deposited by the party.

(3) I further order outright confiscation of Indian Currency amounting to Rs. 10,000 (Rupees ten thousand only) seized from Venkatesh, under Sec. 121 of the Customs Act, 1962.

(4) I also impose the following personal penalties on the undermentioned persons under S. 112 (b) (i) of the Customs Act, 1962.

1. B. Srinivas. Rs. 1,00,000/-"
(Rupees one lakh only)
2. B. Venkatesh. Rs. 1,00,000/-"
(Rupees one lakh only)

3. As can be seen from para 2 of the order the petitioner had already deposited a sum of Rs. 5,000/- as security deposit and the same has been ordered to be adjusted towards the redemption fine ordered by the Collector for the release of the car. Evidently to obtain the benefit of para 2 of the order of the Collector, the petitioner formally exercised the option for redemption of the car by a letter addressed to him on 7-7-1977 (Exhibit C). After exercising the option on 7-7-1977, the petitioner who had become entitled for the return of the car moved the Collector of Central Excise and his subordinates for the return of the car. As the collector did not comply with the demand, the petitioner has approached this Court under Art. 226 of the Constitution for a Mandamus to the Collector to release and restore car bearing Registration No. MYO 1605 forthwith.

4. In order to decide the claim of the petitioner, it is necessary to determine the legal effect of the order D/-28-2-1977 of the Collector of Central Excise in so far as it relates to the Ambassador Car bearing Registration No. MYO 1605. So far as the car is concerned, the Collector's order is an independent order and is clearly severable from the other orders made by him against the petitioner. It is in no way dependent on the other orders passed by the Collector like the confiscation of bobbins of metallic yarn, synthetic fabrics or the levy of personal penalty on the petitioner. Secondly the petitioner has been permitted to redeem the car on payment of a redemption fine of Rs. 5,000/- which admittedly has been complied by him in all respects. On the exercise of the option and the payment of redemption fine, the petitioner has become the absolute owner of the car and therefore he became entitled for its return also from the Collector notwithstand-

ing the failure to pay the personal penalty imposed on him or any other proceeding pending against him or by him before any other authority.

5. As the Collector did not respect and implement his own order and his subordinates did not comply with his order, the petitioner has been compelled to approach this Court for relief under Art. 226 of the Constitution.

6. In my view, there was no justification whatsoever for the Collector or his subordinates for not returning the car to the petitioner when once he had become the absolute owner and was entitled for its return under the very order of the Collector. Shri U. L. Narayana Rao, learned counsel for the respondent, urged that the petitioner had filed an appeal challenging the order of the Collector before Central Board of Excise and Customs, New Delhi, and therefore he was not entitled for the return of the car and in any event I should refuse to exercise my power under Art. 226 of the Constitution. Shri Jeshtmal appearing for the petitioner admitted that the petitioner has filed an appeal challenging the seizure of articles, imposition of penalty and the order of confiscation of car passed by the Collector. But he contended that the same does not in any way disentitle the petitioner for seeking relief for the release of the car from the Collector of Central Excise or from this court. In this appeal before the Central Board of Excise and Customs, the petitioner, it is true, has challenged the confiscation of the car. In case he succeeds in that challenge before the Central Board of Excise and Customs, he will undoubtedly be entitled for the return of the car. Assuming that the petitioner does not succeed in his appeal, even then also he is entitled for the return of the car. In this case, the petitioner is depending on the very order of the Collector and the fulfilment of the terms thereof by him to claim relief before this court. In my view, the petitioner is not pursuing parallel remedies one before the Central Board of Excise and Customs and another before this court for one and the same relief and therefore there is no merit in the contention of Shri U. L. Narayana Rao that I should decline to exercise my discretion in favour of the petitioner.

7. Shri U. L. Narayana Rao, learned counsel for the respondent urged that proceedings for attachment and disposal of car bearing registration No. MYO. 1605 under S. 142 of the 1962 Act are pending and therefore I should not exercise my discretion in favour of the petitioner. Shri Jeshtmal, learned counsel for the petitioner, has produced the show cause notice dated 28-11-1977 received by the petitioner with a memo. From a reading of the show cause notice, it is clear that the Assistant Collector of Central Excise, III Division, Bangalore, has only issued a show cause notice for non-payment of the personal penalty imposed against the petitioner, and that there is no attachment of the car subsisting or any further order for the disposal of the car under S. 142 of the 1962 Act. In my view, it would be unjust to hold up these proceedings to enable the Assistant Collector of Central Excise to complete his proceedings under S. 142 of the 1962 Act.

8. As the petitioner is clearly entitled for the return of his car and that the Collector of Central Excise has illegally and without any justification has not released the same for an unreasonably long period, he is entitled for a writ in the nature of mandamus for the return of the car. I therefore, direct the issue of a writ of mandamus to the respondent for the release of the car within three days from the date of receipt of the order/ Writ of this court.

9. Rule made absolute. Petitioner is entitled to his costs. Advocate's fee Rs. 250/.

Writ petition allowed.

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G. K. GOVINDA BHAT C. J. AND M. N. VENKATACHALIAH, J.

M. R. Nanjunda Setty, Appellant v. Land Tribunal, Somwarpet Taluk and another, Respondents.

Writ Appeal No. 53 of 1976, D/- 7-11-1977.*

Karnataka Land Reforms Act (10 of 1962), S. 48-A (5) — Constitution of India, Art. 226 — Order of Tribunal under S. 48A (5) — Must be speaking order — High Court in writ proceedings cannot examine record and try to support conclusions of Tribunal. W. P. No. 5739 of 1975 D/- 8-12-1975 (Kant), Reversed.

An order of a Tribunal which is not a speaking order is void in law. It is not for the High Court to sit as an appellate Tribunal to examine the records and justify the conclusion of the Tribunal. That is not the function of this Court under Art. 226. (W. P. No. 5739 of 1975, D/- 8-12-1975 (Kant), Reversed).

If the order of the Tribunal is not a speaking order, that calls for interference under Art. 226 and it should be quashed and the matter remitted back to the Tribunal for adjudication afresh. (Paras 4 and 5)

Anno: AIR Comm. Constitution of India (2nd Edn.), Art. 226, N. 59.

K. S. Gourishankar, for Appellant; V. C. Brahmarayappa, Govt. Pleader, for Respondent No. 1.

GOVINDA BHAT, C. J.:— This writ appeal preferred by a land-holder is directed against the order dated 8-12-1975 made by Venkataramiah, J., in W. P. 5739 of 1975 rejecting the writ petition at the preliminary hearing stage.

2. The appellant is the holder of three agricultural lands comprised in Survey Nos. 10/1, 11/2 and 89/1 of Bychanahalli village, Kushalangar Taluk, Coorg District. The second respondent made an application before the Land Tribunal, Somwarpet Taluk, Coorg District, under S. 48-A of the Karnataka Land Reforms Act, 1961, for grant of occupancy right in respect of the aforesaid three lands alleging that he is a tenant of the lands personally cultvating the same immediately prior to 1-3-1974. On the said application, notice was issued to the appellant land-holder. It is relevant to observe that before notice was issued to the appellant, the application of the second respondent in form No. 7 was not verified by the Tahsildar with reference to the entries in the Revenue records as he is required to do under R. 19 of the Rules made under the Act. The Tahsildar has merely noted that he has 'verified'. He has not stated whether the name of the applicant appears in the Record of Rights as the tenant of the lands in question. The appellant's son appeared before the Tribunal and he was examined. The second respondent was examined and on his behalf the Patel of the village was also examined. Thereafter, the Tribunal made an order which reads thus:—

"28-10-75— Case called. The applicant is present. On behalf of the landlord, his son M. N. Ramachandrappa appeared. He gave deposition on behalf of his father. Witness of Patel is recorded. Although the applicant has no records, according to enquiry, the Tribunal has come to conclusion that the applicant is the tenant of the lands. Therefore, the lands have vested in Government. The Tribunal determines that the applicant is the ordinary tenant and confirms the occupancy of Sy. No. 10/1, 11/2 and 89/1 of Bychanalli village in the name of the applicant Parivarada Jourappa."

The order of the Tribunal granting occupancy right to the second respondent was challenged by the appellant before this Court in W. P. No. 5739 of 1975. The matter came up before Venkataramiah, J. for preliminary hearing. The learned single Judge appears to have directed the counsel for the appellant to produce the deposition of the witnesses and after discussing the evidence of the witnesses he rejected the writ petition holding that the Tribunal has found, on the material placed before it, that the second respondent was a tenant and was, therefore, entitled to be registered as its occupant.

*(Against Judgment of Venkataramiah J. in W. P. No. 5739 of 1975, D/- 8-12-1975.)

3. The order of the Tribunal, it will be seen, is not a speaking order. It does not state as to what is the evidence given by the contesting parties and their witnesses. It also makes no reference to the presumption arising under S. 133 of the Karnataka Land Revenue Act and does not state whether the same has been rebutted in any manner by the second respondent. The Record of Rights shows that the name of the second respondent does not find a place therein. On the contrary the name of the land-holder has been shown as the person cultivating the land immediately prior to 1-3-1974. The burden, therefore, is clearly on the second respondent to show that the entries in the Record of Rights are not correct. It is for the Tribunal, which is the final authority on the question of fact, to apply, its mind with reference to the material on record and say whether the presumption arising under S. 133 of the Land Revenue Act has been rebutted or not. The Tribunal has also to state what is the evidence or other material placed before it on the basis of which it has come to the conclusion that the lands in question are tenanted lands. whether the same have vested in the State Government on 1-3-1974 and whether the applicant before it is the person cultivating the land immediately prior to 1-3-1974.

4. It is settled law that an order of a Tribunal which is not a speaking order is void in law. It is not for this Court to sit as an appellate Tribunal to examine the records and justify the conclusion of the Tribunal. That is not the function of this Court under Art. 226 of the Constitution. If the order of the Tribunal is not a speaking order, that calls for interference under Art. 226 of the Constitution, and the order of the Tribunal should be quashed and the matter remitted back to the Tribunal for adjudication afresh.

5. In our opinion, the learned Single Judge was in error in himself examining the material on record and trying to support the conclusion of the Tribunal. That is the function exclusively of the Tribunal. Therefore, the learned Single Judge was in error in rejecting the writ petition.

6. Accordingly, we allow this appeal and, in reversal of the order of the learned Single Judge, quash the order of the Tribunal dated 28-10-1975 made in L. R. M. /VI/E/7/75/76 and remit the matter to the Tribunal for adjudication afresh in the light of this order. Parties to bear their own costs. Ordered accordingly.

Appeal allowed.

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G. K. GOVINDA BHAT, C. J. AND M. N. VENKATACHALIAH, J.

Koragamma Parvathi Shedthi, Appellant v. Coondapur Taluk Land Tribunal and another, Respondents.

Writ Appeal No. 447 of 1976, D/- 26-10-1977.*

Karnataka Land Reforms Act (10 of 1962), S. 48-C — Temporary injunction — Order made after spot inspection by chairman and members of the Tribunal — Order signed only by the chairman and not by members — Order made is not an order of the Tribunal — It is a nullity. Order in W. P. No. 8042 of 1976 D/- 17-9-1976 (Kant), Reversed.

The order which has been signed only by the Chairman of the Tribunal cannot be construed as an order of the Tribunal. The order of the Tribunal was not dictated in open Court when all the Members who constituted the Tribunal sat as a Tribunal. It was written by the Chairman and signed about a month after the date of local inspection. Certain reasons have been given for making the order. There is nothing on record to show that the members of the Tribunal have agreed not only with the order to be issued, but also with the reasons given. Signatures of the Members are necessary to render the order one made by the Tribunal. The fact that the original order has been signed only by the Chairman and not by the other Members, renders the order, inffective and inoperative. In the eye of law, it is no order at all. This is not a technical error. It is an infirmity which goes to

*(Against Judgment of Malimath J. in W. P. No. 8042 of 1976, D/- 17-9-1976.)

AV/AV/A50/78/ABO/VBB.

the root of the matter: W. P. No. 8042 of 1976, D/- 17-9-1976 (Kant.), Reversed. (Para 4)

P. Vishwantha Shetty, for Appellant; P. R. Mohan Rao for Padubidri Raghavendra Rao (for No. 2) and K. S. Puttaswamy, I Addl. Govt. Advocate (for No. 1.) for Respondents.

GOVINDA BHAT C. J. :—This writ Appeal arising under the Karnataka Land Reforms Act, 1961, is directed against the order dated 17-9-1976 made in W. P. No. 8042 of 1976 by Malimath, J., dismissing the Writ Petition at the preliminary hearing stage.

2. The second respondent Subbakka Shedthy is the wife of Manjayya Shetty. The petitioner is the land-holder. The second respondent made an application before the Land Tribunal, Coondapur (respondent No. 1) on 3-3-1976 to grant her occupancy right in respect of several items of agricultural lands situate in Chittur village of Coondapur Taluk. In the said proceedings, she made an application under Section 48-C of the Act for issue of an order of Temporary Injunction against the land-holder from interfering with her alleged possession of the lands. On that application, the Tribunal made local inspection in the presence of the parties on 17-5-1976. On 15-6-1976 an order was made granting the application for Temporary Injunction in respect of 8 items of agricultural lands. It is relevant to state at this stage that the original records, which we had perused on an earlier occasion, show that the Chairman and three members of the Tribunal were present when the decision was taken; but the order has been signed only by the Chairman and not by the other Members. This fact has been verified by us. The order signed by the Chairman of the Tribunal states —

"All the members of the Tribunal are therefore, unanimously of the opinion that on the facts of the case and also on the materials found at the time of local inspection, the applicant has been in actual possession of the lands detailed below."

The said order was challenged by the appellant before this Court under Art. 226 of the Constitution. When the matter came up before Malimath, J., the learned single Judge dismissed the writ petition at the preliminary hearing stage on the ground that the order made by the Tribunal being a discretionary order, there is no ground to issue rule nisi.

3. The ground which was pressed before us seriously, viz., that the impugned order of the Tribunal has not been signed by the members other than the Chairman was not urged before the learned single Judge. With the leave of the Court, the learned counsel for the appellant raised that ground in this appeal.

4. We do not propose to deal with the other grounds urged by the learned counsel for the appellant since, in our view, the order which has been signed only by the Chairman of the Tribunal cannot be construed as an order of the Tribunal. The order of the Tribunal was not dictated in open Court when all the members who constituted the Tribunal sat as a Tribunal. It was written by the Chairman and signed about a month after the date of local inspection. Certain reasons have been given for making the order. There is nothing on record to show that the members of the Tribunal have agreed not only with the order to be issued, but also with the reasons given. If they had signed the order, it would have conclusively shown that though the order was written by the Chairman, the members of the Tribunal have agreed with the reasons given therein. Let us envisage a case where the members do not agree with the conclusion of the Chairman but the Chairman issues the order — interim or final — signed by himself solely, stating in the order that the Tribunal has unanimously come to that decision. We have come across several orders where the members have differed from the Chairman. There are Tribunals constituted under various Acts, e.g., the Income-tax Act, 1961, The Karnataka Sales Tax Act, etc., We have not come across any case where the Chairman alone signs the order and the members do not sign. Signatures of the members are necessary to render the order one made by the Tribunal. The fact that the original order has been signed only by the Chairman and not by the other members, renders the order, in our

opinion, ineffective and inoperative. In the eye of law, it is no order at all. This is not a technical error. It is an infirmity which goes to the root of the matter.

5. Therefore, reversing the order of the learned Single Judge, we allow this appeal and quash the impugned order dated 15-6-1976, reserving liberty to the Tribunal to take up the matter afresh and make an order in accordance with law after giving opportunity to both the parties of being heard and placing all the relevant material before it. All other contentions are left open.

6. In the cricumstances, the parties are directed to bear their own costs.

Appeal allowed.

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V. S. MALIMATH AND D. B. LAL, JJ.

M/s. Mckenzies Ltd., Bombay, Petitioner v. State of Mysore (Karnataka) and others, Respondents.

Civil Revn. Petn. No. 982 of 1974, D/- 23-9-1977.*

(A) Arbitration Act (10 of 1940), Section 5 — Grant of leave for revoking authority of arbitrator — Principles — Court should be satisfied that substantial miscarriage of justice will take place.

Before the Court exercises its discretion to give leave to revoke an arbitrator's authority, it should be satisfied that a substantial miscarriage of justice will take place in the event of its refusal. AIR 1966 SC 1036, Foll. (Para 3)

It is now well settled that the Arbitrators functioning under the Arbitration Act are not governed by the strict procedure prescribed by the Code of Civil Procedure and the rules regarding evidence contained in the Evidence Act. The Arbitrators are entitled to regulate their own procedure. They are not under an obligation to frame issues as provided in the Code of Civil Procedure. The Arbitrators are also not under an obligation to record reasons for their decision. They are entitled to decide both questions of law and of fact. Such being the legal position, merely because the Arbitrators, who have framed issues pertaining to jurisdiction, limitation and merits of the case, have decided to record evidence on all issues and postponed their decision on issue No. 1 pertaining to jurisdiction to a later date, it is impossible to take the view that failure to grant permission to revoke the authority of the Arbitrator appointed by the State will result in substantial miscarriage of justice. Even if it is assumed that it may be found in this case at a later stage that some or all the claims made by the respondent State are not arbitrable, it cannot be said that the inconvenience or trouble caused by leading evidence on all the issues will have the effect of substantial failure of justice unless permission sought for under Section 5 of the Act is granted to the State. (Para 4)

It cannot be said that the Arbitrators lacked jurisdiction to go into the merits of the claim of the petitioner without the Arbitrators recording a finding in the first instance on issue No. 1. The nature of the case pleaded by the petitioner, in the instant case clearly indicates that the question regarding arbitrability of the claims raised by the State is not a pure question of law; but a mixed question of law and fact. Hence, in the very nature of things, the Arbitrators cannot record a satisfactory finding on the first issue pertaining to jurisdiction without the parties leading evidence in regard to the merits of the claim made by the State. (Para 5)

In the instant case even the Advocate General who appeared for the State at earlier stages of the proceedings was satisfied with the procedure which the Arbitrators had prescribed for themselves in this matter. If the contesting party itself agreed with the procedure prescribed by the Arbitrators and further participated in the proceedings before the Arbitrators on that basis, it cannot be said that the procedure was not the right and legal procedure to be followed by the Arbitrators. (Para 5)

Anno: AIR Manual, (3rd Edn.), Arbitration Act, S. 5, N. 4

*(Against order of 2nd Addl. Civil J. Bangalore, D/- 2-11-1973.)

(B) Civil P. C. (5 of 1908), Section 115 (1) (c) — Exercise of jurisdiction illegally or with material irregularity — View of Civil Judge that refusal to accord leave to revoke authority of arbitrator under S. 5, Arbitration Act will result in substantial miscarriage of justice, found wholly unjustified — Held decision of Civil Judge rendered under S. 5 was vitiated by the material illegality justifying interference under S. 115 (1) (c). **(Para 6)**

Anno: AIR Comm., C. P. C., (9th Edn.), S. 115, N. 12.

(C) Constitution of India, Art. 133 (1) (c) — Certificate of fitness for appeal — Case not involving any substantial question of law of general importance which is required to be decided by Supreme Court — Principles applied in the case well settled by the Supreme Court decision — Certificate for leave to appeal to Supreme Court, refused. **(Para 8)**

Anno: AIR Comm., Const. of India, Art. 133, N. 15.

(D) Civil P. C. (5 of 1908), Sec. 115 — Revision — Right of the party to secure reliefs at the hands of High Court or power of High Court cannot be taken away by the party obtaining the order challenged in revision. **(Para 2)**

Anno: AIR Comm., C. P. C. (9th Edn.), S. 115, N. 1.

Cases Referred: Chronological Paras

AIR 1973 SC 76 : 1973 Lab IC 407 6
AIR 1966 SC 1036 3, 8

V. Krishnamurthy and V. Tarakaram for Petitioner; R. N. Byra Reddy, Advocate, for Respondent No. 1.

MALIMATH, J.:— M/s. Mckenzies Ltd., Engineers and Contractors, Bombay, have challenged in this revision petition filed under Section 115 of the Code of Civil Procedure, the order of the Second Additional Civil Judge, Bangalore City, made in A. C. No. 14 of 1972, on the 2nd of November, 1973, under Sec. 5 of the Arbitration Act, 1940, (hereinafter referred to as 'the Act'). The facts necessary for decision of this case may briefly be stated as follows:

The petitioner-firm entered into an agreement D/- 23-11-1959 with the 1st respondent-State of Mysore (Karnataka) in connection with construction of Linganamakki Main Dam, S. II, which is part of the Sharvathi Project. The said agreement contained an arbitration clause — Clause 51 — in regard to settlement of certain types of disputes between the parties. It contemplates reference of certain types of disputes to Arbitrators, each of the parties to the agreement nominating one Arbitrator. The petitioner raised certain disputes to be adjudicated by the Arbitrators and proposed Respondent 3 Shri H. C. Sharma as an Arbitrator. The 1st respondent nominated Respondent 2 Shri M. V. A. Setty, Advisor to Government, Irrigation and Power, reserving, however, the right to contend that no matter referred to in the notice of the petitioner could be decided by arbitration under Clause 51 of the agreement on the ground that the disputes referred are not arbitrable under the agreement. The State filed its written statement dealing with the claim made by the petitioner. It appears that the State raised a contention to the effect that all the items referred to arbitration are not arbitrable, that they are barred by limitation and that they are covered by other clauses in the agreement, viz., Clauses 20, 27 and 28. The Two Arbitrators appointed an Umpire and the Board of three Arbitrators held several sittings after notice to the parties. They framed issues arising out of the pleadings, the 1st issue being:

"Are all the claims or any of them arbitrable under the contract?"

Paragraph 8 of the order under revision contains a brief summary of the claim of the petitioner, which may be extracted as follows:

"The claim of the 1st respondent before the arbitrators was for certain amounts towards loss sustained on account of the piecemeal handing over the site in short stretches; because of the inconsistent and insufficient supply of surki mortar by the State of Mysore; change over from the Surki mortar to Cement mortar which involved purchase of huge quantity of sand at forbidding rate and execution of the work at certain structures of greater depths which in turn put the contractor to extra lifts and leads. In respect of the above, the 1st respon-

dent put forward a claim to more than Rs. 8,00,000/-."

After the issues were settled, when the case was posted on the 24th of December, 1971, the Arbitrators suggested that all the questions including the questions of limitation and jurisdiction may be decided very conveniently after recording the entire evidence on the ground that the question whether any particular claim was within the clause empowering reference to arbitration and if so, to what extent, was not a pure question of law but involved questions of fact. The then Advocate General who appeared for the State appears to have agreed to this procedure. Several documents were marked on both the sides on the 23rd and the 24th of March, 1972. The then Advocate General appears to have submitted to the Arbitrators that if any oral evidence is to be led in this case, such evidence also should be led before final arguments are heard. In view of the stand taken by the then Advocate General, time was granted to the petitioner to file a list of witnesses on 24-3-1972. When the present Advocate General Sri R. N. Byra Reddy was appointed in place of the then Advocate General Shri S. G. Sundra Swamy, he, raised a contention that the question regarding arbitrability of the disputes, which bears on the question of jurisdiction of the Arbitrators, should be decided in the first instance. In other words, he pressed for a decision on Issue No. 1, which we have extracted above, before the Arbitrators proceed to record evidence on the merits of the disputes. After hearing the learned Counsel for both the sides, the Arbitrators have recorded their decision, a copy of which was placed for our perusal during the course of the arguments, and it reads as follows:—

"The Arbitrators have heard both parties in regard to jurisdiction and limitation. The Arbitrators have also studied the various citations submitted by both the parties in connection with jurisdiction and limitation. It is recalled that in the very first hearing on 10-11-1971, the Arbitrators permitted both the parties to frame such issues as they desired the Arbitrators to decide keeping in view of course their submissions made also. Both the parties submitted their issues and in consultation with them and with their acceptance thereto, the Arbitrators finalised the issues and furnished a copy of the same to both the parties. Neither party at that stage desired that the Issues Nos. 1 and 2 to be treated as preliminary issues. As such, the proceedings have been progressing thereafter. It is also recalled that both the parties have agreed to extension of time in connection with all issues and the Arbitrators have been perusing the same. Having heard both the parties and having nearly 10 sittings, justice will not be met, if we do not continue the proceedings and as such, the Arbitrators are of the opinion that the hearing of all issues should continue."

It is thus, when the attempt of the State to persuade the Arbitrators to record a finding on Issue No. 1, failed, that an application was filed under Sec. 5 of the Act in the Court of the Civil Judge, Bangalore City, on the 29th of June, 1972, seeking leave of the Court to revoke the authority of the Arbitrator Shri M. V. A. Shetty— Respondent 2 — appointed by the State. The said application was seriously contested by the petitioner. The learned Civil Judge has, by his order made on the 2nd of November, 1973, granted leave to the State to revoke the authority granted to the 2nd respondent Arbitrator. It is the said order that is challenged by the petitioner in this petition under Sec. 115 of the Code of Civil Procedure.

2. The learned Advocate General appearing for the State, filed a Memo along with an order of the State Government dated the 16th of January, 1974, revoking the authority of Respondent 2 as Arbitrator and contended that in view of the said order of the State Government, this revision petition does not survive. The order under revision was made on the 2nd of November, 1973 and the present revision petition was filed on the 30th of January 1974. It is on the 16th of January 1974, that the State Government, on the basis of the leave granted by the learned Civil Judge, passed the order, revoking the authority given to Respondent 2 as an Arbitrator. It is no doubt true that the petitioner had not obtained any order from the Court of the Civil Judge,

staying the operation of its own order on the ground that they need some time for filing a revision petition in this Court. As there was no stay order operating against Respondent 1, there was also no legal hurdle in its way for revoking the authority granted to Respondent 2 having regard to the fact that it had obtained leave from the Court on the 2nd of November, 1974. But, merely because action has been taken as aforesaid by the 1st respondent to revoke the authority of the 2nd respondent, we fail to see how the present revision petition can be rendered incompetent. The right of the party to secure reliefs at the hands of this Court or the power of this Court under Sec. 115 of the Code of Civil Procedure, cannot be taken away by the party obtaining the order challenged in revision. If the contention of the learned Advocate General is accepted it would mean that the right of the party or the power of the Court can successfully be curtailed by the party obtaining leave under Section 5 of the Act revoking the authority of the Arbitrator without waste of time and well before the other party approaches this Court for relief. The learned Advocate General has not assigned any good reasons for persuading us to take the view that the order made by the State Government on the 16th of January, 1974, referred to above, has the effect of rendering this revision petition incompetent or infructuous. Hence, we overrule the objection of the learned Advocate General.

3. Shri V. Krishnamurthy, learned counsel for the petitioner contended that the learned Civil Judge has committed a material illegality in according leave to the 1st respondent under Sec. 5 of the Act. It was maintained that the Court cannot accord leave to revoke the authority of the Arbitrator, unless it is satisfied that substantial miscarrage of justice would take place in the event of its refusal. It was further contended that by recording a clearly unsustainable finding that substantial injustice will take place in the event of refusal to grant leave to remove the authority of the Arbitrator, the Court cannot exercise the power of granting leave under Sec. 5 of the Act. The principles to be borne in mind by the Court in the matter of granting leave under Sec. 5 of the Act for revoking the authority of the Arbitrator, have been laid down by the Supreme Court in M/s. Amarchand Lalitkumar v. Shree Ambica Jute Mills (AIR 1966 SC 1036). The principle laid down by their Lordships of the Supreme Court in para. 13 of the Judgment, may be extracted as follows:—

"We now turn to the legal position which seems to us to be quite clear. Before the Court exercises its discretion to give leave to revoke an arbitrator's authority, it should be satisfied that a substantial miscarriage of justice will take place in the event of its refusal. In considering the exercise by the Court of the power of revocation it must not be forgotten that arbitration is a particular method for the settlement of disputes. Parties not wishing the law's delays know, or ought to know, that in referring a dispute to arbitration they take arbitrator for better or worse, and that his decision is final both as to fact and law. In many cases the parties prefer arbitration for these reasons. In exercising its discretion cautiously and sparingly, the Court has no doubt these circumstances in view, and considers that the parties should not be relieved from a Tribunal they have chosen because they fear that the arbitrators decision may go against them (See Russel on Arbitration 16th Edition, page 54). The grounds on which leave to revoke may be given have been put under five heads:

(1) Excess or refusal of jurisdiction by arbitrator.
(2) Misconduct of arbitrator.
(3) Disqualification of arbitrator.
(4) Charges of Fraud.
(5) Exceptional cases.

....
...."

The aforesaid decision was cited before the learned Civil Judge. The learned Civil Judge, after considering the principle laid down by the Supreme Court in the aforesaid decision, has summarised his findings and recorded his decision in paragraph 27 of his order, as follows—

"As I have pointed out in my discussion above, the arbitrators lack the very jurisdiction to go into the merits

of the claim of the 1st respondent. The arbitrators should have first decided issue framed by them and considered whether the claims put forward by the 1st respondent were arbitrable or not in which event alone, the arbitrators would get the jurisdiction to decide the merits of the case. Their refusal to decide the 1st issue even when it was brought to their notice by the State of Mysore would amount to the arbitrators acting in excess of their jurisdiction. In not granting leave to the State of Mysore to revoke the authority but permit the arbitrators to proceed with the matter, it could be seen that there would be substantial miscarriage of justice, if ultimately, the arbitrators find that the claim is not arbitrable then ultimately the entire proceedings before the arbitrator become void ab initio. The finding of the arbitrators would not enure to the benefit of either party. It is a sheer waste of public funds and unnecessarily investigating into a claim and this could easily be avoided if the arbitrators proceed to decide the first issue and find out whether they have any jurisdiction to consider the claim of the 1st respondent or not? Even though it was specifically pointed out by the State of Mysore that they had no jurisdiction, the arbitrators have not considered it fit to dispose of the question of jurisdiction.

....
...."

It is no doubt true that the learned Civil Judge has recorded a finding to the effect that there would be substantial miscarriage of justice, if leave prayed for the State under Sec. 5 of the Act, is not granted in this case. But, the reasoning given by the learned Civil Judge is that if the issue pertaining to jurisdiction is not decided in the first instance as a preliminary issue, it will lead to a sheer waste of public funds and unnecessarily investigating into a claim which could easily be avoided. He has also held that in the event of the Arbitrators ultimately finding that the claim is not arbitrable, the entire proceedings would become void ab initio. Even assuming that the findings recorded by the learned Civil Judge are correct, we fail to see how the said findings can lead to an inference that refusal to grant leave to the State under Sec. 5 of the Act would result in substantial miscarriage of justice. What the Arbitrators have done is not to decilne to go into the question of jurisdiction raised by the State. They have, in fact, framed a specific issue — Issue No. 1 bearing on the question of jurisdiction, so that they could go into the said question and record their finding on the said question. All that the Arbitrators have done in this case is to take the view that it is not just and convenient to record findings on all the issues, including the 1st issue pertaining to jurisdiction, until evidence is led by the parties on all the issues, including the issues bearing on the merits of the claim. It is necessary to bear in mind that the Arbitrators appear to have taken the view that the questions as to whether particular claims are arbitrable or not under Clause (51) of the Agreement, are not pure questions of law, but, are mixed questions of law and fact and, therefore, they appear to have taken the view that without evidence being led in regard to the nature of the claims of the 1st respondent, it may not be possible for the Arbitrators to record a satisfactory finding on the question of jurisdiction. The learned Advocate General also fairly submitted that if a finding on the 1st issue pertaining to jurisdiction cannot be recorded without evidence being led, there should not be any valid objection for the Arbitrators recording evidence on the 1st issue. What he, however, maintained is that there is no justification for not limiting the leading of evidence to Issue No. 1 and permitting the parties to lead evidence in regard to all other issues as well which issues do not bear on the question of jurisdiction.

4. It is now well settled that the Arbitrators functioning under the Arbitration Act are not governed by the strict procedure prescribed by the Code of Civil Procedure and the rules regarding evidence contained in the Evidence Act. The Arbitrators are entitled to regulate their own procedure. They are not under an obligation to frame issues as provided in the Code of Civil Procedure. The Arbitrators are also not under an obligation to

record reasons for their decision. They are entitled to decide both questions of law and of fact. Such being the legal position, merely because the Arbitrators, who have framed issues pertaining to jurisdiction, limitation and merits of the case, have decided to record evidence on all issues and postponed their decision on issue No. 1 pertaining to jurisdiction to a later date, it is impossible to take the view that failure to grant permission to revoke the authority of the Arbitrator appointed by the State will result in substantial miscarriage of justice. Even if it is assumed that it may be found in this case at a later stage that some or all the claims made by the first respondent are not arbitrable, it cannot be said that the inconvenience or trouble caused by leading evidence on all the issues will have the effect of substantial failure of justice unless permission sought for under Sec. 5 of the Act is granted to the State.

5. It is impossible to agree with the view taken by the learned Civil Judge that the Arbitrators lacked jurisdiction to go into the merits of the claim of the petitioner without the Arbitrators recording a finding in the first instance on issue No. 1. The nature of the case pleaded by the petitioner, the summary of which as made by the learned Civil Judge we have extracted above, clearly indicates that the question regarding arbitrability of the claims raised by the first respondent is not a pure question of law, but a mixed question of law and fact. Hence, in the very nature of things, the Arbitrators cannot record a satisfactory finding on the first issue pertaining to jurisdiction without the parties leading evidence in regard to the merits of the claim made by the first respondent. As the Arbitrators have yet to record a finding on issue No. 1 pertaining to jurisdiction, it is obvious that the Arbitrators cannot be regarded as having clutched jurisdiction which did not vest in them merely because they have postponed consideration of issue No. 1 to a further stage. That merely because the learned Civil Judge feels that it would have been better in the circumstances for the Arbitrators to record a finding on issue No. 1 and not to postpone consideration of the said issue to a later stage, it is impossible to take the view that refusal to grant leave under Sec. 5 of the Act in this case would result in substantial failure of justice. This is not a case in which any allegations of bias or misconduct have been made by the first respondent against respondents 2 and 3. The way in which the Arbitrators have proceeded in this case clearly indicates that they have regulated their procedure in such a manner as to advance the cause of justice by giving full and adequate opportunities to both the parties of adducing evidence in support of their respective contentions on all the issues that arose for consideration. What is of considerable significance is that the learned Advocate General, who appeared for the State at the earlier stage of proceedings before the Arbitrators, agreed for the procedure which the Arbitrators were inclined to follow, viz., of postponing the consideration of issue No. 1 to a later stage after evidence is recorded on all the issues that arose for consideration. As the then Advocate General who appeared for the first respondent agreed to such a procedure being followed, further steps were taken in the matter of marking exhibits by consent of parties. Several documents have been marked as Exhibits on both the sides by consent of parties. The then Advocate General who appeared for the first respondent insisted that if at all oral evidence has to be led in the case, such evidence also should be led before arguments are heard on all the issues that arose for consideration. It is only when there was a change in the counsel for the State by the appointment of another Advocate General that there was change in the stand taken on behalf of the first respondent. We do not say that the State is not entitled to take an appropriate stand in support of its case contrary to the one taken at earlier stages of the proceedings, if the circumstances justify such a stand being taken. But we are narrating these facts only for the purpose of emphasizing that even the Advocate General who appeared for the first respondent at earlier stages of the proceedings was satisfied with the procedure which the Arbitrators had prescribed for themselves in this matter. That is also a relevant matter

to be taken into consideration while deciding an application for according leave under S. 5 of the Act, particularly having regard to the fact that the Court has to bear in mind the question as to whether substantial miscarriage of justice will result in the event of the Court refusing to grant leave under S. 5 of the Act. If the contesting party itself agreed with the procedure prescribed by the Arbitrators and further participated in the proceedings before the Arbitrators on that basis, it is difficult to take the view that the procedure was not the right and legal procedure to be followed by the Arbitrators. We have, therefore, no hesitation in taking the view that the learned Civil Judge was wholly unjustified in holding that refusal to accord leave under S. 5 of the Act to the first respondent will result in substantial miscarriage of justice on the ground that the procedure prescribed by the Arbitrators is likely to result in unnecessary investigation into the merits of the claim by the Arbitrators.

6. The learned Advocate General, however, maintained, that this is not a case for interference under S. 115 of the Code of Civil Procedure, on the ground that the discretion vested in the Court below having been exercised in a particular manner, there is no scope for interference by this Court. In support of his contention, he relied upon the decision of the Supreme Court reported in Hindustan Aeronautics Ltd. v. Ajid Prasad Tarway (AIR 1973 SC 76). It is clear from the judgment of the Supreme Court that on the facts of the case before their Lordships they held that the order of the first appellate Court did not suffer from any illegality. But, in the instant case, the learned Civil Judge having recorded a clearly unsustainable finding to the effect that refusal to grant leave under S. 5 of the Act will result in substantial miscarriage of justice, proceeded to exercise his discretion in favour of the first respondent. By recording a clearly unsustainable finding in regard to the aforesaid aspect, the learned Civil Judge has proceeded to allow the application of the first respondent. As we have recorded a finding to the effect that it is impossible in this case to take the view that refusal to accord leave under S. 5 of the Act will result in substantial miscarriage of justice, it has to be held that the decision of the learned Civil Judge rendered under S. 5 of the Act is vitiated by material illegality, justifying interference by this Court under S. 115 (1) (c) of the Code of Civil Procedure. We, therefore, reject the contention of the learned Advocate General in this behalf.

7. For the reasons stated above, we allow this revision petition, set aside the order of the learned Civil Judge and dismiss the application of the first respondent made under S. 5 of the Act. The petitioner is entitled to his costs.

8. The learned Advocate General orally applied for a certificate to appeal to Supreme Court under Art. 133 of the Constitution for preferring an appeal to the Supreme Court. We are not satisfied that this case involves any substantial question of law of general importance which is required to be decided by the Supreme Court. The principles of law which we have applied in this case are well settled by the Supreme Court in the decision rendered in M/s. Amarchand Lalitkumar v. Shree Ambica Jute Mills Ltd. (AIR 1966 SC 1036). Hence, the certificate prayed for under Art. 133 of the Constitution is refused.

Revision allowed.

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G. K. GOVINDA BHAT C. J. AND M. N. VENKATACHALIAH, J.

Mahalingeswamigalu, Petitioner v. State of Karnataka and others, Respondents.

Writ Petn. No. 3638 of 1975, D/- 13/4/1977.

Karnataka Land Reforms Act (10 of 1962), S. 107 (1) (ii) (as amended by Karnataka Act 1 of 1974) — Expression "Lands held on lease from Government" — Meaning of — Land must be owned by Government and not merely managed by it under S. 25 of Religious and Charitable Institutions Act. (Mysore Religious and Charitable Institutions Act (7 of 1927)).

GU/GU/C122/77/SBB

In order to claim the benefit of cl. (ii) of sub-sec. (1) of S. 107 of the Act what is required is that the lands should be held on lease from the Government. Land can be said to be held on lease from the Government only where they are owned by the Government and not where the Government by virtue of a statutory provision assumes management of the property of a citizen or an institution. (Para 13)

The argument that although the lands belonged to Religious Institution when they were leased by an officer of the Government appointed as manager on the Government assuming management of the lands, the lands are being held on lease from Government is not sound. When the Government assumes management of the property of a religious or charitable institution under S. 25 of the Mysore Religious and Charitable Institutions Act, the property does not cease to be the property of the institution. What is taken over is merly possession and management of the property of the Religious Institution. (Para 13)

B. Veerabhadrappa, for Petitioner; M. P. Chandrakantharaj Urs, Govt. Advocate, P. R. Mohan Rao for Padubidri Raghavendra Rao (for No. 3); S. T. Parthasarathy (for No. 4) and V. R. Govindarajulu (for Nos. 5 to 7), for Respondents.

GOVINDA BHAT, C. J.:— This is a writ petition by a Mathadhipathi preferred under Arts. 226 and 227 of the Constitution, for a writ in the nature of certiorari or other suitable writ or order quashing the proceedings before the Land Tribunal, T. Narasipur Taluk, Mysore District, initiated on the applications of respondents 3 to 7 under S. 48-A of the Karnataka Land Reforms Act, 1961, hereinafter called the Act'.

2. Respondents 3 to 7, claiming that they are tenants of three agricultural lands in Survey Nos. 131, 133 and 134 of Vadayendaballi village, measuring in all about 14 acres 1 gunta, applied to the Land Tribunal, T. Narasipur Taluk, for grant of occupancy under S. 45 of the Act. On receipt of the applications, the Land Tribunal issued notices to the petitioner-Mathadhipathi, in form No. 9, to appear before the Tribunal on 6/8/1975. On service of the said notices, the petitioner-Mathadhipathi has preferred the above writ petition.

3. Two grounds have been urged in this writ petition. The first ground is that the notice in form No. 9 is not proper. This ground was not pressed by Shri Veerabhadrappa, learned counsel for the petitioner, at the hearing. The second ground, which is the only ground pressed at the hearing is that by virtue of S. 107 of the Act all other provisions of the Act, except S. 8, do not apply to the lands in question and, therefore, the Land Tribunal has no jurisdiction to proceed with the case.

4. The short question that arises for decision is, whether by virtue of S. 107 of the Act, all the provisions of the Act, except S. 8, are made inapplicable to the lands in question.

5. In order to appreciate the arguments advanced on behalf of the petitioner, it is necessary to state briefly the relevant facts. The management of the properties of the Mutt was taken over by the Government of Mysore in the year 1937, under the provisions of S. 25 of the Mysore Religious and Charitable Institutions Act, 1927. The management of the properties of the Mutt by the Government continued from 1937 till 1970, when the Government restored the management of the properties to the petitioner-Mathadhipathi.

6. During the period of management of the properties of the Mutt by the Government, the lands in question were leased to tenants by Officers of the Government appointed as managers. The last such lease was made to respondent No. 5 on 8-5-1958. That lease was for a term of five years. It was submitted that although in the auction held by the managers appointed by the Government the fifth respondent became the successful bidder, there was an agreement between respondents 3 to 7 inter se to cultivate the lands in separate shares and pay rent also separately. According to the case of the petitioner, the tenants had surrendered the lands on the expiry of the term of the lease and petitioner was put in actual possession of the lands at the time of restoration of management. It is averred by petitioner that the tenants having obtained an order of injunction from the Civil Court, they are in possession of the lands. The contention of respondents 3 to 7 is that they are tenants personally cultivating the lands immediately prior to 1/3/1974.

7. Section 44 of the Act, as substituted by Act 1 of 1974, vests all tenanted lands immediately prior to 1/3/1974 in the State Government and S. 45 entitles

tenants personally cultivating such lands to obtain registration of occupancy.

8. The case of the petitioner is that by virtue of S. 107 of the Act, the whole of the Act except S. 8, is made inapplicable and that Ss. 44 and 45 being inapplicable to the lands in question, the lands have not vested in the State Government; and that even assuming without conceding that the lands are tenanted lands and that Ss. 44 and 45 and other provisions of Chapter III are applicable, the Tribunal has no jurisdiction to adjudicate on the question of tenancy set up by respondents 3 to 7.

9. The learned High Court Government Advocate Shri Chandrakantharaj Urs appearing for the State, and the learned counsel appearing for respondents 3 to 7, contended that the exemption that had been originally granted to religious and charitable institutions by S. 107 of the Act as it stood prior to its substitution by Act 1 of 1974, was not continued after the amendment as claimed by the petitioner.

10. Section 107, before it was substituted by Act 1 of 1974, read thus:—

"107. Act not to apply to certain lands.— Subject to the provisions of S. 110, nothing in the provisions of this Act except S. 8 shall apply to lands belonging to or held on lease from the Government or lands belonging to or held on lease from religious or charitable institutions managed by or under the control of the State Government, or lands belonging to or held on lease from, a public trust or a society for public educational purpose created or formed before the 18th Nov. 1961 and in existence on the date of commencement of the Mysore Land Reforms (Amendment) Act, 1965....."

The said section, as substituted by Karnataka Act 1 of 1974 reads thus:—

"107. Act not to apply to certain lands.—

(1) Subject to the provisions of S. 110, nothing in this Act, except S. 8, shall apply to lands—

(i) belonging to Government;

(ii) held on lease from Government for a period not exceeding twenty years;

(iii) belonging to or held on lease by or from a local authority, an Agricultural Produce Marketing Committee constituted under the Karnataka Agricultural Produce Marketing Regulation Act, 1966 (Karnataka Act 27 of 1966), a University established by law in India, the Karnataka Bhoodhan Yagna Board established under the Karnataka Bhoodhan Yagna Act, 1963 (Karnataka Act 34 of 1963);

(iv) given as a gallantry award;

(v) used for such stud farms as are in existence on the 24th day of January 1971 and approved by the State Government;

(vi) used for the cultivation of linaloe;

(vii) held by the Coffee Board constituted under the Coffee Act, 1942 (Central Act 7 of 1942) for purposes of research, development or propaganda:

Provided that in the case of lands belonging to or held on lease from the Karnataka Bhoodhan Yagna Board, the exemption under this section shall not be applicable if such lands were in the possession of tenants on the date of donation to the said Board....."

11. A reading of the above section before and after the amendment, makes it abundantly clear that the exemption that had been conferred on religious or charitable institutions managed by or under the control of the State Government, has been altogether taken away by Act 1 of 1974. What has been retained after the substitution of the section by Act 1 of 1974, is the exclusion from the provisions of the Act, except S. 8 which relates to fair rent, of lands (1) belonging to Government; (2) held on lease from Government for a period not exceeding twenty years; and (3) belonging to or held on lease by or from a local authority.

12. The argument of Shri Veerabhadrappa, learned counsel for the petitioner, was that the lease in favour of the fifth respondent, on the basis of which respondents 3 to 7 claim their rights, was granted when the Government was managing the properties of the Mutt and, therefore, this is a case of lands 'held on lease from Government for a period not exceeding twenty years' and that the case falls under cl. (ii) of sub-sec. (1) of S. 107 of the Act.

13. That the Legislature, while it enacts Act, does not introduce words superfluous, nor does it delete words, phrases or clauses necessary, is a well recognised rule of interpretation of statutory enactments. Presumption is always against superfluity. Section 107, before it was substituted by Act 1 of

1974, clearly exempted, except with regard to provisions regarding fair rent, lands belonging to religious and charitable institutions under the control or management of the State Government. The reference to religious and charitable institutions is altogether omitted in Section 107 as substituted by Act 1 of 1974. If the intention of the Legislature was to continue the benefit already granted to religious and charitable institutions managed by the Government, there was no need to make substantial changes in the language of S. 107 and altogether delete the reference to religious and charitable institutions in the said section. The argument of the learned counsel for the petitioner is that although the lands belonged to the Mutt, when they were leased by an Officer of the Government appointed as manager on the Government assuming management of the lands, the lands are being held on lease from Government. This argument is unsound. When the Government assumes management of the property of a Mutt or a religious or charitable institution under S. 25 of the Mysore Religious and Charitable Institutions Act, the property does not cease to be the property of the Mutt or the institution. What is taken over is merely possession and management of the property of the Mutt. If a suit has to be instituted in respect of any claim relating to such property when the property is under the management of the Government, the plaintiff in such an action is not the Government but the Mutt or the Mathadhipathi. If a suit has to be instituted against the Mutt, the defendant in such cases will not be the State Government but the Mathadhipathi or the Mutt represented by its Manager. Assumption of management by the Government does not change or take away the ownership of the Mutt. In order to claim the benefit of cl. (ii) of sub-sec. (1) of S. 107 of the Act what is required is that the lands should be held on lease from the Government. Land can be said to be held on lease from the Government only where they are owned by the Government and not where the Government by virtue of a statutory provision assumes management of the property of a citizen or an institution.

14. Therefore, in our judgment, the ground urged by the learned counsel for the petitioner that the Act does not apply to the lands in question, is wholly untenable. No other grounds are urged.

15. For the reasons stated above, the writ petition fails and is dismissed but in the circumstances without costs.

Petition dismissed.

AIR 1978 KARNATAKA 98

K. JAGANNATHA SHETTY, J.

Gurupadayya Shivayya Hiremath, Appellant v. Shivappa Basappa Guramanavar, Respondent.

Second Appeal No. 1302 of 1974, D/- 1-2-1978.*

Specific Relief Act (47 of 1963), Section 16 (c) — Suit for specific performance — Averment in plaint and proof that plaintiff is ready to perform his part of contract is necessary. (C. P. C. (1908), O. 6 R. 4 and App. A, Forms 47 & 48).

Section 16 (c) makes it obligatory for the plaintiff to aver in his plaint and also to prove that he has performed or has always been ready to perform the essential terms of the contract which are to be performed by him. The plaint, however, need not be followed by the actual deposit when a contract involves such payment, but there must be proper averments in the plaint regarding the plaintiff's willingness to perform his part of the contract followed by the evidence to prove it. In other words, his conduct should not be anything other than his readiness to perform his part of the contract. If there is no such proper pleas in that regard, the suit for specific performance is not maintainable. (1969) 2 SCC 539, Rel. on. (Para 2)

Where an agreement to sell was executed in respect of properties belonging to the vendor as well as one of his relatives and a notice was issued to him by the purchaser to execute the sale deed in respect of both those properties but in the suit the purchaser claimed a decree for specific performance only in respect of property belonging to the vendor and though a period of one year was prescribed in the agreement for performing the contract, the vendee deposited balance amount in court after near-

*(Against judgment and decree of Civil Judge, Haveri, D/- 3-10-1974).

about four and half years it could not be said that the vendee was willing or ready to perform his part of the contract. Consequently, his suit for specific performance could not be decreed. (Paras 3, 4)

Anno: AIR Manual (3rd Edn.), Specific Relief Act S. 16 N. 3; AIR Comm. C. P. C. (8th Edn.) O. 6, R. 4 N. 8.

Cases Referred: Chronological Paras

(1969) 2 SCC 539 2
AIR 1968 SC 1355 2

S. C. Javali, for S. N. Hatti, for Appellant; Kadidal Manjappa, for Respondent.

JUDGMENT:— This second appeal arises out of a suit for specific performance based on Ex. P-1, the agreement for sale of a property belonging to the defendant. The trial Court decreed the suit, but the appellate Court while reversing that decree has granted the alternate relief to the plaintiff to recover the consideration under Ex. P-1. The decree for specific performance has been denied solely on the ground that the plaintiff's pleas are not in conformity with S. 16 (c) of the Specific Relief Act, 1963.

2. The only question to be determined in this appeal is whether the appellate Court was right in stating that the plaintiff is not entitled to a decree for specific performance in view of his defective pleadings.

The pleadings and proof in any suit for specific performance should be in conformity with the provisions of Section 16 (c) and forms 47 and 48 of the first schedule in the Civil P. C. If these requirements are not complied with, the plaintiff is not entitled to a decree for specific performance. Section 16 (c) of the Specific Relief Act, 1963 provides:

"16. Specific performance of a contract cannot be enforced in favour of a person—

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

"Explanation.— For the purposes of Cl. (c):

(i) where a contract involved the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in Court any money except when so directed by the Court:

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction."

This sub-section makes it obligatory for the plaintiff to aver in his plaint and also to prove that he has performed or has always been ready to perform the essential terms of the contract which are to be performed by him. The plaint, however, need not be followed by the actual deposit when a contract involves such payment, but there must be proper averments in the plaint regarding the plaintiff's willingness to perform his part of the contract followed by the evidence to prove it. In other words, his conduct should not be anything other than his readiness to perform his part of the contract. If there is no such proper plea in that regard, the suit for specific performance is not maintainable. That was the view expressed by the Supreme Court in Ouseph Verghese v. Joseph Aley (1969) 2 SCC 539. It was observed at p. 543 as follows:—

".....The plaintiff did not plead either in the plaint or at any subsequent stage that he was ready and willing to perform the agreement pleaded in the written statement of the defendant. A suit for specific performance has to conform to the requirements prescribed in Forms 47 and 48 of the 1st Schedule in the Civil Procedure Code. In a suit for specific performance it is incumbent on the plaintiff not only to set out agreement on the basis of which he sues in all its details, he must go further and plead that he has applied to the defendant specifically to perform the agreement pleaded by him but the defendant has not done so. He must further plead that he has been and is still ready and willing to specifically perform his part of the agreement. Neither in the plaint nor at any subsequent stage of the suit the plaintiff has taken those pleas. As observed by this Court in Pt. Prem Raj v. D. L. F. Housing and Construction (Pvt.) (Ltd.) (Civil Appeal No. 37/66, decided on 4-4-1968) (reported in AIR 1968 SC 1355) that it is well settled that in a

suit for specific performance the plaintiff should allege that he is ready and willing to perform his part of the contract and in the absence of such an allegation the suit is not maintainable."

The above observations of the Supreme Court were based on Forms 47 and 48 given in Appendix A of the 1st Schedule in the Civil Procedure Code, which also require the plaintiff to state in the plaint that he requested the defendant specifically to perform the agreement on his part, but the defendant has not done so. Form 48 also requires the plaintiff to state in the plaint that on such and such date the plaintiff tendered.....rupees to the defendant and demanded a transfer of the said property by a sufficient instrument. That Form also requires the plaintiff to state that the plaintiff demanded such transfer or the defendant refused to transfer the same to the plaintiff.

3. It is admitted by Sri Javalli, Senior Advocate for the appellant that the plaint is silent in respect of these matters. He, however, said that the readiness on the part of the plaintiff to perform his part of the contract has to be inferred from the notice issued by him against the defendant demanding execution of the sale deed and also from his subsequent conduct. He urged that the plaintiff has deposited the balance amount on 5-6-1970 during the pendency of the suit and he had also issued a notice (Ex. D-3) on 22-7-1965 asking the defendant to execute the sale deed as per terms agreed upon under Ex. P-1.

I do not think that Ex. D-3 could be considered as an evidence of willingness or readiness on the part of the plaintiff to perform his part of the contract, so far as the subject-matter of the suit is concerned. The agreement Ex. P-1 was not confined only to the property belonging to the defendant. It was executed by the defendant agreeing to sell the property belonging to him and also of his sister-in-law Mallavva. Ex. D-3 was a notice issued by the plaintiff asking the defendant to execute the sale deed in respect of both those properties. But in the suit he has not claimed a decree for specific performance in respect of the property belonging to Mallavva. The plaintiff has not issued any other notice to the defendant stating that he has always been ready and willing to perform his part of the contract pertaining to the property belonging to defendant. The fact that he has deposited the balance amount on 5th June 1970 is admitted, but it cannot be weighed in favour of the plaintiff since the deposit was made after about four and half years from the date of Ex. P-1. Ex. P-1 prescribed a period of one year for performing the contract.

4. The plaintiff admittedly has not taken any such action before approaching the Court. Quite naturally he could not have pleaded those averments. Since the requirements of law have not been adhered to by the plaintiff, his suit for specific performance cannot be decreed. The appellate Court was therefore, justified in dismissing that claim and granting the alternate relief prayed for by the plaintiff.

5. In the result, the appeal fails and is dismissed, but in the circumstance, I make no order as to costs.

Appeal dismissed.

AIR 1978 KARNATAKA 106

G. N. SABHAHIT, J.

S. V. Sreekanthayya, Petitioner v. M/s. Lakshmi Hardware Stores and others, Respondents.

Civil Revn. Petn. No. 1448 of 1977, D/- 18-1-1978.*

(A) Karnataka Rent Control Act (22 of 1961), S. 21 (1) Proviso (h) — Proceedings under — Not a suit. (Para 5)

(B) Civil P. C. (5 of 1908), Sec. 80— Notice to receiver under — Necessity of.

No notice under S. 80 is necessary when the suit is not for any acts or omission done by the receiver in his personal capacity. AIR 1940 Cal 1 and AIR 1969 SC 227 Rel. on. (Para 5)

Anno: AIR Comm. C. P. C. (8th Edn.), S. 80 N. 3.

(C) Civil P. C. (5 of 1908), O. 40, R. 1 — Suit against receiver — Leave of Court — Stage for obtaining.

*(Against order of 3rd Addl. Civil J. Bangalore City in H. R. C. No. 1207 of 1975).

Leave to sue against the receiver can be obtained either before the action is commenced or after the action is instituted. AIR 1977 SC 2304, Rel. on. (Para 4)

Anno: AIR Comm. C. P. C. (8th Edn.), O. 40 R. 1 N. 31.

Cases Referred: Chronological Paras

AIR 1977 SC 2304: (1977) 2 Kant LJ 472 4

AIR 1969 SC 227 5

AIR 1940 Cal 1 5

Gopal L. Bangalore, for Petitioner.

ORDER:— This is a landlord's revision petition against the order dated 25-6-1977 passed by the III Additional Civil Judge, Bangalore City, in H. R. C. No. 1207 of 1975 on his file holding that the petition of the landlord for eviction of tenants represented by the receiver was not maintainable.

2. The landlord instituted a petition for eviction of the tenants under Cl. (h) of the proviso to S. 21 (1) of the Karnataka Rent Control Act, 1961. In the litigation with regard to the partnership dissolution, a receiver was appointed to the properties of the partnership firm which was running in the said premises, by the High Court of Bombay. Hence, the receiver was also made a party to the suit in addition to the partners and the firm.

3. A preliminary objection was raised during the hearing of the petition. It was contended that the petition was not maintainable on two grounds, viz., that the leave of the High Court of Bombay was not obtained to sue against the receiver and secondly S. 80, C. P. C., notice was not served on the receiver before instituting the suit. The learned Civil Judge upheld both the objections and rejected the petition on the preliminary ground itself. Aggrieved by the said order, the landlord has come up in revision before this Court.

4. The learned counsel appearing for the revision petitioner submitted that the petitioner has now obtained the leave of the Bombay High Court to sue against the receiver for possession. The same is produced before this Court. It is dated 12th Aug. 1977. It clearly permits the landlord to file an ejectment petition under S. 21 (1) of the Karnataka Rent Control Act. Hence, the counsel submitted that the initial defect is cured. In support of the proposition that leave can be obtained even during the pendency of the proceeding, the learned counsel relied on the ruling in Everest Coal Co. v. State of Bihar, (1977 (2) Kant LJ 472): (AIR 1977 SC 2304). In that decision, the Supreme Court of India ruled that leave to sue against the receiver can be obtained either before the action is commenced or after the action is instituted. In this case, leave is obtained during the pendency of the proceedings and hence the defect is cured.

5. Adverting to the second point, namely, S. 80 C. P. C., notice was not served on the receiver before commencing the lis, the learned counsel submitted that no such notice was necessary. Section 80 C. P. C., clearly states that notice would be necessary in respect of any act purported to be done by such public officer in his official capacity. There is no act complained against the receiver on the facts of this case. In the case of Smt. Bhuban Mohini Debi v. Biraj Mohan (AIR 1940 Cal 1), it is clearly held that no property is vested in the receiver and when the suit is not against the receiver, for any acts done by him, in his personal capacity, no notice is necessary under S. 80 C.P.C. The term 'act' used in S. 80 C. P. C. was explained by the Supreme Court of India in Amalgamated Electricity Co. v. Ajmer Municipality (AIR 1969 SC 227). In that case, their Lordships have ruled that the term 'act' includes 'illegal omissions' also. There is neither act complained of nor an illegal omission against the receiver discharging his official duties, on the facts of this case. Hence, S. 80 C. P. C. notice is not necessary and the learned Civil Judge was not justified in holding that such a notice is necessary. Moreover, the petition for eviction under the Rent Control Act, before the tribunal, cannot even be designated as a suit. Hence, I hold that the petition for eviction is maintainable.

6. In that view of the matter, I allow the revision petition and set aside the impugned order passed by the learned Civil Judge. The case is now remitted to the Civil Judge with a direction that he shall proceed to hear the petition on merits. Since the case is pending for long, he is further

directed to expedite hearing and dispose of the matter early. No costs.

Revision allowed.

AIR 1978 KARNATAKA 102

G. N. SABHAHIT, J.

M. Balaram and others, Petitioners v. M. S. Vasanth and another, Respondents.

Civil Writ Petns. Nos. 356 to 358, 407, 465, 466, 511 and 514 of 1977, D/- 3-1-1978.*

(A) Karnataka Rent Control Act (22 of 1961), S. 21 (1) Proviso Cls. (h) and (j) — Relative scope of — Decree for possession cannot be passed under both the Clauses.

When the landlord requires the premises for his personal occupation, he has to apply under Cl. (h) of S. 21 (1) of the Act. When he merely wants to demolish and reconstruct with a view to derive better income or when the building has become dilapidated, he has to approach the Court under Cl. (j) of S. 21 (1) of the Act. When he obtains possession under Cl. (j) of S. 21 (1) of the Act, there is always an obligation on him to re-let the premises to the original tenant in case he elects for it after re-construction, whereas under Cl. (h) of S. 21 (1) of the Act, he has to occupy the premises himself. That being so, it is obvious that the two Clauses are designed to play different roles and a decree cannot be passed both under Cls. (h) and (j) of S. 21 (1) of the Act. (Para 15)

It is now well settled that when once the landlord obtains a decree under Cl. (h) of the proviso to S. 21 (1) of the Act, it is not necessary that he should occupy the premises in the same condition in which he took possession. Simply because he intends to demolish and reconstruct the building after taking possession to suit his convenience, the facts would not attract Cl. (j) of S. 21 (1) of the Act. Thus, there is no justification to give a narrow construction either to the word "premises" or to the word "occupy"; even demolition and reconstruction would amount to occupation in the circumstances. (Para 16)

Held on facts and circumstances of the case that the landlords reasonably and bona fide required the premises for their personal occupation; that they would be put to greater hardship in case possession was not restored to them and that as they were entitled to possession under Cl. (h), Cl. (j) did not survive for consideration. (Paras 20, 21)

(B) Interpretation of Statutes — Sub-sections of section — Interpretation.

The sub-sections must be read as parts of an integral whole and as being inter-dependent, an attempt should be made in construing them to reconcile them if it is reasonably possible to do so, and to avoid repugnancy. AIR 1962 SC 1543, Rel. on. (Para 13)

Cases Referred: Chronological Paras

AIR 1962 SC 1543 13

P. Ananda Bhat (In CRP 356, 357, 358/77), K. Shankara Rao (In CRP 407/77) and A. Nagesh Rao (In CRP 465, 466, 511 & 514/77), for Petitioners; G. Vedavyasachar, for Respondents in all the Petns.

ORDER:— These Revision Petitions are instituted by the tenants and they arise out of the common order dated 15-12-1976, passed by the First Additional Civil Judge, Bangalore City, in H. R. C. Nos. 674/1976, 684/1976, 686/1976, 678/1976, 672/1976, 726/1976, 680/1976 and 728/1976. The learned Civil Judge has ordered eviction of the tenants from the suit premises. Aggrieved by the said order, the tenants have come up in Revision before this Court.

2. The landlords instituted action for eviction of the tenants under Cls. (a), (h), (j) and (k) and against some under Cls. (f) and (p) of S. 21 (1) of the Karnataka Rent Control Act, 1961, (hereinafter referred to as 'the Act').

3. There were in all 11 tenants in the suit building occupying one tenement each and the landlords instituted action against them all. Three of the tenants, viz., tenants in H. R. C. Nos. 682, 722 and 724 of 1976, have not preferred any revision.

4. The landlords averred that they required the suit building occupied by the tenants bona fide and reasonably for their personal occupation; the 2nd

*(Against order of 1st Addl. Civil J. Bangalore, D/- 15-12-1976).

landlord, viz., M. S. Srikrishna, was duly qualified to start an industry, he having obtained Diploma in Mechanical Engineering; he was at present unemployed; they had the necessary funds and the 2nd petitioner had the necessary experience to start the industry. So, the landlords intended to demolish the one room tenements which were in a diplapidated condition and construct therein a godown and shops to suit the 2nd petitioner-landlord to start the industry and hence, they required the suit premises bona fide and reasonably for their personal occupation.

5. They further averred that since the present tenements were in a dilapidated condition, they wanted to demolish them and put up a new building to suit the requirement of the 2nd petitioner-landlord and then occupy the same personally. They had obtained the sanction for the plan as per Exhibit P. 6, licence as per Exhibit P. 5 and they had also got the estimate prepared for the new construction as per Exhibit P. 7.

6. The landlords further affirmed that the tenants in H. R. C. Nos. 680 and 682 of 1976, had sublet the premises and some of them had not paid the rents. Two of the tenants had acquired their own houses elsewhere. So the landlords brought action against them under Cls. (a) (f) and (p) of Sec. 21 (1) of the Act. The landlords further claimed that the local authority had issued notices to them to demolish the tenements as they were in a dangerous condition and hence, claimed possession under Cl. (k) of S. 21 (1) of the Act also.

7. The tenants on entering appearance, resisted the claim of the landlords. They denied the bona fide and reasonable requirement of landlords. They asserted that they would be put to greater hardship in case they were evicted from the suit tenements. According to them, the tenements were not in a dilapidated condition. They did not require either demolition or reconstruction. The concerned tenants denied sub-letting and the fact that they were in arrears of rental. They denied the ground made under Cl. (p) of S. 21 (1) of the Act also. They denied that any notice was issued by the local Authorities to the petitioners to demolish the building. Alternatively they averred that they would be put to greater hardship in case of eviction.

8. Since all the petitions against the different tenants gave rise to common questions of law and facts, the parties and Counsel submitted that they might be heard together and a common order passed. Accordingly, the learned Civil Judge recorded common evidence in H. R. C. No. 672 of 1976 and proceeded to pass a common order in all these cases.

9. The learned Civil Judge, appreciating the evidence adduced by the parties, held that the landlords required the suit premises bona fide and reasonably for their personal occupation. He further answered the point under Cl. (j) of S. 21 (1) of the Act in the affirmative in favour of the landlords and also the ground made under Cl. (k) of S. 21 (1) of the Act. He negatived the claim of the landlords under Cls. (a), (f) and (p) of S. 21 (1) of the Act against the concerned tenants and in view of his findings under Cls. (h), (j) and (k) of S. 21 (1) of the Act, he ordered eviction of the tenants from the tenements by his order dated 15-12-1976. It is against that order, that the tenants have preferred these Revision Petitions before this Court.

10. The learned Advocate appearing on behalf of the tenants vehemently contended that the learned Civil Judge was not justified in ordering eviction of the tenants under Cls. (h), (j) and (k) of S. 21 (1) of the Act. According to him, the landlords had an alternative site wherein they could build the godown and shops to run their industry. Besides, the notice issued under Cl. (k) of S. 21 (1) of the Act on behalf of the local Authority was not issued by the proper Authority. Hence, it could not be countenanced in allowing the claim of the landlords under Cl. (k) of S. 21 (1) of the Act. He further submitted that the tenants would be put to greater hardship in case of eviction and the learned Civil Judge had not properly appreciated this aspect. According to him, the landlords were not in a position to immediately demolish and reconstruct. The landlords had not shown to the court that they were having sufficient where-

withal. Hence, he submitted that the Revision Petitions should be allowed.

11. As against that, the learned counsel appearing on behalf of the landlords argued supporting the findings of the learned Civil Judge. I was taken through the evidence on record and the order of the learned Civil Judge.

12. I may at once point out that the learned Civil Judge was not justified in allowing the claim of the landlords both under Cls. (h) and (j) of S. 21 (1) of the Act. There persists some confusion in regard to the application of these two clauses. Hence, it is necessary to elucidate the clauses and to clarify their respective field of application.

13. In Madanlal Fakirchand Dudhediya v. Shree Changdeo Sugar Mills Ltd., (AIR 1962 SC 1543), the Supreme Court of India made it clear that where the Court is dealing with two sub-sections of a section, it is necessary that the two sub-sections must be construed as a whole "each portion throwing light, if need be, on the rest." The two sub-sections must be read as parts of an integral whole and as being inter-dependent; an attempt should be made in construing them to reconcile them if it is reasonably possible to do so, and to avoid repugnancy.

14. Keeping this in mind, it is necessary to read Cls. (h) and (j) of S. 21 (1) the Act. Cl. (h) reads:

"That the premises are reasonably and bona fide required by the landlord for occupation by himself or any person for whose benefit the premises are held or where the landlord is a trustee of a public charitable trust, that the premises are required for occupation for the purposes of the trust."

Cl. (j) reads:

"that the premises are reasonably and bona fide required by the landlord for the immediate purpose of demolishing them and such demolition is to be made for the purpose of erecting a new building in place of the premises sought to be demolished."

In S. 25 of the Act, it is specifically stated that where a decree for eviction has been passed by the Court on the ground specified in Cl. (h) of the Proviso to sub-sec. (1) of the Sec. 21 and the premises are not occupied within a period of three months from the date the landlord recovers possession, or the premises are relet within one year of the said date to any person other than the original tenant, the Court may, on the application of the original tenant made within thirteen months of such date, order the landlord to place such tenant in occupation of the premises on the original terms and conditions.

15. Sec. 26 of the Act speaks of recovery of possession of the building after reconstruction and re-entry by the tenant. Thus, it becomes manifest that S. 21 (1) (h) of the Act comes into play when the landlord requires the premises for his personal occupation. When the landlord merely wants demolition and re-construction, the tenant will have a right to elect re-entry. Thus, the two clauses are clearly meant for different situations. When the landlord requires the premises for his personal occupation, he has to apply under Cl. (h) of S. 21 (1) of the Act. When he merely wants to demolish and reconstruct with a view to derive better income or when the building has become dilapidated, he has to approach the Court under Cl. (j) of S. 21 (1) of the Act. When he obtains possession under Cl. (j) of Section 21 (1) of the Act, there is always an obligation on him to re-let the premises to the original tenant in case he elects for it after reconstruction, whereas under Cl. (h) of S. 21 (1) of the Act, he has to occupy the premises himself. That being so, it is obvious that the two clauses are designed to play different roles and a decree cannot be passed both under Cls. (h) and (j) of S. 21 (1) of the Act.

16. It is now well settled that when once the landlord obtains a decree under Cl. (h) of the proviso to S. 21 (1) of the Act, it is not necessary that he should occupy the premises in the same condition in which he took possession. The term 'occupy' has a wider connotation. When once the landlord obtains a decree for possession, he may occupy it in the same condition or he may perform any acts of ownership with regard to the property which also amounts to his occupation. He may alter the buliding to suit his convenience or he may demolish and reconstruct it. Simply be-

cause he intends to demolish and reconstruct the building after taking possession to suit his convenience, the facts would not attract Cl. (j) of Section 21 (1) of the Act. Thus, there is no justification to give a narrow construction either to the word 'premises' or to the word 'occupy'; even demolition and reconstruction would amount to occupation in the circumstances.

17. Turning to the facts of the present case, the landlords have made it very clear that the suit tenements are required for their personal use and occupation as the 2nd petitioner-landlord is a qualified hand to run the industry and he wants to start an industry in the premises after demolishing the existing tenements which have become dilapidated and after reconstructing a building in their place to suit his convenience. This clearly falls under Cl. (h) and not under Cl. (j) of S. 21 (1) of the Act. The learned Civil Judge is, therefore, not justified in allowing the petition under both the Clauses. When he allowed the petition under Cl. (h), Cl. (j) of S. 21 (1) of the Act, does not survive for consideration.

18. Now, I have to examine and find out whether the order of the learned Civil Judge under Cl. (h) of S. 21 (1) of the Act can be justified. The evidence on record clearly shows that the 2nd petitioner is a qualified hand. Their father was running an industry. He has training in it. He holds a Diploma in Mechanical Engineering. He is at present unemployed. Hence, the bona fides of the landlords cannot be challenged. The learned Civil Judge has rightly pointed out that the tenants have not contended that the real intention of the landlords is to enhance the rental. They have not challenged the averments made by the landlords with regard to the training and experience of the 2nd petitioner-landlord. That being so. I have no hesitation to confirm the finding of the learned Civil Judge that the requirement of the landlords is bona fide.

19. The requirement of the landlords is also reasonable because the 2nd petitioner-landlord who is qualified and trained is unemployed. If he wants to start an industry in the suit premises, there is nothing unreasonable in it. It cannot be described as unfair, capricious or absurd. Hence, agreeing with the learned Civil Judge. I hold that the requirement of the landlords is reasonable also.

20. It is only to show their earnestness about starting the industry after putting up a suitable building, that the landlords have got marked Exhibit P. 6, the sanctioned plan, Ex. P. 5 the licence and Exhibit P. 7 the estimate. They have also deposed that they have got sufficient finance to put up such a construction to start the industry. The Income-tax returns of the landlords is at Exhibit P. 8. Valuation of the properties is at Exhibit P. 9. Exhibit P. 10 is the assessment of the value of their properties. These documents would go to show that the net wealth of petitioners-landlords, is to the tune of a lakh of rupees. That being so, it is obvious that the landlords have the necessary funds to put up a suitable building and to run the industry therein. The learned Civil Judge has believed them. I have no reason to differ. Thus, I hold that the requirement of the landlords under Cl. (h) of S. 21 (1) of the Act, is both bona fide and reasonable.

21. The only other point that needs consideration under this clause is one of comparative hardship. The learned Civil Judge has rightly pointed out that greater hardship would befall the landlords in case they are not awarded possession. The learned Civil Judge has pointed out that two of the tenants have their own accommodation and the rest of them are generally taking up work in house construction. He has pointed out that the house construction activities are more in the extensions where they could easily secure tenements. That being so, he has come to the conclusion that the landlords would be put to greater hardship in case possession is not restored to them. I agree with him. Thus, the landlords are entitled to possession under Cl. (h) of S. 21 (1) of the Act. That being so, Cl. (j) of S. 21 (1) of the Act does not survive for consideration.

22. Though the learned Advocate for the Revision Petitioners submitted that the notice to quit issued in different cases was not valid, he was unable to show me how the notices were bad in law. The learned Civil Judge

has rightly held that different tenants took the lease on different dates and the landlords have properly terminated their tenancies. The learned counsel was not able to show me how the findings of the learned Civil Judge was wrong. Hence, I hold that there is no substance in the contention so raised.

23. The learned Advocate for the Revision Petitioners invited my attention to the fact that the proper authority contemplated under the Act, has not issued the notice to the landlords and hence, the landlords cannot press the claim under Cl. (k) of Sec. 21 (1) of the Act. Be that as it may, in view of my finding under Cl. (h) of Section 21 (1) of the Act, it is not necessary for me to discuss that aspect.

24. That being so, I hold that the Revision Petitions are devoid of merits. Hence, I dismiss the same. On the peculiar facts of the cases, I make no order as to costs. I grant three months' time from this day to the tenants in each case to vacate their respective tenements.

Revision dismissed.

AIR 1978 KARNATAKA 106

M. RAMA JOIS, J.

Nanaiah, Petitioner v. The Regional Transport Officer, Coorg Region, Mercara, Respondent.

Writ Petn. No. 1338 of 1976, D/- 17-1-1978.*

Motor Vehicles Act (4 of 1939), Section 31 — Transfer of Motor Vehicle — Transport Officer cannot refuse to make entries regarding transfer in certificate of registration for non-payment of tax due on the vehicle — He is under a statutory duty to make entries regarding transfer of ownership of the vehicle. Writ Petn. No. 1576 of 1969, D/- 2-7-1970 (Kant), Rel. on.

(Paras 3, 4)

Cases Referred: Chronological Paras

(1970) Writ Petn. No. 1576 of 1969, D/- 2-7-1970 (Kant) 4

S. J. Srinivasan, for Petitioner; S. G. Doddakalegouda 1st Addl. Govt. Advocate, for Respondent.

ORDER:— The petitioner purchased a motor vehicle (contract carriage) with registration No. MYA-4266. The transferor was one Choodappa. On 29-9-1975, the petitioner reported the transfer of the said vehicle to him as required under S. 31 (1) (b) of the Motor Vehicles Act. Thereafter an endorsement dated 30-12-1975 was issued to the petitioner and his transferor stating that enhanced rate of tax is due on the said vehicle and, therefore, they were advised to pay the tax due to the department.

2. Though there is no specific mention about the payment of tax being made a condition precedent for making the necessary entries regarding the transfer of the motor vehicle, the contention of the petitioner is that on the ground of non-payment of tax, the respondent has refused to make the necessary entries regarding the transfer of ownership in the certificate of registration.

3. Section 31 of the Act provides for reporting the transfer of a motor vehicle both by the transferor and the transferee and also provides for making the necessary entries by the concerned authority. No other condition is imposed in the said section regarding the transfer of ownership.

4. Therefore, the respondent was under a statutory duty to have made the necessary entries in the certificate of registration regarding the transfer of ownership of the vehicle in question to the petitioner. The respondent has failed to discharge its statutory duty. The same view has been taken by this court in Writ Petn. No. 1576 of 1969 decided on 2-7-1970.

For the reasons stated above, the rule is made absolute. A writ in the nature of mandamus shall issue to the respondent to effect the necessary entries in the certificate of registration regarding the transfer of ownership of the vehicle MYA 4266 in favour of the petitioner within 15 days from the date of receipt of this order. The petitioner is entitled to costs. Advocate's fee Rs. 100/-.

Rule made absolute.

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*(To quash order passed by R. T. O. Mercara, D/- 30-12-1975).

AIR 1978 KARNATAKA 107

K. JAGANNATHA SHETTY, J.

Ulavappa Bhimappa Hosur, Petitioner v. The Sub-Divisional Magistrate, Dharwar and others, Respondents.

Writ Petn. No. 3144 of 1977, D/- 14-10-1977.*

(A) Karnataka Debt Relief Act (25 of 1976), S. 3 (c), (d), (e), (g) — Definition of debtor in S. 3 (c) — Scope of — Includes three categories of persons viz., (1) a small farmer defined in S. 3 (e); (2) a landless agricultural labourer as defined in S. 3 (d); and (3) a weaker section of the people as defined in S. 3 (g).

A combined reading of the above provisions makes it clear that if a debtor wants to be called "landless agricultural 'labourer", he should not hold any land, and his principal means of livelihood should be only manual labour on land. There is, however, no limit prescribed for his income. If a debtor on the other hand, wants to be termed as a "small farmer", he should hold, whether as owner, tenant or mortgagee not more than one unit of land, and should not have any income from any other source other than agriculture. If he has income from any other source, he falls outside the category of "small farmer". The "weaker sections of the people", exclude both the small farmer and the landless agricultural labourer, but his income from all sources should not exceed Rs. 2,400/- per annum. (Para 5)

The words "all sources" plainly and grammatically mean all sources of income that are available to a person belonging to "weaker sections of the people". It means, in other words, "every source of income", be it agricultural, manual labour or from any other avocation. (Para 6)

(B) Karnataka Debt Relief Act (25 of 1976), S. 4 — Application under, by debtor — Summary enquiry — Finding of Sub-Divisional Magistrate based on consideration of evidence adduced by both parties and supported by reasons that applicant's income from all sources was less than Rs. 2400/- — Finding is not illegal or contrary to law. (Para 7)

(C) Karnataka Debt Relief Act (25 of 1976), Ss. 4 and 5 (5) — Karnataka Land Reforms Act (10 of 1962), Sections 112-B and 123 — Duties of Sub-Divisional Magistrate and Land Tribunal — Prior proceeding by petitioner before Land Tribunal for declaration of occupancy rights — Subsequent application by respondent under Sec. 4 that petitioner was only a mortgagee and that debt stood discharged — Proper procedure — Stay of subsequent proceedings.

The two statutory authorities have got two different duties and responsibilities. The Land Tribunal is not concerned with the problem of creditor and debtor, and the Sub-Divisional Magistrate is not concerned with the question of landlord and tenant. The Sub-Divisional Magistrate is charged with the duty to determine which of the debtors are entitled to the relief and direct the delivery of mortgaged property to the debtor. His statutory duties should not unnecessarily be denied, if he genuinely feels on the unimpeachable evidence on record that the relationship between the parties is one of creditor and debtor. If, however, the terms of the dispute or the transaction between the parties is already pending adjudication before the Land Tribunal on the question of tenancy pleaded by one party, and the matter is not free from doubts, or the question raised is of complicated nature, it would, be proper for the Sub-Divisional Magistrate to stay the proceedings before him, and await the decision of the Land Tribunal. The Sub-Divisional Magistrate by adopting this procedure, would be avoiding conflicting decisions on the same subject-matter. (Para 8)

In the instant case the nature of the deed in question viz., "Illavatti" not being free from doubt the High Court under Art. 226 of the Constitution quashed the finding of the S. D. M. that the deed was a mortgage and directed the stay of proceeding before him till it was decided by the Land Tribunal. (Paras 9, 10)

Cases Referred: Chronological Paras
(1976) 1 Kant LJ 98 9

B. V. Deshpande, for Petitioner; B. B. Mandappa (for Nos. 1 & 2) and N.

*(To quash order of Sub-Divisional Magistrate Dharwar, D/- 15-3-1977).

AV/AV/A47/78/KSB

Y. Hanumanthappa (for No. 3), for Respondents.

ORDER:— This petition under Article 226 of the Constitution, is directed against the order made by the Sub-Divisional Magistrate, Dharwar, under Section 4 of the Karnataka Debt Relief Act, 1976, (called shortly 'the Act').

Briefly stated, the facts are these; A. Y. Choukinavar, respondent-3, is the owner of the land to an extent of 8 acres in Block No. 1000 of Aminabhavi village, Taluk Dharwar. He delivered possession of the land to the petitioner by receiving Rs. 5,000/- and executing a registered deed styled as 'Illavatti', in favour of the petitioner. After coming into force of the Karnataka Land Reforms Act, 1961, the petitioner applied to the Land Tribunal, Dharwar, for occupancy rights in respect of the said land stating that he is in possession of it as a tenant and the deed executed by respondent-3 was a lease in his favour. That matter is still pending consideration before the Tribunal. In the meanwhile, the Karnataka Debt Relief Act, 1976, came into force, and respondent-3 moved the Sub-Divisional Magistrate under Section 4 of the Act, contending that he had mortgaged the land in favour of the petitioner and he is entitled to get back possession of the land as the mortgage debt has been extinguished by the operation of law.

The petitioner, while resisting the application of respondent-3, inter alia, contended that he is in possession of the land as a tenant; that his application for occupancy rights is pending before the Land Tribunal, and the transaction relied upon by respondent-3 is not mortgage but lease deed. He also prayed that till the Tribunal gives its decision, the Sub-Divisional Magistrate should not proceed with the application of respondent-3.

2. The Sub-Divisional Magistrate, however, proceeded to hold an enquiry in the course of which respondent-3 produced four witnesses in support of his claim, and the petitioner in his turn also examined four witnesses to prove, in particular, that the total income of respondent-3 was less than Rs. 2,400/- per annum. Upon consideration of these evidence, the Sub-Divisional Magistrate concluded thus:

"The applicant has stated that his income is less than Rs. 2,400/- per annum. He has examined 4 witnesses on his behalf who stated that the applicant's only income is from what he earns by working as a coolie. They state that he earns Rs. 4/- to Rs. 5/- per day and that this is his only source of income. The 4 witnesses that the opponent has examined have stated that the applicant also sells grains. However, only one witness has stated that the applicant gets Rupees 300/- as monthly income. One witness has stated that the applicant gets Rs. 100/- to Rs. 150/- through his business. One has stated that now the applicant has stopped selling milk as he used to. The 4 witnesses state that the applicant sells grains, but that he does not know of the income the applicant gets. From the evidence on record. I am satisfied that the applicant's income is below Rs. 2,400/- per annum. Hence the order."

3. The validity of the aforesaid order is called into question in this petition.

4. It was urged for the petitioner that the order was perfunctory, contrary to law and evidence on record. It was also urged that the decision of the Tribunal on the question whether the deed is a mortgage or a lease would be binding on the Sub-Divisional Magistrate and, therefore, the latter ought not to have decided the question when the same question is pending before the Land Tribunal.

5. In order to appreciate the contentions, it may be necessary to refer to the scope of the definition of the word 'debtor'. Section 3 (c) of the Act defines 'debtor' to mean:

"(i) a small farmer; or

(ii) a landless agricultural labourer; or

(iii) a person belonging to the weaker sections of the people."

The 'debtor' thus includes three categories of persons, (1) a small farmer; (2) a landless agricultural labourer and (3) a weaker section of the people. 'Small farmer' has been defined under Section 3 (e) to mean:

"a person who holds whether as owner, tenant, or mortgagee with possession or partly in one capacity and partly in another not more than one unit of land and who has no income

from any source other than agriculture."

A 'Unit' has been defined under Section 3 (f), A 'Landless agricultural labourer' has been defined under Section 3 (d) to mean:

"a person who does not hold any land and whose principal means of livelihood is manual labour on land."

So also, "weaker sections of the people" has been defined under S. 3 (g). It provides:

"'weaker sections of the people' means persons not being small farmers or landless agricultural labourers whose annual income from all sources does not exceed two thousand and four hundred rupees."

From the above provisions, it becomes clear that if a debtor wants to be called 'a landless agricultural labourer', he should not hold any land, and his principal means of livelihood should be only manual labour on land. There is, however, no limit prescribed for his income. If a debtor on the other hand, wants to be termed as a 'small farmer', he should hold, whether as owner, tenant or mortgagee not more than one unit of land, and should not have any income from any other source other than agriculture. If he has income from any other source, he falls outside the category of 'small farmer'. The 'weaker sections of the people', exclude both the small farmer and the landless agricultural labourer, but his income from all sources should not exceed Rs. 2,400/- per annum.

It was urged for the petitioner that 'all sources of income' referred to in the definition of 'weaker sections of the people', must be other than the sources of income of small farmer and landless agricultural labourer. It was also urged that a person who holds land more than one unit automatically falls outside the category of 'weaker sections of the people', and his income from agriculture even if it falls below Rs. 2,400/-, is not relevant.

6. I do not think that there is any justification to curtail the scope of the words "all sources" in the definition of 'weaker sections of the people'. The intention of the Legislature has always to be gathered from the words used by it, giving to the words their plain, normal and grammatical meaning. The words "all sources" plainly and grammatically mean all sources of income that are available to a person belonging to 'weaker sections of the people'. It means, in other words, 'every source of income', be it agricultural, manual labour or from any other avocation. If that meaning is not given, a person who holds land more than one unit with an income of less than Rs. 2,400/- from all sources, would be deprived of the relief under the Act. Likewise, a landless labourer whose means of livelihood is partly on land and partly on other avocations, will be denied of the rights conferred although his total income falls below Rs. 2,400/-. The suggested construction which produces such unreasonable and undesirable consequences cannot and should not be accepted.

7. I shall now proceed to consider the legality of the finding recorded by the Sub-Divisional Magistrate on the status of the petitioner. From the impugned order, it is clear that the Sub-Divisional Magistrate has briefly considered the evidence adduced by both the parties and reached a conclusion that the income of respondent 3 from all sources was less than Rs. 2,400/-. The order, although brief, is supported by reasons on objective consideration of the evidence adduced by the parties. The order is therefore in conformity with the procedure prescribed by summary enquiry and the said finding cannot be stated to be illegal or contrary to law.

8. This takes me on to the other contention urged for the petitioner. It was urged that since the deed in question relied upon by respondent-3 is pending consideration before the Land Tribunal, the Sub-Divisional, Magistrate ought not to have expressed any opinion whether it is a mortgage or lease deed.

The contention, in my view, is very wide in its terms, and requires a careful scrutiny of the respective duties of the Land Tribunal and the Sub-Divisional Magistrate. Under the Karnataka Land Reforms Act, by Section 112-B, the Land Tribunal has exclusive jurisdiction to decide the question whether a person is a tenant or not. Section 133 prohibits civil or criminal court, officer or authority from deciding in any suit, case or proceedings

concerning a land, whether such land is or is not agricultural land and whether the person claiming to be in possession is or is not a tenant of the said land, notwithstanding anything in any law for the time being in force. The said section also provides that such court or officer or authority shall stay such suit or proceedings in so far as such question is concerned and refer the same to the Tribunal for decision.

Under the Karnataka Debt Relief Act, every debt advanced before 21st October, 1975, including the amount of interest, if any, payable by the debtor to the creditor has been wholly discharged, and every mortgage executed by the debtor in favour of the creditor shall stand redeemed and the mortgaged property shall be released in favour of such debtor. When the creditor fails to do so, the Sub-Divisional Magistrate having jurisdiction over the place where the mortgaged property is situate may, suo motu or on application of the debtor put the debtor in possession of the mortgaged property after holding such enquiry as he may deem fit. Under Section 5 (5), the Sub-Divisional Magistrate shall determine which of the debtors are entitled to the relief under the Act, and direct the creditor to make an endorsement of discharge on the mortgage deed and deliver the same to the debtor. If the creditor fails so to do, the Sub-Divisional Magistrate shall himself record the fact of discharge and issue a certificate to that effect to the debtor and also deliver possession of the property to the debtor.

The two statutory authorities have thus got two different duties and responsibilties. The Land Tribunal is not concerned with the problem of creditor and debtor, and the Sub-Divisional Magistrate is not concerned with the question of landlord and tenant. The Sub-Divisional Magistrate is charged with the duty to determine which of the debtors are entitled to the relief and direct the delivery of mortgaged property to the debtor. He would be, therefore, failing in his duty if he does not proceed with the matter brought before him and give relief to the debtors to whom that relief has been denied by the creditors. His statutory duties should not unnecessarily be denied, if he genuinely feels on the unimpeachable evidence on record that the relationship between the parties is one of creditor and debtor. If, however, the terms of the dispute or the transaction between the parties is already pending adjudication before the Land Tribunal on the question of tenancy pleaded by one party, and the matter is not free from doubts, or the question raised is of complicated nature, it would, I think, be proper for the Sub-Divisional Magistrate to stay the proceedings before him, and await the decision of the Land Tribunal. The Sub-Divisional Magistrate by adopting this procedure, would be avoiding conflicting decisions on the same subject-matter.

9. With that, I will now turn to the document in question. It has been styled as 'Illavatti'. In order to ascertain the real character of the transaction recorded in the document, one must look at the recitals therein. The relevant recitals are in the following terms:

[x x x x x]

(The recitals in original script are omitted for purpose of this report—Ed.)

It was urged by Sri B. V. Deshpande, learned counsel for the petitioner that although the document is styled as 'Illavatti', it is really in the nature of an advance loan, i. e., 'Agava Lavani'. That contention is seriously disputed by Sri N. Y. Hanumanthappa, learned counsel for respondent-3. He said that, in the Bombay Karnataka area, where the parties to this case hail from, 'Illavatti' has got a special connotation and has always been accepted as a mortgage deed. In support of his contention, he relied upon the decision of Venkataramaiah, J., in Veerappa Rudrappa Alagawadi v. The Land Tribunal (1976) 1 Kant LJ 98.

It is true that the observations made by my learned brother in that case lend support to the contention urged for respondent-3. But, it seems to me that the case on hand is not free from doubt and requires a careful consideration of all the evidence and circumstances of the case. It is, therefore, proper that the Sub-Divisional Magistrate should await the outcome of the proceedings before the Land Tribunal in the concerned matter.

10. In the result, the rule is made absolute. The finding of the Sub-Divisional Magistrate, so far as it relates to the nature of the deed in question, is quashed while keeping undisturbed the finding on the income of respondent-3 from all sources. The matter stands remitted to the Sub-Divisional Magistrate with a direction that he should dispose of the application of respondent 3 after the decision of the Land Tribunal, Dharwar, in the concerned case.

In the circumstances of the case, I make no order as to costs.

Order accordingly.

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K. S. PUTTASWAMY, J.

T. Sharda, Petitioner v. The Principal, Visveswariah College of Engineering, Bangalore and others, Respondents.

Writ Petn. No. 10162 of 1977, D/-28-12-1977.

Constitution of India, Arts. 226, 14 and 15 — Reservation of seats to backward classes — If can be interfered with under Art. 226.

It was not the case of the University that there was any express order providing for reservations to Backward Classes. Its case was that the principles of reservations to Backward Classes followed by it in permitting transfers to Electronics was a fair practice and in adopting such a practice and procedure, it had not violated the equality clause enshrined in Article 14 of the Constitution. Whatever may be the legality or otherwise of the same, the University authorities in providing seats to Electronics had followed a fair practice and procedure having due regard to the constitutional provisions and realities of the conditions in India and had not consciously committed an infraction of Art. 14 or any manifest illegality to deprive the just claims of the other persons. The University by giving effect to the reservations to Backward Classes had done substantial justice to whom justice is due. Assuming that there was any illegality in providing for reservations to Backward Classes without an express order, the same had not resulted in any failure of justice to others. On the other hand by accepting an extremely formal and a legalistic approach, High Court would be doing grave injustice to whom justice has been meted out by the authorities. Held that whatever may be the illegality, it would not be a fit case in which High Court should exercise the extraordinary power conferred on it under Art. 226. (Para 5)

Anno: AIR Comm., Const. of India, Art. 226, N. 18; Art. 14, N. 34, Article 15 N. 16.

M. Narayanaswamy, for Petitioner; S. Vijaya Shankar, for Respondent No. 2.

ORDER:— At the end of the 4th Semester, the petitioner, respondent Nos. 3 and 4 and several others sought for a change from Electrical Engineering to Electronics for which there appears to be keen competition. On the basis of merit and reservations generally made to Backward classes, Scheduled Castes and Scheduled Tribes in Educational Institutions, the University authorities have permitted respondent Nos. 3 and 4 and 5 others and have denied the demand of the petitioner for a seat in Electronics for which reason she has moved this Court for a writ of mandamus to respondent Nos. 1 and 2 to admit her to the 5th Semester in Electronics either in addition or in supersession of respondent Nos. 3 and 4.

2. In the original and the additional statement of objections filed, respondent Nos. 1 and 2 have pleaded that transfers to the subject of Electronics have been permitted on the basis of merit and reservation to Backward Classes and that in effecting transfers they have adopted a fair practice and procedure and that respondent No. 4 is more meritorious than the petitioner and that the transfer of respondent No. 3 who is a member of a Backward class, though he has secured lesser marks than the petitioner is justified.

3. In the merit list of students based on their performance at the 1st, 2nd, 3rd and 4th Semesters, respondent No. 4 has secured higher marks than the petitioner and he occupies Rank No. 7 while the petitioner occupies Rank No. 8. As it is now found

that respondent No. 4 is more meritorious than the petitioner, her claim against him is factually unfounded and is therefore liable to be rejected. I, therefore, reject the claim of the petitioner against respondent No. 4.

4. So far as respondent No. 3 is concerned, the case of the University is that though he is less meritorious than the petitioner, he has been preferred on the ground that he is a member of the Backward Classes. It is not the case of the petitioner that she is a member of the Backward Classes. In my view, the University in preferring respondent No. 3 on the ground that he is a member of the Backward classes, has not contravened the constitutional guarantee of equality of opportunity or has not committed any manifest illegality resulting in substantial failure of justice to the petitioner.

5. Shri M. Narayana Swamy, learned counsel for the petitioner, strenuously urged that in the absence of legislation or an express order providing for reservations to Backward Classes, Scheduled Castes and Scheduled Tribes for allotting seats to Electronics, the action of the University in preferring respondent No. 3 is illegal and impermissible. For purposes of this case, I will assume that Shri Narayana Swamy is right in his submission. But that does not necessarily mean that I should strike down the selection of respondent No. 3 and direct the allotment of that seat to the petitioner. It is not the case of the University that there is an express order providing for reservations to Backward Classes. The case of the University is that the principles of reservations to Backward Classes followed by it in permitting transfers to Electronics is a fair practice and in adopting such a practice and procedure, it has not violated the equality clause enshrined in Art. 14 of the Constitution. In my view, whatever may be the legality or otherwise of the same, the University authorities in providing seats to Electronics have followed a fair practice and procedure having due regard to the constitutional provisions and realities of the conditions in our Country and have not consciously committed an infraction of Art. 14 of the Constitution or any manifest illegality to deprive the just claims of the petitioner. In my view, the University by giving effect to the reservations to Backward Classes has done substantial justice to whom justice is due. Assuming that there is any illegality in providing for reservations to Backward Classes without an express order, the same has not resulted in any failure of justice to the petitioner. On the other hand by accepting an extremely formal and a legalistic approach this Court would be doing grave injustice to respondent No. 3 to whom justice has been meted out by the authorities. I am therefore of the view that whatever may be the illegality, it is not a fit case in which I should exercise the extraordinary power conferred on this Court under Art. 226 of the Constitution.

6. Shri S. Vijaya Shankar, learned counsel for respondent Nos. 1 and 2 contended that the 5th Semester for which the petitioner is seeking for admission and to which respondent No. 3 has already been admitted and has studied, is due to end on 31st December, 1977 and that the petitioner even if inducted by displacing respondent No. 3 or otherwise cannot be admitted to the said 5th Semester and learn what has not been learnt so far and on that ground also I should decline to exercise the extraordinary power conferred on this Court under Art. 226 of the Constitution. Shri M. Narayana Swamy, learned counsel for the petitioner, urged that the petitioner has approached this Court without any delay and that she cannot be blamed for any delay that has taken place and therefore I should not decline to exercise my power in favour of the petitioner notwithstanding any of the circumstances pleaded by the authorities. For various reasons, which do not require an examination, the position now is that the petitioner cannot join and study the 5th Semester and cannot be inducted to the 6th Semester which is due to commence from the 1st of January, 1978 hopping the 5th Semester. Finally, it would be unjust to unseat respondent No. 3 at this late stage and direct him to commence his studies in another subject from the 5th Semester and thus cause considerable inconvenience and hardship in the prosecution of his studies. For the above reasons, I am of the view that whatever may be the legality or other-

wise of the action of the University, it is not a fit case in which I should exercise the extraordinary jurisdiction conferred on this Court under Art. 226 of the Constitution in favour of the petitioner.

7. In my view, for all the above reasons, this is not a fit case for the exercise of the power conferred on this Court under Art. 226 of the Constitution and therefore the Rule is liable to be discharged. Rule discharged.

8. In the circumstances of the case, I direct the parties to bear their own costs.

Writ petition dismissed.

AIR 1978 KARNATAKA 113

K. JAGANNATHA SHETTY, J.

Manappa Manikappa Sheded and others, Appellants v. Bhaskhrappa A. Bhasana and others, Respondents.

Second Appeal No. 1393 of 1973, D/- 8-3-1978.*

(A) Civil P. C. (5 of 1908), S. 20 — Cause of action — Accrual — Place of.

The cause of action is a bundle of essential facts and refers entirely to the media upon which the plaintiffs ask the Court to arrive at the conclusion in their favour.

Where the District Church Council of a Christian sect by a resolution compulsorily affiliated the churches of the sect in an area to another sect with which the former sect had absolutely no connection, it could not be said that the members of the former sect in the affected area did not have cause of action to sue the Council in the Court within whose jurisdiction they resided for getting the resolution quashed. The fact that the Council happened to be located outside the jurisdiction of the Court in question was immaterial (Para 4)

Anno: AIR Comm. C. P. C. (9th Edn.) S. 20, N. 15.

(B) Civil P. C. (5 of 1908), S. 21 — Objection as to jurisdiction rejected by trial Court — Interference by appellate Court on gound of want of jurisdiction — Validity.

Where the defendants only showed that their objection as to want of jurisdiction was rejected by the trial Court, the appellate Court could not interfere with the decision of the trial Court on the ground of want of jurisdiction. It was incumbent on the defendants to show besides, that they had been prejudiced in the trial Court and the prejudice resulted in failure of justice. (Para 5)

Anno: AIR Comm. C. P. C. (9th Edn.) S. 21, N. 5.

(C) Civil P. C. (5 of 1908), S. 11, O. 23 R. 3 (2) (as inserted by Karnataka) — Dismissal of earlier suit in pursuance of compromise — Procedure prescribed by law for such dismissal not followed — Dismissal of earlier suit cannot bar fresh suit.

Even assuming that the compromise in question could be recorded in the representative suit, where the compromise was not recorded in accordance with the procedure provided under O. 23 R. 3 (2) as inserted by the Karnataka State by first giving notice of the application for recording compromise in the manner prescribed in sub-rule (3) of R. 8 of O. 1 for giving notice of the institution of such suit, the suit would not bar institution of a subsequent suit. AIR 1950 Bom 378, Rel. on. (Para 6)

Anno: AIR Comm. C. P. C. (8th Edn.) S. 11, N. 114-A.

Cases Referred: Chronological Paras

AIR 1950 Bom 378 6

B. P. Holla, for Appellants; B. V. Krishnaswamy Rao, for Respondents Nos. 2, 8 & 9.

JUDGMENT:— The appellants-plaintiffs brought a suit in the representative capacity on behalf of all the members of the Christian community owing allegiance to the Organisation called the "United Basel Mission Church in India" (U. B. M. C. I) for a declaration that the resolution of the District Church Council of the U. B. M. C. I. passed in May 1958 that the churches in Bombay-Karnataka area should join in the Church of South India (C. S. I.) was void and ultra vires of the Constitution and powers of the District Church Council of U. B. M. C. I and not binding on the plaintiffs. The suit was also for a consequential relief of permanent injunction restraining the defendants 1 and 2 from convening the meetings of the District Church Council or the North Karnataka Pradeshik Council and also restraining them from operating

*(Against Judgment and decree of Addl. Civil J. Bijapur, D/- 5-9-1973).

the accounts of the District Church funds, etc. The trial Court accepted the contentions of the plaintiffs and decreed the suit.

2. Defendants 1 and 2 being the President and Treasurer of the District Church Council of U. B. M. C. I. preferred Regular Appeal No. 99 of 1968 in the Court of the Civil Judge, Bijapur. In the appeal counsel on both sides argued only two preliminary points, both related to the maintainability of the suit without going into the merits of the matter. The learned Judge accepted both the contentions and allowed the appeal dismissing the suit.

Hence, the plaintiffs appeal to this Court.

3. The first question relates to want of territorial jurisdiction of the trial Court to entertain the suit. The learned Judge has stated thus:

The suit was filed in the Court of the Additional Munsiff, Bijapur. The cause of action for the suit as stated in the plaint was the passing of the resolution dated 22-5-1958 by the District Church Council of U. B. M. C. I. at Hubli. But defendants 1 and 2 were then residing at Hubli which remained outside the jurisdiction of the Munsiff Court, Bijapur. That there were the no averments in the plaint that the said resolution was enforced at Bijapur and therefore, the plaintiffs at Bijapur had no cause of action and the Munsiff Court at Bijapur had no jurisdiction to entertain the suit.

4. It seems to me that the learned Judge has taken a too narrow view of the matter. The cause of action as it is well accepted, is a bundle of essential facts and refers entirely to the media upon which the plaintiffs ask the Court to arrive at the conclusion in their favour. If one peruses the entire averments in the plaint, it is evident that the plaintiffs were aggrieved by the impugned resolution dated 22-5-1958 passed at Hubli. The effect of the resolution was that the Churches in Bombay-Karnataka area were compulsorily affiliated to "Church of South India" which had absolutely no connection with the U. B. M. C. I. and the faith and order of the members of the two organisations were quite different from each other. The plaintiffs could not be compelled to change their faith even by the District Church Council of U. B. M. C. I. and therefore any action of the District Church Council of joining a new organisation in the entire Bombay-Karnataka area, would be void and ultra vires of the constitution and powers. The substance of these allegations was that the plaintiffs must join the C. S. I. whether they like it or not. Having regard to these averments in the pleadings, it cannot be said that the plaintiffs have no cause of action at Bijapur to sue defendants 1 and 2 although the defendants were residing outside the territorial jurisdiction of the trial Court.

5. Even otherwise, objection as to territorial jurisdiction cannot be allowed by the appellate Court unless such objection has been raised in the trial Court before the issues were settled and unless it was shown that there has been a consequent failure of justice. That is the requirement of Section 21 of the Civil P. C. The defendants' objection as to jurisdiction was rejected by the trial Court. They have adduced evidence on all the issues. They have not shown in the appellate Court how they have been prejudiced in the trial Court. In the absence of such prejudice which must result in failure of justice, the appellate Court cannot interfere with the decision of the trial Court on the ground of want of jurisdiction.

6. The second point formulated by the appellate Court was whether the suit was barred under S. 11, O. 23 (3) and O. 9 R. 9 of the Civil P. C. in view of the order passed in O. S. No. 144/59. O. S. No. 144/1959 was also a suit filed in the Court of the Civil Judge, Senior Division Hubli, in a representative capacity for a declaration that the impugned resolution dated 22-5-1958 was void and not binding on them. That suit was dismissed on 10-7-1971 as per the joint memo filed by the Advocates for the parties therein. The joint memo provided thus:

"The plaintiffs and defendants in this case request the Court to dismiss the suit without order as to costs as the parties have amicably settled the dispute between them out of Court."

The Court, accordingly, dismissed the suit. The Court had not recorded the compromise said to have been arrived at by the parties. The compromise, as I understand, was only to get the suit dismissed without anything further. On these facts, the lower appellate Court has stated that the dismissal of that suit was a bar to file another suit.

I am unable to agree with that view. It is doubtful whether such an order would fall under O. XXIII R. 3 of the

Civil P. C. as the Court had not recorded any such compromise. Assuming for a moment that such order also would fall within the scope of O. 23 R. 3, as the suit was in the representative capacity, the said compromise was not recorded in accordance with the procedure provided under O. XXIII R. 3 of the Civil P. C. as amended by Karnataka State. The amended sub-rule provides that the Court in a representative suit shall not proceed with the consideration of a compromise or to pass a decree in accordance therewith without first giving notice of the application for recording such compromise in the manner prescribed in sub-rule (3) of R. 8 of Order I for giving notice of the institution of such suit. This is in accordance with the declaration of law made by Bombay High Court in Asian Assurance Co. v. Madholal, AIR 1950 Bom. 378. Chagla, C. J. speaking for the Court observed at page 380:

"It is perfectly true that the Court can give its consent to the compromise or withdrawal of a representative suit. But normally the Court does not do so without directing that the plaintiff should advertise in the papers that he proposed to take a particular course of action, and if no objection is forthcoming then the Court ordinarily passes the order."

It is not shown in the instant case that O. S. No. 144 of 1959 was withdrawn or got dismissed after following the aforesaid procedure. Therefore, the dismissal of that suit is no bar to institute the present suit.

The appellate Court has also stated that the present suit has been barred by O. IX R. 9 of the Civil P. C. I fail to understand how that rule is applicable to the facts of the present case. O. IX R. 9 is attracted when a suit is dismissed under O. IX Rule 8, that is, where the defendant appears and the plaintiff does not appear when the suit is called on for hearing. It is nobody's case that O. S. No. 144 of 1959 was dismissed under Order IX Rule 8. Therefore the decision of the appellate Court cannot be upheld.

7. In the result, the appeal is allowed. The Judgment and decree of the appellate Court are set aside, with a direction to rehear the appeal and dispose of the same on merits, and in accordance with law.

Appeal allowed.

AIR 1978 KARNATAKA 115

E. S. VENKATARAMIAH AND N. VENKATACHALA JJ.

S. Narasimha Bhandary, Appellant v. Smt. V. Vijaya Bai, Respondent.

Misc. First Appeal No. 872 of 1974, D/- 2-2-1978.*

Hindu Marriage Act (25 of 1955), S. 10 (2) — Rescission of decree for judicial separation — Grounds — Power of court — Exercise of.

The statute does not refer to any specific grounds on which the decree for judicial separation can be annulled or rescinded. Section 10 (2) of the Act, however, empowers the Court to rescind the decree for judicial separation if it considers it just and reasonable to do so. A party against whom a decree for judicial separation is passed cannot succeed in getting the decree rescinded, in the absence of other circumstances which justify an order of rescission to be passed, merely by saying that he or she is willing to rejoin and live with the other spouse. The power conferred on the Court under S. 10 (2) has to be exercised with great circumspection. AIR 1973 Madh Pra 4 Rel. on. (Paras 5, 6)

Anno: AIR Manual (3rd Edn.) Hindu Marriage Act, S. 10 (2), N. 6.

Cases Referred: Chronological Paras

AIR 1973 Madh Pra 4 6

Balakrishna Rao, for Appellant; B. V. Acharya, for Respondent.

VENKATARAMIAH J.:— The appellant is the husband of the respondent. They were married on 4-12-1966. The appellant filed a petition under Section 10 (1) of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act) in M. C. 3 of 1971 on the file of the Civil Judge, Mangalore, for judicial separation from the respondent on the ground that the respondent had without any justifiable reason deserted him. The respondent contested the petition. In the course of her statement of objections filed in that case, she pleaded that she was staying away from her husband on account of cruelty on the part of her husband and that she was not willing to stay with him. The court ultimately upheld the case of the appellant and passed a decree for judicial separation on 17-7-1972.

*(Against Judgment and decree of Civil J. Mangalore, D/- 28-6-1974).

DV/EV/B411/78/AS/DVT

2. The respondent, thereafter filed a petition under Section 10 (2) of the Act on the file of the Civil Judge, Mangalore, out of which this appeal arises, requesting the Court to rescind the decree for judicial separation. In the course of that petition, she pleaded that on 'deep reflection' she felt that she had committed a mistake in not going back to her husband's house when he asked her to do so before the petition for judicial separation was filed and that she was willing to rejoin her husband and live with him. The rest of the allegations in the petition related to the allegations and counter-allegations which had been made in the previous case. The appellant opposed the petition filed under Section 10 (2) of the Act.

3. The Court below allowed the petition. In the course of its order, it observed as follows:

"The sworn testimony of the petitioner goes to show that notwithstanding the past illtreatment of her husband and his mother, she is prepared to have one more chance and I do not find as to why she should not be provided with one more opportunity and find whether her husband is prepared to meet the marital obligation. I am not convinced that because the petitioner has not proved change in circumstances, she is not entitled to get the relief sought for. The petitioner has proved that she most honestly feels and desires to go to her husband and live with him and I find that the petition should be allowed."

4. Aggrieved by the order of the court below the appellant has filed this appeal.

5. It is seen from the pleadings filed in the case and the evidence adduced by the parties that the only ground made out by the respondent for claiming relief under Section 10 (2) of the Act is that as she was willing to go back and live with her husband, she was entitled to rescission of the decree for judicial separation. Section 10 (2) of the Act provides that "Where a decree for judicial separation has been passed, it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so."

Unless the court considers that it is just and reasonable to rescind the decree, the application made under S. 10 (2) of the Act cannot succeed. It follows that a party to a decree for judicial separation cannot by merely expressing his or her willingness to live with the other spouse claim the rescission of the decree for judicial separation. A decree for judicial separation secures the liberty to the petitioner to live away from the respondent. Either party to the decree would also be entitled to file a petition for dissolution of marriage under S. 13 (1-A) (i) of the Act, if there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree. If the contention urged on behalf of the respondent is to be accepted, then it would be open to the respondent in a petition for judicial separation who has contested it and failed ultimately to secure rescission of the decree for judicial separation by merely filing a petition under S. 10 (2) of the Act expressing his or her willingness to live with the other spouse. We do not think that the Parliament intended that such a result should flow from S. 10 (2) of the Act.

6. At this stage it is appropriate to refer to corresponding provisions in the Indian Divorce Act, 1869 and the Matrimonial Causes Act, 1965 which is in force in England. Section 26 of the Indian Divorce Act, 1869 reads as follows:

"26. Decree of separation obtained during absence of husband or wife may be reversed:— Any husband or wife, upon the application of whose wife or husband, as the case may be, a decree of judicial separation has been pronounced, may, at any time thereafter, present a petition to the Court by which the decree was pronounced, praying for a reversal of such decree, on the ground that it was obtained in his or her absence, and that there was reasonable excuse for the alleged desertion, where desertion was the ground of such decree.

The Court may, on being satisfied of the truth of the allegations of such petition, reverse the decree accordingly; but such reversal shall not prejudice or affect the rights or remedies which any other person would have had, in case it had not been decreed, in respect of any debts, contracts, or acts of the wife incurred, entered into, or done between the times of the sentence of separation and of the reversal thereof."

The relevant part of S. 12 of the Matrimonial Causes Act, 1965 reads:

".....

12 (3). The court may, on an application by petition of the spouse against

whom a decree of judicial separation has been made and on being satisfied that the allegations in the petition are true, rescind the decree at any time on the ground that it was obtained in the absence of the applicant, or if desertion was the ground of the decree, that there was reasonable cause for the alleged desertion."

It is seen from the above provisions in the Indian Divorce Act and the Matrimonial Causes Act, 1965 that an application for rescission of a decree of judicial separation can be made only on two specific grounds mentioned therein. Section 10 (2) of the Act, however, empowers the Court to rescind the decree for judicial separation if it considers it just and reasonable to do so. The statute no doubt, does not refer to any specific grounds on which the decree for judicial separation can be annulled or rescinded. But from a reading of S. 10 (2) of the Act, we are of the opinion that a party against whom a decree for judicial separation is passed cannot succeed in getting the decree rescinded, in the absence of other circumstances which justify an order of rescission to be passed, merely by saying that he or she is willing to rejoin and live with the other spouse. The power conferred on the court under Section 10(2) of the Act has to be exercised with great circumspection. In Godabai v. Narayan Zingaji, (AIR 1973 Madh Pra 4) the High Court of Madhya Pradesh has taken more or less the same view.

7. We, therefore, feel that in the circumstances of this case, the court below was in error in passing an order under S. 10 (2) of the Act rescinding the decree for judicial separation. The order of the court below is set aside and the application made under S. 10 (2) of the Act is dismissed. The appeal is accordingly allowed.

Appeal allowed.

AIR 1978 KARNATAKA 117

N. D. VENKATESH, J.

V. Krishna Bhat, Petitioner v. Ravishankar and others, Respondents.

Civil Revn. Petn. No. 2050 of 1976, D/- 20-12-1977.*

*(Against order of 1st Addl. Civil J., Mangalore, D/- 22-9-1976.)

CV/DV/B28/78/CWM

(A) Civil P. C. (5 of 1908), O. 33 Rr. 6 & 9 — Claim to sue as a pauper — Defendant's right to contest such claim.

It cannot be said that the claim of a party to sue as a pauper is a matter to be sorted out between him and the State. The defendants have a right to intervene and to contest the claim of the plaintiffs to sue as a pauper. AIR 1972 SC 2379 Foll. (Para 12)

Anno: AIR Comm. C.P.C. 8th Edn. O. 33, R. 6, N. 1 O. 33 R. 9, N. 1.

(B) Civil P. C. (5 of 1908), O. 33 R. 2 — Application for permission to sue as pauper — Non-disclosure of properties — Effect.

The motive for suppression is irrelevant, but utmost good faith is expected of persons who seek permission to sue as paupers. But, it is not every case of omission that is fatal, but only omissions indicative of lack of bona fides or good faith on the part of the applicants that would indeed be fatal and the party lacking in good faith is not entitled to these concessions at all. Whether the conduct of a party lacks good faith and whether the omission to mention all the properties belonging to him is a deliberate act of suppression has to be ascertained from the facts of that particular case and the surrounding circumstances. AIR 1976 All 355 and 1971 (1) Mad LJ 510 Rel. on. (Paras 17, 18)

Anno: AIR Comm. C.P.C. 8th Edn. O. 33 R. 2, N. 1.

(C) Civil P. C. (5 of 1908), O. 33 R. 1— Possessed of sufficient means — Factor to be proved.

For purposes of R. 1 of O. 33, a person cannot be said to be possessed of sufficient means unless he has actual control over a thing and unless he is in possession of it or can reduce it into his possession without having recourse to law. AIR 1960 Andh Pra 540 and 1969 (2) Mys LJ 220 Rel. on. (Paras 19, 20)

Anno: AIR Comm. C.P.C. 8th Edn. O. 33 R. 1, N. 3.

(D) Civil P. C. (5 of 1908), S. 115 — Revisional jurisdiction — Scope.

The jurisdiction of the High Court under S. 115 of C.P.C., is a limited one. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. AIR 1972 SC 2379 Foll. (Para 22)

Anno: AIR Comm. C.P.C. 8th Edn. Section 115, N. 13.

Cases Referred: Chronological Paras

AIR 1977 Andh Pra 15 15

AIR 1976 All 355 16
AIR 1976 Pat 127 15
AIR 1974 Punj & Har 203 19
AIR 1972 SC 2379 12, 22
AIR 1972 Pat 313 19
(1971) 1 Mad LJ 510 17
(1969) 2 Mys LJ 220 19
AIR 1969 Orissa 10 15
1968 All LJ 1102 16
AIR 1961 Punj 131 15
AIR 1960 Andh Pra 540 19
AIR 1952 All 608 15
AIR 1934 All 396 15
(1930) 8 Mys LJ 1 19

K. Krishna Bhat, for Petitioner; K. Shivashankar Bhat, for Respondents Nos. 1 to 4.

ORDER.:— The first defendant in O. S. No. 105 of 1970 on the file of the I Additional Civil Judge at Mangalore, has preferred this revision against the order of that court on I. A. No. XVII dated 22-9-1976.

2. Respondents 1 to 4 are the plaintiffs; respondents 5, 6, 7, 8 and 9 are defendants 2 to 6 respectively in the suit.

3. Plaintiffs are minors and are represented by their next friend—their maternal uncle in the suit. During the course of this order I shall be referring the parties as they appear in the original suit in the court below.

4. Defendants 2 to 4 are the sons of the first defendant, and the fifth defendant is his wife. The sixth defendant is the mother of the plaintiffs and the widow of one Rama Bhat. The first defendant is the brother of the said Rama Bhat who died on 6-7-1968 leaving behind him the plaintiffs and his widow as his legal representatives.

5. It appears that after his death, within a period of a few months, a partition took place in which the family properties came to be divided between the plaintiffs and their mother on the one side and the other defendants on the other. In this connection it is also stated that a registered partition deed was executed on 18-9-1968.

6. According to the plaintiffs this was not a genuine partition. They allege that it is one sided, inequitable, and had taken place at the pressure and persuasion of the first defendant. They also allege that the said partition is the result of fraud, undue influence and coercion committed by the first defendant. On these allegations they have brought the suit for effecting a proper partition and for obtaining their 24/50th share in the plaint schedule properties. They have also sought for rendition of accounts and for mesne profits.

7. The valuation of the suit for purposes of court-fee constitutes nearly about Rs. 2 lakhs and the total court-fee payable would be about Rs. 14,000/-. According to the plaintiffs they do not possess any means to pay the necessary court-fee. Therefore, they have filed I. A. No. XVII requesting the Court to permit them to prosecute the suit in forma pauperis.

8. After taking evidence and hearing the parties concerned, the learned Civil Judge, has allowed I. A. No. XVII. Being aggrieved, the first defendant has come up with this revision.

9. For the plaintiffs their maternal uncle who has been acting as a next friend in the suit examined himself and has closed his side of the evidence on I. A. No. XVII. No oral evidence has been let in by contesting defendants, but they rely on certain documents which have already been filed in the suit.

10. The two main grounds urged by Sri K. Krishna Bhat, learned counsel for the first defendant (petitioner herein) in support of his contention that I. A. No. XVII should have been dismissed by the Court below are, (i) that the plaintiffs have not disclosed all their assets in their application as provided under sub-rule (2) of O. 33 C. P. C., and (ii) they also possess sufficient means to pay the requisite court-fee.

11. While rebutting these grounds Sri K. Shivashankar Bhat, learned Counsel for the plaintiffs (contesting respondents herein) also raised two preliminary objections, the first of which is that the question of sufficiency of court-fee on a plaint is a matter essentially between the State and the parties concerned, and the defendants in the suit will have no locus standi to intervene in this dispute. Secondly, he contended that even assuming that the contesting defendants have a right to have their say in the matter, they cannot pursue the same up to this Court invoking its limited powers under S. 115 C. P. C., to nullify the decision of the court below.

12. The decision reported in AIR 1972 SC 2379 (Shri M. L. Sethi v. R. P. Kapur) provides an effective answer to the first preliminary objection of the learned Counsel for the contesting respondents. Their Lordships of the Supreme Court have been pleased to observe, at para 7 of the judgment as follows :—

"Under O. 33 R. 9, it is open to the Court on the application of the defendant to dispauper the plaintiff on the grounds specified therein, one of them being that his means are such that he ought not to continue to sue as a pauper. An immunity from a litigation unless the requisite Court-fee is paid by the plaintiff is a valuable right for the defendant. It follows therefrom as a corollary that the proceedings to establish that the applicant-plaintiff is a pauper, which will take away that immunity, is a proceeding in which the defendant is vitally interested. This is further borne out by order 33 Rule 6 which confers the right on the opposite party to participate in the enquiry into the pauperism and adduce evidence to establish that the applicant is not a pauper."

In this view of the matter it cannot be said that the claim of a party to sue as a pauper is a matter to be sorted out between him and the State. The defendants have a right to intervene and to contest the claim of the plaintiffs to use as a pauper.

13. I will take up the second preliminary objection for consideration at a later stage.

14. In support of the first contention of the first defendant (petitioner herein) that the plaintiffs have not disclosed all their assets in their application seeking permission of the Court to sue as paupers, he mainly place reliance on three registered sale deeds dated 6-1-1970 executed by all the parties (including the plaintiffs and defendant) under which some properties which had been kept undivided at the partition had been sold subsequently. It is said that under these documents the plaintiffs are entitled to get their shares of the purchase money on future dates — the dates when each of these minor defendants respectively attain majority. According to this agreement plaintiffs 2, 3, 4 and 1, it appears, are entitled to get Rs. 3,148/- Rs. 3,148/- Rs. 3,148/- and Rs. 18,903/- respectively by 31-3-1981 31-3-1983, 31-3-1985 and 31-3-1987 respectively with interest at an annual rate of 5½ per cent. The contesting defendant's main ground is that the plaintiffs have not disclosed these facts in their application, and therefore, for lack of good faith and for suppression of these facts their application is liable to be rejected. The learned counsel for the plaintiffs does not dispute the fact of there being sale deeds D/- 6-1-1970 and the recitals therein stipulating the payment of the aforesaid sums to these minor plaintiffs on future dates, but what he contends is that this omission, in the circumstances of the case, should not be made much of by the defendants, and the Court below had rightly not taken these contentions too seriously. He further contends that the decisions relied on by the contesting defendant in support of his say that the application has to be thrown out on the ground of non-disclosure alone, have no bearing on the facts of this case and are clearly distinguishable. According to the learned counsel the plaintiffs are all minors and the suit is brought on their behalf by their maternal uncle, and he cannot be expected to know all these details. It is stated that the plaintiffs' mother who might have known these facts, being a party to the said documents, has not been helping them, and that therefore the plaintiffs were unaware of these facts.

15. The learned Counsel for the contesting defendant places reliance in support of his case on a number of authorities. In Navudu Nuka Raju v. Rajani Chima Appanna (AIR 1977 Andh Pra 15) it is stated that every applicant should approach the Court for leave to sue as a pauper with a full and complete disclosure of his moveable and immoveable property assets. If he does not do it, the application is liable to be dismissed. It is further stated that the motive for such non-disclosure is immaterial and even if the undisclosed property is not sufficient to pay the court-fee it does not alter the situation. That was a case in which the life interest of the party in a particular property had not been disclosed. The learned single Judge who decided the said case has been pleased to observe that utmost good faith is required of the petitioner when he discloses his properties and assets. The decision in Maharaj Bali v. Mt. Tirath Dei (AIR 1952 All 608) is also to the same effect. The Division Bench of that Court was pleased to observe that utmost bona fide is required of the petitioner in the matter of disclosure of his assets. To that effect also are the decisions reported in Ghansyam Das Rastogi v. A. N. Sayal (AIR 1961 Punj 131), Rajib Lochan v. Prafulla Kumar (AIR 1976 Pat 127), Lakhyeswar Karmi v. Padmabati Karmi (AIR 1969 Ori 10), and Widdia Pat Upadhiya v. Mahadeo Shastri (AIR 1934 All 396).

16. It is true that sub-rule (5) of O. 33 provides that where an application to

sue in forma pauperis is not framed and presented in the manner prescribed by Rr. 2 and 3, it should be rejected. Sub-rule (2) says that every application for permission to sue as a pauper shall contain the particulars required in regard to plaints in suits and a schedule of any moveable or immoveable property belonging to the applicant with the estimated value thereof. But, it is contended by the learned Counsel for the plaintiffs that a mere non-disclosure of the properties belonging to the plaintiffs is not fatal. In addition to that, according to him, it is necessary to see as to whether the conduct of the plaintiffs lacks bona fides and good faith. He draws a distinction between the facts of the cases referred to by the other side and the case on hand. In the instant case the parties are minors and they have brought the suit to nullify a partition, which, according to them, is the result of fraud and coercion. The suit is brought on behalf of the minors by their maternal uncle. This situation, according to the learned Counsel, has to be taken note of while trying to know as to whether the non-disclosure of all the properties is with any ulterior motive or just an innocent act. In this connection he places reliance on a decision of the Allahabad High Court in The State of Punjab v. R. P. Kapoor (AIR 1976 All 355). In that decision reference is also made to 1968 All LJ 1102, a previous decision of the Division Bench of that Court. It is stated in that decision that: "It is not every suppression of assets from the Schedule annexed to a pauper petition that can result in an order of refusal of permission to sue as a pauper. There may be cases of bona fide omissions also. The view consistently taken by all the courts is that if the omission of any assets from such a schedule is bona fide, it cannot be made a ground for refusing permission to sue as a pauper. The question whether there were any omissions at all and whether such omissions were not bona fide are clearly questions of fact....." I am inclined to agree with the above view.

17. It is true that, as stated in Rajakumar Bhagwatsaran v. V. P. P. Rajan (1971) 1 Mad LJ 510 the motive for suppression is irrelevant, but utmost good faith is expected of persons who seek permission to sue as pauperis. But, as observed by their Lordships of the Allahabad High Court in the decision referred to above that it is not every case of omission that is fatal, but only omissions indicative of lack of bona fides or good faith on the part of the applicants that would indeed be fatal and the party lacking in good faith is not entitled to these concessions at all.

18. Whether the conduct of a party lacks good faith and whether the omission to mention all the properties belonging to him is a deliberate act of suppression has to be ascertained from the facts of that particular case and the surrounding circumstances. As already stated above, in the instant case, the plaintiffs are minors and it is alleged that their mother who was a party to the earlier partition has not been taking any helpful attitude and the suit is brought by their maternal uncle acting as a next friend. In the circumstances of the case and in view of the evidence on record it is not possible to say that they have wantonly not disclosed about their rights for the unpaid purchase moneys payable to them under the sale deeds dated 6-1-1970. Their application is not liable to be rejected only on this ground.

19. The next ground urged by the learned Counsel for the contesting defendant is that the plaintiffs do possess sufficient means to pay the court-fee, and therefore, they should not be allowed to sue as paupers. He submits that it was possible for them to raise sufficient loans for this purpose, at least on the security of their shares of the family properties. In support of this contention he places reliance on a decision reported in Sanyukta v. Prem Kumar Madan (AIR 1974 Punj and Har 203) wherein it is stated that "what is to be seen is not whether a person possesses sufficient property which can enable him to pay the prescribed fee but whether he has sufficient means for this purpose." To this effect also is a ruling of the Patna High Court reported in Dulhin Suraj Mukhi Devi v. Jokhu Raj (AIR 1972 Pat 313). On the other hand, the learned Counsel for the plaintiffs submits that in view of the fact that his clients are minors it is not possible for them to raise loans on the security of their shares in the family property unless they can secure court's permission as provided under the Hindu Minority and Guardianship Act. It is in this connection he places reliance on a decision of the Andhra Pradesh High Court reported in Virupakshiah v. Shivalingaiah (AIR 1960 Andh Pra 540). At para 8 his Lordship is pleased to observe as follows:—

"It cannot be assumed that a person who is entitled to a share in joint family property of considerable value would always be able to raise comparatively smaller amounts on its security. When the property does not consist of cash, the test is not whether a person has a power in the abstract of raising money, but whether, in the concrete circumstances of the case, he could succeed in raising anything substantial by exercising that power. In each case evidence would be necessary to enable one to judge whether money could be raised on the properties.

Held on facts that as the de facto guardian of the minor petitioners was not legally competent under Section 11 of the Hindu Minority and Guardianship Act, 1956, to offer their undivided share of the joint family property as security, the applicants could not be said to be capable of raising funds."

To this effect also is the decision of our High Court in Radhakrishna Nayak v. Kunhappa Nayak (1969 (2) Mys LJ 220), wherein his Lordship Narayana Pai J., (as he then was), has been pleased to observe as follows at Para-6 of the Judgment:—

"It appears to me that what is really necessary is that the plaintiff in question should either possess property or have such control over property as is sufficient to enable him to command credit and raise sufficient money to pay the Court-fee. In Munipapiya v. Munimarappa ((1930) 8 Mys LJ 1) it has been pointed out that for purposes of R. 1 of O. XXXIII a person cannot be said to be possessed of sufficient means unless he has actual control over a thing and unless he is in possession of it or can reduce it into his possession without having recourse to law."

20. If the facts of this case are viewed in the light of the decisions referred to above, it cannot be said that the minor plaintiffs either possess property or have such control over any property as is sufficient to enable them to command credit and raise sufficient means to pay the court-fee.

21. In my opinion the revision petitioner cannot succeed on either of the grounds urged here.

22. Besides these, it was urged by the learned Counsel for the plaintiffs that in the circumstances of this case the petitioner should not be permitted to invoke the revisional jurisdiction of this Court to nullify the decision of the court below. About the revisional powers of the High Court there have been number of rulings of the Supreme Court and I may mention only one such case here. In the decision referred to above — AIR 1972 SC 2379 — at paras 8 and 9 their Lordships have been pleased to observe as follows:

"The jurisdiction of the High Court under S. 115 of C.P.C., is a limited one. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved.

Section 115 empowers the High Court to satisfy itself on three matters (a) that the order of the subordinate court is within its jurisdiction; (b) that the case is one in which the Court ought to exercise jurisdiction; and (c) that in exercising jurisdiction the Court has not acted illegally, that is, in breach of some provision of law, or with material irregularity by committing some error of procedure in the course of the trial which is material in that it may have affected the ultimate decision.

"And if the High Court is satisfied on these three matters it has no power to interfere because it differs from the conclusions of the subordinate court on questions of fact or law. A distinction must be drawn between the errors committed by subordinate courts in deciding questions of law which have relation to, or are concerned with, questions of jurisdiction of the said court, and errors of law which have no such relation or connection. An erroneous decision on a question of law reached by the subordinate court which has no relation to questions of jurisdiction of that court cannot be corrected by the High Court under S. 115."

23. If the facts and circumstances of this case are considered in the light of what is stated above by their Lordships of the Supreme Court, it cannot be said that the decision of the learned Civil Judge on I. A. No. XVII calls for interference at the hands of this court.

24. For the reasons stated above, this revision petition fails and is dismissed.

25. Parties are directed to bear their own costs.

Revision dismissed.

AIR 1978 KARNATAKA 122

E. S. VENKATARAMIAH AND N. D. VENKATESH, JJ.

The Navalgund Taluka Agricultural Produce Co-operative Marketing Society Ltd., Annigeri, Petitioners v. The State of Karnataka, Respondents.

Writ Petn. No. 1257 of 1976, D/- 19-12-1977.

Karnataka Co-operative Societies Act (11 of 1959), S. 30 (1) — Opportunity of oral hearing — Not contemplated — (Constitution of India, Art. 226 — Natural justice).

The management of the Society was called upon to state its objection in writing to the charges mentioned in the show cause notice. The management of the Society availed of the opportunity. However, the opportunity to an oral representation was denied. Held that except in proceedings in Courts, a mere denial of opportunity of making an oral representation, without more, will not vitiate the proceedings as there is no rule which requires that in all cases an opportunity by way of personal hearing should be afforded. An opportunity to state the objections in writing is sufficient compliance with the rules of natural justice. AIR 1967 SC 1398 and AIR 1971 SC 1093, Rel. on. (Para 6)

Anno: AIR Comm. Const. of India (2nd Edn.), Art. 226, N. 59.

Cases Referred: Chronological	Paras
AIR 1971 SC 1093	6
AIR 1967 SC 1398	6

K. A. Swami, for Petitioners; H. N. Narayan H. C. G. P. for R. 1 to R. 4, R. N. Chandangoudar for R. 5, for Respondents.

E. S. VENKATARAMIAH, J.:— On a reference made by Bhimiah, J. the above petition has come up before us for disposal.

2. The 1st petitioner is the Navalgund Taluk Agricultural Produce Co-operative Marketing Society Ltd., Annigeri, District Dharwar. Petitioners 2 to 10 were the members of the Committee of Management of 1st petitioner-Society. On the basis of certain allegations relating to the mismanagement of the affairs of the 1st petitioner-Society by its Committee of Management, a show cause notice was issued by the Joint Registrar of Co-operative Societies, Belgaum under S. 30 (1) of the Karnataka Co-operative Societies Act 1959 (hereinafter referred to as the 'Act') to the petitioners, to show cause as to why action should not be taken to remove the Committee of Management of petitioner No. 1 Society, within 30 days from the date of receipt of the notice. The said notice contained the particulars of 22 charges which were based on the allegations made against the Committee of Management.

3. In reply to the said notice, the Chairman of petitioner No. 1-Society, submitted an explanation on 3-5-1975 on behalf of the Committee of Management. After taking into consideration the material available from the records and the reply given on behalf of the Committee of Management the Joint Registrar came to the conclusion that the Committee of Management had acted in a manner prejudicial to the interests of the Society and beyond its powers and that the irregularities committed by the Committee of Management were of grave and serious character. He therefore made an order dated 27-9-1975 removing the Committee of Management for a period of one year from the date of the order at the first instance and appointing the Assistant Registrar of Co-operative Societies, Dharwar as the Administrator of the 1st petitioner-Society, during the period of supersession, in exercise of his powers under S. 30 (1) of the Act. Aggrieved by the said order of the Joint Registrar of the Co-operative Societies, Belgaum, the 1st petitioner filed an appeal before the Registrar of Co-operative Societies under S. 106 of the Act. That appeal was dismissed. Thereafter the petitioners filed the above writ petition questioning the correctness of the orders passed by the Registrar and the Joint Registrar.

4. Two contentions are urged by Sri K. A. Swamy learned Counsel for the petitioners in support of this writ petition.

(1) The order passed by the Joint Registrar of Co-operative Societies was vitiated as no opportunity to make oral representation had been given to the petitioners; and

(2) that the order in question had been passed on account of the influence brought to bear upon the Joint Registrar by the Minister for Co-operation.

5. A counter-affidavit has been filed by the State Government denying the allegations made in the petition against the Minister concerned. In view of the counter-affidavit Sri K. A. Swamy, learned counsel for the petitioners, does not press the second ground. The only ground

which survives for our consideration is whether the order passed by the Joint Registrar is vitiated because no opportunity was given to the petitioners to make oral representation. Section 30 (1) of the Act reads as follows:

"(1) If, in the opinion of the Registrar, the committee of any co-operative society persistently makes default or is negligent in the performance of the duties imposed on it by this Act or the rules or the bye-laws or commits any act which is prejudicial to the interests of the society or its members, or is otherwise not functioning properly, the Registrar may, after giving the committee an opportunity to state its objections, if any, by order in writing, remove the committee, and

(a) appoint a new committee consisting of one or more members of the society in its place, or

(b) appoint one or more Administrators who need not be members of the Society to manage the affairs of the society for such period or periods not exceeding two years as may be specified by order of the Registrar; and after the period of two years, the Registrar may in accordance with the provisions of sub-sec. (2) by order extend such period from time to time, so that the aggregate period does not exceed four years."

It is seen from S. 30 (1) of the Act that the Legislature has provided for an opportunity to be given to the Committee against which action is taken to state its objections if any. There is however no express provision requiring the Registrar or any other Officer exercising the powers of the Registrar under S. 30 (1), to hear the members of the Committee of Management in person before passing final orders under S. 30 (1) of the Act.

6. It is not disputed that in the instant case, the petitioners were called upon to state their objections if any in writing to the charges mentioned in the notice within the specified period and that they had availed of that opportunity by filing a statement of objections before the Joint Registrar. It is no doubt true that in cases of this nature when action is being taken against a Committee of Management under S. 30 (1) of the Act, reasonable opportunity should be given to the persons against whom action is being taken to put forward their case before the authority concerned. Except in proceedings in courts, a mere denial of opportunity of making an oral representation, without more, will not vitiate the proceedings, as there is no rule which requires that in all cases an opportunity by way of personal hearing should be afforded. An opportunity to state their objections in writing is sufficient compliance with the rules of natural justice; vide State of Assam v. Gauhati Municipal Board (AIR 1967 SC 1398) and Union of India v. Jyothi Prakash Mitter (AIR 1971 SC 1093). Since, in the instant case, an opportunity to make a written representation has been given, we do not find that there has been violation of principles of natural justice.

In the result, this petition fails, and it is dismissed. No costs.

Petition dismissed.

AIR 1978 KARNATAKA 123

K. JAGANNATHA SHETTY J.

Menawwa, Appellant v. Chandranappa Sangappa Rolli, Respondent.

Second Appeal No. 520 of 1974. D/- 13-3-1978.*

(A) Civil P. C. (5 of 1908), O. 23, R. 1 — Withdrawal of suit — Formal defect — Suit by predeceased son's widow against father-in-law for maintenance — During pendency of appeal death of defendant — Application by plaintiff for withdrawal of suit on the ground that her right has been enlarged by death of defendant — Question requiring determination on merits in appeal — — Held, that leave to withdraw could not be granted. (Para 6)

Anno: AIR Comm. C. P. C. (8th Edn.) O. 23, R. 1, N. 25.

(B) Civil P. C. (5 of 1908) O. 6, R. 2 — Custom — Maintenance suit — Proof of marriage — Modified form of marriage alleged — Marriage must be proved as custom.

Where a marriage is alleged to have been performed in accordance with any modified form of Shastric Hindu Law, it must be pleaded and proved as a custom and, in absence of pleadings, no amount of evidence could be looked into. AIR 1973 Andh Pra. 208, Relied on. (Para 7)

Anno: AIR Comm. C. P. C. (9th Edn.) O. 6 R. 2 N. 6-B.

Cases Referred: Chronological Paras
AIR 1973 Andh Pra 208 7

*(Against judgment and decree of Addl. Civil Judge, Bijapur, D/- 13-8-1973).

V. Krishnamurthy for S. K. Kulkarni, for Appellant; S. G. Sundarswamy for S. D. Chhatre, for Respondent.

JUDGMENT:— The appellant-plaintiff brought a suit — O. S. No. 49 of 1970 — in the court of the Munsiff, Basavanabagewadi, for maintenance at the annual rate of Rs. 1,200/- from the defendant who, according to her, was her father-in-law. The plaintiff claimed that she was the second wife of Shivappa, the only son of the defendant and his first wife being Basalingawwa. She had further stated that she had given birth to a daughter called Laxmavva who died in infancy in 1950 and Shivappa died in 1959. She claimed that the suit properties consisting of lands and houses were the ancestral properties of the defendant, out of which she was legally entitled to annual maintenance, which according to her, has been denied unreasonably by the defendant.

2. The defendant, while resisting the suit, contended inter alia, in the written statement that the plaintiff was not the wife of Shivappa. Shivappa had no second wife and Laxmavva was not the daughter of the plaintiff by Shivappa. It was also contended that the plaintiff had a husband called Rahutappa Siddappa Bilgi who died after some years after his marriage with the plaintiff.

3. It may be relevant to state that the plaintiff never disclosed in her plaint that she was first married to Rahutappa Siddappa Bilgi.

4. The first issue framed by the trial Court was as to whether the plaintiff was the wife of Shivappa and Laxmavva was the daughter of the said Shivappa. On this issue, the plaintiff has examined herself (P. W. 1), besides producing two other witnesses (P. Ws. 2 and 3) to prove her marriage with Shivappa. The trial Court held that the plaintiff has failed to establish the custom and also the requisite ceremonies of her marriage with Shivappa. But, it raised the presumption in favour of the validity of her marriage and the legitimacy of Laxmavva on the ground of her continuous residence in the house of Shivappa. The Trial Court also held that the suit properties were the ancestral properties of the defendant and accordingly, it awarded maintenance as prayed for with effect from 11th June, 1970.

In the appeal preferred by the defendant, the learned Additional Civil Judge, Bijapur, has observed that the plaintiff being formerly the wife of Rahuthappa Siddappa Bilgi and thereafter she having claimed to have married Shivappa, the form of marriage undergone by the plaintiff could be only in Udiki form and that form of marriage has neither been pleaded by the plaintiff in the plaint nor has it been satisfactorily proved in her evidence. On the consideration of other evidence, the learned Judge has found fault with the trial Court for having raised the presumption of legitimacy of the marriage when the very issue of marriage was held to be not proved in the case. With that conclusion, the learned Judge allowed the appeal and set aside the decree of the trial Court.

Hence, the plaintiff appeals to this Court.

5. The plaintiff has also filed an application under O. 23 R. 1 of the Civil P. C. seeking leave to withdraw the suit on the ground that during the pendency of the appeal, the defendant died, and, consequently, her right has been enlarged and she is now entitled to one-half of the suit properties as a co-widow of Shivappa. She has further stated that owing to the intervention of this subsequent event, there is a defect in the suit akin to a formal defect and, therefore, this Court should permit her to withdraw the suit so as to institute a fresh suit.

6. This application has been resisted by the respondent on the ground that there is no formal defect in the suit and her claim that she is entitled to one-half of the suit properties as a co-widow of Shivappa depends upon the proof of her second marriage and it could not be considered as a formal defect within the meaning and scope of O. 23 R. 1. I think, the objection of the respondent is well-founded. Formal defect denotes every kind of defect which does not affect the merits of the case. The plaintiff's contention that she is now entitled to one-half of the suit properties as a co-widow of Shivappa due to the death of her father-in-law also depends entirely upon the proof of her second marriage. That is the primary question to be determined on merits in this appeal. It is, therefore, not a formal defect; nor there is any other sufficient ground in this case for granting leave to the plaintiff to withdraw the suit. The application is accordingly rejected.

7. Turning now to the merits of the case, on the question of Udiki form of marriage, she has not averred anything in her plaint. The defendant in his written statement, did point out that the plaintiff was not married to Shivappa and she

has married one man called Rahutappa Shivappa Bilgi of Uppaldinni who died after some years after the marriage. In the course of the evidence, the plaintiff has admitted her first marriage with R. S. Bilgi. That being so, the form of marriage which she could have undergone with Shivappa was that of only the customary Udiki form of marriage. In order to prove that form of marriage, she has examined P. W. 2 and P. W. 3. Their evidence, as observed by the appellate Court, falls short of the requirement. The anxiety prevailed upon me to go through that evidence as it pertains to the status of a woman apart from her right to maintenance. But, I cannot help her. Her evidence is most unsatisfactory. It is nowhere near the standard of proof required in such cases.

Apart from that, there is a greater infirmity in this case. As held by the Andhra Pradesh High Court in Malakayya v. Avati Buchamma, AIR 1973 A. P. 208, where a marriage is alleged to have been performed in accordance with any modified form of Shastric Hindu Law, it must be pleaded and proved as a custom and, in the absence of pleadings, no amount of evidence could be looked into. Plaintiff knew very well when it was brought to her notice in the written statement that she was required to prove the customary marriage. She has not made any attempt to amend her plaint nor produced satisfactory proof of her marriage in the Udiki form.

8. In the result, the appeal fails and is dismissed; but, in the circumstances, I make no order as to costs.

Appeal dismissed.

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M. RAMA JOIS J.

Mrs. Thayarammal, Petitioner v. People's Charity Fund, Bangalore, and others, Respondents.

Writ Petition No. 656 of 1978, D/- 15-2-1978.*

(A) Karnataka Cinemas (Regulation) Act (23 of 1964), S. 19 — Rules under, R. 6 — "Lawful possession" — Lease period expiring — Effect of renewal clause.

It was contended that in view of the term in the lease deed enabling renewal of the lease of the building and equipment on terms as may be stipulated by the lessors and the lessee being entitled to first priority in the event of others offering to take a lease the lessee could compel renewal by a suit for specific performance and that therefore her possession even after the expiry of the lease continued to be lawful within the meaning of R. 6 of the Rules framed under the Karnataka Cinemas (Regulation) Act which entitled her for re-grant of licence under the provisions of that Act,

Held (rejecting the contention) that the lessee could not claim renewal as of right and that even if she could get the lease renewed filing a suit for the purpose, still, possession would not be lawful until the lease got renewed as a result of the suit. The lessors, in the case, appeared to have decided to run the cinema themselves and the correspondence between the parties too did not indicate that the lessors agreed to renew the lease. AIR 1974 SC 104, Rel. on. (Paras 12,14 & 18)

(B) T. P. Act (4 of 1882) S. 108 (q) — Term of re-delivery at the expiry of lease period is implied.

Where the lease period was fixed, the lessee was bound to put the lessor in possession of the demised property at the expiry of the lease period notwithstanding the absence of specific term to that effect. Such a term would be implied in view of S. 108 (q), T. P. Act. (Para 15)

Anno: AIR Comm. T. P. Act, 4th Edn. S. 108 (q) N. 1

(C) Constitution of India, Art. 226 — New point — Plea not urged before statutory authority nor entertained in writ proceeding. (Para 17)

Anno: AIR Comm. Constn. of India, 2nd Edn. Art. 226 N. 42 (u).

Cases Referred: Chronological	Paras
AIR 1974 SC 104	6, 10, 18
AIR 1968 SC 620	11
AIR 1928 Sind 137	16
AIR 1916 Mad 1224 (1)	18
1915 AC 428; Commrs. of Inland Revenue v. Southend on Sea Estates Co. Ltd.	16
(1914) 1 K. B. 515, Southend on Sea Estates Co. Ltd. v. Commrs. of Inland Revenue	16

K. K. Venugopal with V. P. Govindarajulu, for Petitioner; N. Srinivasan for Respondent No. 1.

ORDER:— The legality of the order of the Licensing Authority under the Karnataka Cinemas (Regulation) Act, 1964 (hereinafter referred to as 'the Act') refusing

*(To quash order passed by Dist Magistrate, Bangalore, D/- 28-12-1977).

to regrant the cinematograph licence to the petitioner, on the ground that the possession of the petitioner of the building in which she has been exhibiting the cinematograph films and the equipment, is not lawful and the order of the appellate authority confirming the order of the Licensing Authority is questioned by the petitioner in this writ petition.

2. The petitioner became the lessee of the premises together with equipments meant for exhibiting cinematograph films, called IMPERIAL TALKIES situate in the City of Bangalore. The People's Charity Fund, a Trust registered under the Trust Act, is the owner, and lessors of the aforesaid building and equipments. After the expiry of the earlier period of leases of the same premises and equipment, the latest lease which is relevant for this case came into existence through a registered deed dated 12-12-1962. The period of lease was fixed at 15 years, on a monthly rent of Rs. 1,450/- and was due to expire on 11-12-1977. Even before the expiry of the lease period, the 1st respondent filed a Civil Suit against the petitioner for eviction on the ground of breach of covenant by sub-letting. The suit was dismissed by the trial Court, but was decreed by the appellate Court and the second appeal, R. S. A. 802/73, filed by the petitioner is pending before this Court. Even as the said second appeal is pending, the period of lease itself came to an end on 11-12-1977.

3. In the lease deed (Exhibit-A) there is a renewal cl. in para (i) (b) of the deed, which reads as follows:

"On the expiry of the period of lease specified here-in-before and in respect of any new lease, the Lessors may enter into at that time, the Lessors are agreeable to give first priority to the Lessees' application for fresh lease provided the Lessees agree to the terms and conditions of the Lessors to be stipulated at that time."

4. About six months prior to the expiry of the lease period, with the intention of seeking renewal of the lease for a further period, a letter dated 13th June 1977 was addressed on behalf of the petitioner to the 1st respondent (Exhibit-B) and the same reads as follows:

"As you are aware, the above referred premises is leased to us and we have been in occupation of the same for more than two decades. The present lease expires on 12th Dec. 1977. Due to the addition of several cinema houses in Bangalore equipped with modern amenities such as air-cooling etc., the competition has increased tremendously. The distributors of foreign films are not inclined to screen first-class pictures in our premises due to the inadequate facilities. In order to procure first-class pictures it is absolutely essential that we modernise the theatre including providing air conditioning or air-cooling plants. This obviously involves investment of money running into several lakhs of rupees. We, on our part, are agreeable to make this investment provided we are given renewal of the lease for a period of 15 years with the option to renew for a further period of 15 years. The lease period requested for is absolutely essential in order to recover our investment for modernising the theatre. As you know, we have been paying monthly rent of Rs. 1,450/- and we are agreeable to enhance the rent to Rs. 2,500/- per month with effect from 12th Dec. 1977 for the next 15 years and Rs. 4,000/- per month after the expiry of first 15 years.

We hope you will consider our proposal favourably and request you to kindly let us have your confirmation as early as possible."

To the said letter the 1st respondent sent a reply on 18th Aug. 1977 (Ex. C). The entire case of the petitioner is based on the said letter, the contents of which are as follows:

"This is to acknowledge receipt of your letter dated 13th June 1977 pertaining to the lease of the New Imperial Cinema at 23, Residency Road, Bangalore-25.

At the outset, we have to point out that our lessees are the Legal Representatives of the Estate of late Mr. S. V. Margan, represented by Smt. Thayarammal, Mr. S. V. Viswanathan and late Mr. S. V. Subramaniam and not as stated by you.

While adverting to your proposal for the lease of the above cinema, after the expiry of the existing lease, please be informed that in this connection we have on hand a number of proposals from various parties with reasonable offers, for the lease of the same theatre on the expiry of the existing lease. As such your proposal shall be taken up for consideration in due course.

However, you are advised that if you wish to pursue this matter further, you may, if you so desire get in touch with our Trustee Sri R. Swaminathan who is now in Bangalore.

We shall await to hear from him in the above.

Thanking you once again for your proposal."

Thereafter the 1st respondent issued a notice of termination of the lease to the petitioner with effect from 11-12-1977 and asked them to vacate and deliver possession on 12-12-1977. In the said notice the 1st respondent, inter alia, categorically stated that the Trust has decided to run the theatre themselves.

5. In this situation, as the cinematograph licence issued to the petitioner was due to expire by the end of Dec. 1977 the petitioner applied for the regrant of the licence, for a further period of one year, on 30th Nov. 1977, before the Deputy Commissioner and the District Magistrate, Bangalore District, who is the Licensing Authority for the grant or regrant of licence under the Act. R. 6 of the Rules framed under the Act, which is relevant for this case, reads as follows:

"6. Records relating to ownership or possession to site, building or equipment to be produced.

If the applicant for licence is the owner of the site, building or equipment he shall produce before the licensing authority necessary records relating to his ownership and possession. If he is not the owner, he shall produce to the satisfaction of the licensing authority, documentary evidence in proof of his lawful possession of the site, building or equipment.

6. As the petitioner is not the owner of the building and the equipment the 2nd respondent proceeded to consider as to whether the possession of the building and equipment by the petitioner on or after 12-12-1977 is lawful as that is the requisite condition for the regrant of licence. The 1st respondent relying on the decision of the Supreme Court in M. C. Chokalingam v. V. Manickavasagam, (AIR 1974 SC 104) held that the possession by the petitioner of the building and equipment was not lawful and accordingly by his order dated 28th Dec. 1977 refused to regrant the licence to the petitioner.

7. The petitioner preferred an appeal to the Divisional Commissioner, Bangalore (3rd respondent), who is the appellate authority under the Act against the order passed by the 1st respondent under the Act under S. 10 of the Act read with R. 114 of the Rules. The said appeal was dismissed by the 3rd respondent by his order dated 7th Jan. 1978 (Exhibit-E).

8. Aggrieved by the aforesaid orders the petitioner has presented this writ petition praying for the issue of writ of certiorari against the orders of 2nd and 3rd respondents and also for the issue of consequential direction to the said respondents directing the regrant of the licence.

9. Sri K. K. Venugopal, learned counsel for the petitioner, urged the following contentions:

(1) The impugned order suffers from patent error of law in that, there has been no consideration of the documents (Exhibits A, B and C) on the basis of which the petitioner claimed the possession of the building and equipment as lawful and without doing so the ratio of the decision of the Supreme Court was mechanically applied, though the case of the petitioner was clearly distinguishable from the said case; and,

(2) In view of the renewal clause contained in the lease deed (Exhibit-A), together with the letter addressed by the petitioner (Exhibit-B) and the reply of the 1st respondent (Exhibit-C) the possession of the building and equipment by the petitioner is lawful, as the petitioner acquired a right for renewal of the lease, and could also seek specific performance of the contract for renewal of the lease.

10. Elaborating the first contention, the learned Advocate for the petitioner, criticised that in the order of the 3rd respondent he has mechanically set out in extenso the grounds urged by the petitioner but in the portion of the order in which he has considered the case of the petitioner, there is no reference to the two letters exchanged between the parties (Exhibits B and C), and the stand taken by the petitioner on the basis of those letters. He submitted that the effect of these documents as contended by the petitioner before the appellate authority was that the petitioner has secured a right to continue in the premises or in any event entitled to compel the petitioner to renew the lease, by filing a suit for specific performance, and this aspect clearly distinguishes the case of the petitioner from the Supreme Court case, (AIR 1974 SC 104), but the appellate authority failed to consider these documents and to notice the distinguishing feature of this case and proceeded to dismiss the appeal.

11. The Supreme Court decision on which respondents 2 and 3 relied on to reject the application of the petitioner for regrant of licence was a case which arose under the provisions of the Madras Cinematograph Act and the Rules framed thereunder. R. 13 of the Madras Rules provided that in order to claim grant or

regrant of Cinematograph Licenses, the applicant not being the owner should establish that his possession of the concerned building and/or equipment was 'lawful.' In the said case, the applicant for regrant of Cinematograph licence was a lessee of the building and equipment who was continuing in possession after the termination of the lease. The Supreme Court held that his possession was unlawful rejecting the contention that his possession was lawful until he was evicted from the building in accordance with law. The relevant portion of the judgment is found at para 15 which reads as follows:

"Turning to R. 13, even in the first part if the applicant for the licence is the owner of the property he has to produce before the licensing authority the necessary records not only relating to his ownership but also regarding his possession It is implicit, that the owner having a title to the property, if he can satisfy the licensing authority with regard to his possession also, will indeed be in 'lawful possession' although the word 'lawful' is not used in the first part. It is in that context that the word 'possession' is even not necessary to be qualified by lawful in the first part of R. 13. If, however, the applicant for the licence is not the owner, there is no question of his showing title to the property and the only requirement of the law is to produce to the satisfaction of the authority documentary evidence with regard to his lawful possession of the property. The word 'lawful,' therefore, naturally assumes significance in the second part while it was not even necessary in the first part. The fact that after expiry of the lease the tenant will be able to continue in possession of the property by resisting a suit for eviction, does not establish a case in law to answer the requirement of lawful possession of the property within the meaning of R. 13. Lawful possession cannot be established without the concomitant existence of a lawful relationship between the landlord and the tenant. This relationship cannot be established against the consent of the landlord, unless, however, in view of a special law, his consent becomes irrelevant. Lawful possession is not litigious possession and must have some foundation in a legal right to possess the property which cannot be equated with a temporary right to enforce recovery of the property in case a person is wrongfully or forcibly dispossessed from it. This Court in Lallu Yeshwant Singh's case, (AIR 1968 SC 620) had not to consider whether juridical possession in that case was also lawful possession. We are clearly of opinion that juridical possession is possession protected by law against wrongful dispossession but cannot per se always be equated with lawful possession."

The petitioner, however, tried to distinguish his case from the Supreme Court case before the Divisional Commissioner on the basis of Para I (b) of the Lease Deed which contains a renewal clause and the offer made by the petitioner to have the lease renewed in the letter dated 13th June 1977 (Exhibit-B) and the reply dated 18th Aug. 1977 (Exhibit-C) by the 1st respondent in which according to the petitioner there was the clearest indication that the 1st respondent had decided to lease the building and equipment after 12-12-1977 and therefore having regard to the first priority available to the petitioner under the renewal clause, the offer of the petitioner had to be accepted. The Divisional Commissioner has fully set out the written arguments submitted before him on the above lines in his order and also the renewal clause in the lease deed and thereafter proceeded to consider his case and stated in para 13 of his order as follows:

"It will be seen from the wordings of the covenant that in the event of lessors agreeing to lease the property, first priority should be given to the lessee (the appellant herein). In the event of sale, the first option should go to the appellant. To read more than this into the covenant may not be very correct. It is accepted by both the parties that time fixed for the lease period is 15 years and the same has already elapsed. The lessor (the respondent herein) has not agreed to allow the lessee (the appellant herein) to continue in the premises under the terms and conditions of the agreement. Neither there is any fresh lease in favour of the appellant. In these circumstances, it cannot be considered that the appellant is in lawful possession of the building, as required under the rules. The facts and the law enunciated in various decisions referred to and relied upon by the appellant are not relevant to the facts of this case. In these circumstances it cannot be said that the documentary evidence produced by the appellant is beyond ambiguity. What is required is the satisfaction of the licensing authority as to the lawful possession. The Licensing Authority has come to the conclusion that the possession of the pro-

perty by the appellant is litigious in nature and the very history of the case and also the reading to the documentary evidence produced by the appellant makes it clear that the possession is litigious in nature and cannot be said to be a satisfactory lawful possession. In these circumstances, I do not find any reason to interfere with the orders of the learned District Magistrate and accordingly I uphold the same. In the result, the appeal is dismissed."

12. From the above portion of the order, it is clear that the Divisional Commissioner came to the conclusion that all that the relevant clause in the lease deed provided was that in the event of the Lessor (1st respondent) deciding to lease the building, the lessee should get first priority and as lessor has not agreed to lease and as admittedly the lease period has expired, the petitioner's possession is not lawful. It is no doubt true that there is no specific reference to the contents of the letters (Exhibits B and C) in the aforesaid portion of the order, but there is specific reference to the renewal clause. Further the written arguments based on those documents have been fully set out in the earlier part of the order, and the 3rd respondent has come to the conclusion on the basis of these documents that there is no fresh lease or renewal of the lease beyond 12-12-1977. Therefore, I am unable to accept the first contention of the petitioner.

13. As regards the second contention the first submission of the petitioner is based on renewal clause in the lease deed and the letter dated 13th June 1977 (Exhibit-B) and the reply sent by the 1st respondent dated 18th Aug. 1977 (Exhibit-C). The learned counsel for the Petitioner submitted that by virtue of these documents a clear contract came into existence between the petitioner and the 1st respondent for the renewal of the lease and the petitioner is in a position to enforce the specific performance of the said contract and, therefore, the possession of the petitioner could not have been termed to be not lawful. He pointed out that in the Supreme Court case there was no renewal clause, and therefore this case is clearly distinguishable from the said case.

14. A reading of the relevant clause in the lease deed and the two letters which are fully set out earlier will clearly show that there is no substance in this submission of the petitioner. Under the said renewal clause no right is given to the petitioner to claim renewal as of right, at her discretion. According to the renewal clause, if only the 1st respondent decided to give the premises and equipment on lease after 12-12-1977, the petitioner is entitled to first priority, but if the lessors decided to run the cinema themselves and not to give on lease, the petitioner has no right to insist on the renewal of the lease, As the lease period was coming to a close, by letter dated 13th June 1977 (Exhibit-B) aforesaid the petitioner offered to take the building and equipment on lease for further period on payment of higher rents. According to the petitioner this offer was accepted in the reply dated 18th Aug. 1977 (Exhibit-C) or in any event the said letter clearly sets out the decision of the 1st respondent to give the building and equipment on lease after 12-12-1977 and therefore first priority for renewal of the lease accrued to the petitioner in terms of cl. (1) (b) of the lease deed. In the aforesaid letter of the 1st respondent, I am unable to see any decision on the part of the 1st respondent to lease the building in question after the expiry of the lease in favour of the petitioner in the said letter. On the other hand the letter indicates that there were offers by several persons to take the premises on lease including the proposal of the petitioner and they will all be taken up for consideration in due course. The letter does not in the least indicate that any decision had been taken by the 1st respondent to give the premises on lease after 12-12-1977. If only the 1st respondent had decided to give the premises on lease after 12-12-1977 and took up the proposal of all the persons for consideration, the petitioner could have insisted on his right for priority in view of the definite clause in the agreement. But no such decision was taken by the 1st respondent. On the other hand by notice dated 28-9-1977 (Exhibit R-1) the petitioner was informed of the definite intention of the 1st respondent to run the theatre by themselves and not to lease the same to the petitioner or any one else. The petitioner was called upon to deliver the possession of the premises before the midnight of 12-12-1977. Therefore, I do not find any substance in the submission of the petitioner that she had acquired any right for the renewal of the lease.

15. The second submission made on behalf of the petitioner in support of the second contention was that, there was no clause in the lease deed requiring the

petitioner-lessee to put the 1st respondent-lessor in possession of the property after the expiry of the lease period and the absence of such a clause distinguishes this case from the Supreme Court case. I am not impressed by this submission. Once the period of lease is fixed, lessee is bound to put the lessor in possession of the leased property on the termination of the lease. Such a condition has to be read into the lease deed even in its absence in view of Section 108 (q) of the Transfer of Property Act.

16. The third submission made by the learned counsel for the petitioner, in support of the second contention was, that the so called decision of the 1st respondent to run the cinema themselves was not bona fide and it was only with the object of depriving the right of priority for renewal and for evicting the petitioner from the premises, the 1st respondent has said so in the notice dated 28-9-1977 (Exhibit-1). He further submitted that if only the decision of the 1st respondent to run the theatre was bona fide, they could insist on the petitioner to deliver possession of the building and equipment to them and as the decision was not bona fide, the petitioner has the right to retain possession and compel the 1st respondent to renew the lease. In support of the submission the petitioner placed reliance on the following authorities — (i) 1914 (1) K. B. 515; (ii) 1915 A.C. 428; (iii) AIR 1928 Sind 137 at p. 139 and (iv) American jurisprudence Vol. 50, p. 60.

17. The above plea was not raised before the Licensing Authority as is clear from the written submission dated 12-12-1977 made by the petitioner before that authority copy of which is produced by the 1st respondent along with memo dated 7-2-1978. This plea was taken in the appeal memo before the 3rd respondent. The 3rd respondent has not considered this plea raised by the petitioner for the first time in the appeal. The same not having been raised before the Licensing Authority cannot be permitted to be raised in the writ petition.

18. Further I am of the opinion that even if there is any substance in the aforesaid submissions made on behalf of the petitioner in support of the second contention, it may only give rise to a cause of action for the petitioner for filing a suit for specific performance, but that does not in any way improve the position of the petitioner for this case. Even assuming that the petitioner has a good case to file a suit for specific performance, and he files a suit for that purpose and secures a decree compelling the 1st respondent to execute lease deed in his favour and secures a lease deed pursuant to such a decree, the possession of the petitioner of the building and equipment after 12-12-1977 until such an event happens, would be clearly not lawful (See AIR 1916 Mad 1224 (1) and the decision of the Supreme Court in Chocklingam's case (AIR 1974 SC 104) is applicable on all fours to this case. Hence, I reject the second contention of the petitioner also.

19. For the reasons aforesaid, the rule is discharged. The writ petition is dismissed with costs to the 1st respondent. Advocate's fee Rs. 500/-.

Petition dismissed.

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K. JAGANNATHA SHETTY, J.

Dibbadeerappa, Petitioner v. Smt. Honnamma and others, Respondents.

Civil Revn. Petn. No. 208 of 1976, D/- 5-4-1978.*

Civil P. C. (5 of 1908), O. 8, R. 9 — Amendment of written statement — New plea of agricultural tenancy raised by amendment — Issue relating to such tenancy cannot be determined by Civil Court in view of provisions of local Land Reforms Act — Amendment not allowable. (Para 2)

Anno: AIR Comm. C. P. C. (9th Edn.), O. 8, R. 9, N. 1.

M. V. Sheshadri, for Petitioner.

ORDER:— Defendant-3 made an application to amend his written statement. He wanted to raise a plea of tenancy in respect of the agricultural land which is the subject-matter of the suit. The suit was for a declaration of right and permanent injunction. In the original written statement, defendant-3 has not raised any plea of tenancy. The proposed amendment has been allowed by the Court. The plaintiff is aggrieved by that. Hence, he has preferred the revision petition.

2. In my opinion, the Court which has no jurisdiction to determine a question, should not ordinarily allow that question. The proposed amendment relates to the tenancy claimed by defendant 3. If that

*(Against Order of Munsiff and J. M. F. C., Pavagada, D/- 5-12-1975).

amendment is allowed, then the issue relating to the tenancy cannot be determined by the Civil Court, and ought to be referred to the Tribunal as required under S. 133 of the Karnataka Land Reforms Act. I cannot understand why such charity should be extended to defendant-3. It is not as if he has no remedy to establish his right. Under S. 48-A of the Land Reforms Act, he could approach the Land Tribunal for occupancy right claiming that he is a tenant of that land. That is a statutory right conferred upon him. He could have taken recourse to that remedy. I am told that he has already approached the Tribunal and got an order adverse to him.

3. In the result, I allow the revision petition and set aside the impugned order. No costs.

Revision allowed.

AIR 1978 KARNATAKA 131

N. D. VENKATESH, J.

V. Virupakshappa, Petitioner v. D. Hanumanthappa and others, Respondents.

Writ Petn. No. 2529 of 1977, D/- 8-3-1978.

(A) Karnataka Land Reforms Act (10 of 1962), Sections 48 and 48-A and Karnataka Land Reform Rules, 1974, R. 16 — Tribunal constituted under S. 48 — Decision by majority of members constituting quorum would be decision of the Tribunal.

In case of dissent amongst the members of the Tribunal the majority view would prevail and that would be the decision of the Tribunal. The legislature would not have intended that in the event of dissent the question ought to remain undecided especially when by sub-sec. (6) of S. 48 the decision of the Tribunal is made final. Maxwell on Interpretation of Statutes 12th Edn. 229, (1971) 2 QB 216 and AIR 1972 SC 1812, Rel. on. (Paras 15, 18)

(B) Karnataka Land Reforms Act (10 of 1962), S. 48-C — Constitution of India, Arts. 226 (as amended by 42nd Amendment) and 227 — Discretionary interim orders of Land Tribunal under S. 48-C — Interference in writ petition.

Under Art. 226 of the Constitution as amended by the 42nd Amendment, a writ could issue only for enforcement of any of the Part III rights or for the redress of any injury of a substantial nature as a result of any illegality in any proceedings etc. Consequently, the High Court would not interfere with discretionary interim orders of Land Tribunals under S. 48-C. (1974) 2 Kant LJ 34, Dist. (Para 21)

Anno: AIR Comm. Constitution of India (2nd Edn.), Art. 226, N. 173.

Cases Referred: Chronological Paras

(1974) 2 Kant LJ 34 21

AIR 1972 SC 1812 : 1972 Serv LR 385 : 1972 Lab IC 909 17

(1971) 2 QB 216 : (1971) 2 All ER 805, Picea Holdings Ltd. v. London Rent Panel 16

(1963) NZ LR 755, Atkinson v. Brown 16

(1798) 1 B and P 229 : 126 ER 875, Grindley v. Barker 16

M. R. Achar, for Petitioner; H. Ranga Vittalachar, (for No. 1) and C. Shivappa Govt. Pleader, (for No. 6), for Respondents.

ORDER :— This petition filed under Article 226 of the Constitution of India is directed against the order dated 21-1-1977 passed by the Land Tribunal, Hospet, in case No. 1401 of 1974-75, marked as Exhibit 'C' in the case.

2. The proceeding is still pending before the Tribunal. The order in question is an interim order.

3. The petitioner, Virupakshappa, and the first respondent, Dangadi Hanumanthappa, are rival claimants for occupancy rights over a piece of land measuring 2 acres 59 cents in Sy. No. 116 of Amaravathi village, Hospet Taluk. Both have filed applications under S. 48-A of the Karnataka Land Reforms Act, 1961 (hereinafter called the Act). Lingappa (respondent-2), Jambanna (respondent-3) and Nandappa (respondent-4) are admittedly the owners of the land in question.

3-A. Each of the claimants sought for a temporary injunction in his favour alleging that the other rival claimant was trying to interfere with his peaceful possession of the land in question and that he be restrained from doing so. The Tribunal, after recording their statements and hearing all concerned, upheld by a majority the claim of Dangadi Hanumanthappa for an interim injunction and rejected that of Virupakshappa.

4. This interim order is attacked mainly on two grounds, Firstly, it is urged, relying on a decision of this Court, that this was not a case for preferential treatment with an interim injunction of one of the rival claimants at the cost of the other and that on the other hand an appointment of an interim receiver would have been just and proper Secondly, it is stated that the order of the Tribunal, not being a unanimous decision of all the members of the Tribunal,

was no decision at all in the eye of law, and therefore was liable to be quashed.

5. Let us first consider the latter submission. It is a fact that the impugned order is not an unanimous verdict, but is based on the majority opinion. Of the three members who participated in the proceeding on that day, the two non-official members have upheld the claim of Hanumanthappa and the Chairman of the Tribunal has dissented from their view. According to the Chairman, Hanumanthappa was not entitled to any ad interim order in his favour as his claim for occupancy right itself was not on solid grounds. Virupakshappa, according to the Chairman, was also not entitled to an interim order as he had failed to show the urgent necessity for such an order in his favour. However, in view of the majority opinion of the two non-official members holding that Hanumanthappa should be granted an ad interim order in his favour, the same was rendered as the decision of the Tribunal.

6. While trying to substantiate his contention that a decision of the Land Tribunal to be properly so called should be an unanimous verdict, the learned counsel for the petitioner argued that since the Act and the Rules made thereunder do not provide that majority view should prevail in case of differences amongst members, it should be taken that the intention of the legislature was that any decision of the Tribunal should only be a unanimous one. Otherwise, according to him, as in the case of several other enactments like the Karnataka Appellate Tribunal Act, 1976, Karnataka Co-operative Societies Act, 1959, Karnataka Sales Tax Act, 1957, and Karnataka High Court Act, the legislature would have provided for a majority decision.

7. On the other hand. the learned Counsel for the contesting respondent and the learned Counsel for the State, argued that if gathered from the broad scheme of the Act it appears that the intention of the legislature was that in case of difference of opinion amongst the members of the Tribunal the majority view should prevail. In their view any other construction in the circumstances of the case would lead to unfortunate consequences defeating the very purpose and the object of the Act.

8. The Act received the assent of the President on 5-3-1962 and it came into force on 2-10-1965. There have been several Amendments of which the Amendment Act of 1973 (Act 1 of 1974) introduces many important changes in the Act. The Act provides for an uniform law in the entire State of Karnataka in the matter of agrarian relations, conferment of ownership on tenants, ceiling on land holdings and for certain other connected matters. Originially certain categories of landholders had been permitted to resume portions of the lands under cultivation of their tenants. This was done away with by Act 1 of 1974. Act 1 of 1974 came into force on 1-3-1974. In the Act as it stood prior to 1-3-1974 the Court, as constituted under the Act, was the forum to decide the disputes arising out of claims for occupancy rights. The Munsiffs of the respective areas had been constituted as "Courts" for purposes of the Act. The power to determine the surplus areas had been conferred on the Tahsildars. Act 1 of 1974 provided for the constitution of separate Land Tribunals to decide disputes arising out of the claims for occupancy rights. Subsequently by another amendment the power to determine surplus holdings has also been conferred on the Tribunals.

9. Section 48 of the Act which provides for the Constitution of Tribunals reads as follows:

"48. Constitution of Tribunals.—

(1) The State Government shall, by notification, constitute for each Taluk a Tribunal for purposes of this Act consisting of the following members, namely:—

(i) the Assistant Commissioner of the Revenue sub-division having jurisdiction over the Taluk or an Assistant Commissioner specially appointed for the purpose by the State Government;

(ii) four others nominated by the State Government of whom at least one shall be a person belonging to Scheduled Castes or Scheduled Tribes.

Provided that if in its opinion it is necessary so to do. the State Government may constitute additional Tribunals for any Taluk and the Deputy Commissioner, may, subject to any general or special orders of the State Government, distribute the work among the Tribunals in any Taluk.

(2) The Assistant Commissioner shall be the Chairman of the Tribunal.

(3) The State Government from time to time likewise re-constitute the Tribunal.

Any proceeding pending before the Tribunal shall be continued by the re-constituted Tribunal as if the same were instituted before it.

Explanation: For the purpose of this subsection 're-constitution' shall include removal

of a member from or nomination of a new member to the Tribunal.

(4) The quorum to constitute the meeting of the Tribunal and the procedure to be followed by it shall be such as may be prescribed.

(5) No act or proceeding of the Tribunal shall be deemed to be invalid by reason only of the existence of any vacancy among its members or any defect in the constitution or re-constitution thereof.

(6) The non-official members of the Tribunal shall be entitled to such travelling and other allowances as may be prescribed.

(7) The Tahsildar or any officer specially appointed for the purpose by the State Government, shall be the Secretary of the Tribunal.

(8) No legal practitioner shall be allowed to appear in any proceeding before the Tribunal."

Section 48-A which prescribes the procedure to be followed by the said Tribunals reads as follows:—

"48-A. Enquiry By the Tribunal, etc.,

(1) Every person entitled to be registered as an occupant under S. 45 may make an application to the Tribunal in this behalf. Every such application, save as provided in this Act, be made on or before the 31st day of Dec. 1974, provided that the Tribunal may, for sufficient cause shown, admit an application made beyond that date but on or before 30th June 1977.

(2) On receipt of the application, the Tribunal shall publish or cause to be published a public notice in the village in which the land is situated calling upon the landlord and all other persons having an interest in the land to appear before it on the date specified in the notice. The Tribunal shall also issue individual notices to the persons mentioned in the application and also to such others as may appear to it to be interested in the land.

(3) The form of the application, the form of the notices, the manner of publishing or serving the notices and all other matters connected therewith shall be such as may be prescribed.

(4) Where no objection is filed, the Tribunal may, after such verification as it considers necessary, by order, either grant or reject the application.

(5) Where an objection is filed disputing the validity of the applicant's claim or setting up a rival claim, the Tribunal shall, after enquiry, determine, by order, the person entitled to be registered as occupant and pass orders accordingly.

(5A) Where there is no objection in respect of any part of the claim, the Tribunal may at once pass orders granting the application as regards that part and proceed separately in respect of the other part objected to.

(6) The order of the Tribunal under this section, shall be final and the Tribunal shall send a copy of every order passed by it to the Tahsildar and the parties concerned.

(7) The person to be registered as an occupant shall pay to the State Government an amount equal to fifteen times the net annual income referred to in sub-sec. (2) of S. 47 of Schedule-I in the case of A class, B class and C Class lands referred to in Part A of Schedule-I and 20 times such income in the case of D class lands referred to in the said Part-A plus the amount, if any, payable under sub-sec. (3) of that section:

Provided that the premium payable by a permanent tenant shall be six times the difference between the rent and the land revenue of the land.

(8) Where no application is made within the time allowed under sub-sec. (1) the right of any person to be registered as an occupant shall have no effect."

10. Act 1 of 1974 did not provide for the constitution of additional Tribunals. But by a subsequent amendment by Act No. 18 of 1976 it was provided for the constitution of additional Tribunals for any Taluk and for distribution of work amongst the Tribunals. The necessity for additional Tribunals was felt because of a large number of applications in some Taluks. Though the concerned Deputy Commissioners have been given powers to distribute the work between the Tribunals situated in a Taluk there is no provision providing for transfer of cases from one Tribunal to another and this fact—has to be borne in mind. As provided in sub-sec. (4) of S. 48 the quorum to constitute the meeting is required to be prescribed under the rules. Under sub-s. (5) no act or proceeding of the Tribunal will be invalid only because of a vacancy among its members or there being any defect in the constitution or reconstitution of the Tribunal. Under R. 16 of the Karnataka Land Reforms Rules, 1974, three members including the Chairman will constitute the quorum. As provided in R. 17 the Tribunal in conducting its proceeding has to follow the procedure laid down for a summary enquiry under S. 34 of the Karnataka Land Revenue Act, 1964. Each Tribunal consists of an Assistant Commissioner who is its Chairman and four other non-officials of whom at least one should be a person belonging to Scheduled Castes or

Scheduled Tribes. Legal practitioners are barred from appearing before the Tribunals. The Secretary of the Tribunal (he is not a member of the Tribunal) is either the Tahsildar or an officer specially appointed by the State Government. No appeal is provided against the decision of the Tribunal. As contended by the learned Counsel for the petitioner neither the Act nor the rules provide for a decision by the majority members of the Tribunal. The Tribunal, as defined in the Act (S. 2-A (35)), means the Tribunal constituted under S. 48. S. 48-A which lays lown the procedure to be followed by the Tribunal says that the order of the Tribunal shall be final (sub-sec. (6) of S. 48). According to the learned Counsel for the petitioner, in the circumstances, the Tribunal means the members of the Tribunal constituting a quorum at each meeting and any decision rendered therein shall have to be a unanimous decision of all the members present, as otherwise it would be no decision at all in the eye of law.

11. As already stated above, though the Tribunal consists of the Chairman and four non-official members, only three of them will constitute the necessary quorum for the meeting.

12. In such a validly convened meeting of the Tribunal if a decision is taken, not unanimously but by a majority, would it be invalid is the question.

13. Since the Act and the Rules made thereunder are silent on this aspect, we have to look to the broad scheme of the Act and the intention of the legislature for guidance.

14. There are various theories in the matter of interpretation of statutes one of which, though it should be resorted to very sparingly, is to find out the intention of the legislature and to place that construction which would help to achieve the real object underlying the act without doing violence to the fundamental law of the land or the basic principles underlying the legal system of the country. In this connection it may be useful to quote what Maxwell has stated. Maxwell on Interpretation of Statutes—12th Edition—page 229:

"Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity which can hardly have been intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, or by rejecting them altogether, on the ground that the legislature could not possibly have intended what its words signify, and that the modifications made are mere corrections of careless language and really give the true meaning. Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law....."

15. Now, suppose the decision is not an unanimous one, what is the way out? Is there any provision in the Act for transferring cases from one Tribunal to another? If there is no unanimity and no alternate Tribunal to deal with a matter the result would be that the matter remains undecided. That surely would not have been the intention of the legislature. Besides this, human nature being what it is it is not possible to expect all the members to agree on a particular course of action. Dissent is bound to be there and more so in matters like these where controversial questions of facts and law arise. The legislature was not unaware of this. In the circumstances it is fair to assume that the legislature intended that in case of any dissent amongst the members of the Tribunal the majority view should prevail and that should be the decision of the Tribunal.

16. In Great Britain, as observed by S. A. de Smith in his Judicial Review of Administrative Action (3rd Edition), "the general rule is that a Tribunal discharging functions of a public nature neither exceeds jurisdiction nor errs in law merely by arriving at a majority decision; a requirement of unanimity is exceptional." In this connection a recent English decision also affords good guidance. Under the British Rent Act of 1968, to determine fair rent of dwelling houses, powers are conferred on Rent Assessment Committees constituted under S. 42 of that Act. In June 1970 a Rent Assessment Committee of London Rent Assessment Panel, by a majority determined fair rent of a certain tenanted premises. It was argued in Picea Holdings Ltd. v. London Rent Panel, (1971) 2 QB 216, that the Rent Assessment Committees have no power to give majority decisions, there being no such provision in the Act providing for the constitution of such Tribunals. In this connection similar enactments providing for such Tribunals and permitting majority decisions were cited at the Bar to say that since there is no such provision in the Rent Act of 1968 it has to be assumed that the legislature intended that the decisions of the Rent Assessment Com-

mittees, to be valid decisions, must be unanimous. Lord Parker, C. J., who spoke for the Bench observed that the general principle in such cases was that the majority will conclude the minority and the act of the majority will be the act of the whole. To deduce this general principle the learned Judge placed reliance on an earlier ruling of the year 1798. His observations may usefully be quoted:

"Mr. Slynn who has appeared as amicus (curiae) has however in this connection referred to a case in the Court of Appeal in New Zealand; Atkinson v. Brown (1963) NZLR 755. The facts of that case matter little. The importance of it is that it conveniently collects and deals with the relevant authorities on the matter. North, J., the president of the court in that case, pointed out that the general principle dealing with this point was laid down as long ago as 1798 in Grindley v. Barker (1798) 1 B. and P. 229. In that case Eyre C. J., approached the matter in this way. He said, at page 236:

'.....I thought this question would turn on two general heads of inquiry. First, what the general rule of law was in the case of bodies of men entrusted with powers of this nature; whether they must all concur, or whether the decision of the majority would bind the whole? Secondly, suppose the latter to be the general rule, whether that general rule is to be controlled by the intent of the legislature as collected from the scope and provisions of this Act. With respect to the first question, I think it is now pretty well established, that where a number of persons are entrusted with powers not of mere private confidence, but in some respects of a general nature, and all of them are regularly assembled, the majority will conclude the minority, and their act will be the act of the whole'..... ....

....

"Approaching this case with that general principle in mind, it would appear that this is not a case purely of private interest being involved; it no doubt is a matter of private concern between landlord and tenant, but it is quite clearly, under the scheme of the legislation, a matter of considerable public concern and public interest that fair rents should be fixed. Accordingly this qualifies, as I see it, for coming within the general principle."

17. Though as argued by the Counsel for the petitioner, the provisions of the Rent Act are not entirely similar to those of the Act, the principle enunciated above deserves consideration.

17-A. The Supreme Court has also applied this principle while upholding the decision, not of that of a Tribunal of this nature, but of a selection committee constituted to recommend names for appointment to the post of a Vice-Chancellor. The committee had been constituted under the provisions of the University of Saugar Act, 1946. Of the three members of the Committee only two participated in its deliberations and suggested a name. It was not acceptable to the Chancellor on the ground that the recommendation had been made not by all members but only by two out of the three who constituted the committee. In this connection the Supreme Court has observed in Ishwar Chandra v. Sathyanarain 1972 Serv LR 385 : (AIR 1972 SC 1812) as follows (at p. 1816 of AIR):

"If, for one reason or the other, one of them could not attend, that does not make the meeting of others illegal. In such circumstances where there is no rule or regulation or any other provision fixing the quorum, the presence of the majority of the members would constitute it a valid meeting and matters considered thereat could not be held to be invalid. This proposition is well recognised and is also so stated in Halsbury's Laws of England, Third Edition (Vol. IX, page 48, para 95). It is therefore unnecessary to refer to any decisions of the subject."

18. It may be fairly assumed that in this Country also the general rule is (in the words of S. A. de Smith) "that a Tribunal discharging functions of a public nature neither exceeds jurisdiction nor errs in law merely by arriving at a majority decision", unless the legislature provides otherwise. Since, in the instant case the legislature is silent on the point, it may be inferred, as already stated above, that its intention was that in case of differences of opinion amongst the members of the Tribunal, the majority view binds the minority and that would be the decision of the Tribunal.

19. Thus, in the circumstances of the case and for the reasons mentioned above, the impugned order rendered by the majority members of the Tribunal will be the decision of the Tribunal and it cannot be attacked as not a valid decision on the ground that it is not an unanimous one.

20. While assailing the validity of the order on merits, the learned Counsel for the petitioner also submitted that extraneous and irrelevant considerations have weighed with the Tribunal in allowing Hanumanthappa's claim for temporary injunction, and therefore the order deserves to be quashed.

21. Under S. 48-C of the Act the Land Tribunals have been conferred with powers to issue interlocutory orders in the nature of a temporary injunction or appointment of a receiver. This is a discretionary power and they have to exercise the same judicially. The Tribunal also has powers to revoke or modify such an order. The learned Counsel submits that in the light of the facts of this case where there are bona fide rival claims to the tenancy right, the proper order would have been to appoint a receiver instead of granting ad interim order of injunction in favour of one of the claimants at the cost of the other. In this connection he placed reliance on a decision of this Court in Kamala Handthy v. Ananthayya, (1974) 2 Kant LJ 84. It is true this Court has observed in the said decision that "in any suit where there is a bona fide dispute between the parties on the question whether the suit lands were held by one of the parties as a tenant immediately prior to 1-3-1974 it would be just and convenient to appoint a receiver for the disputed property pending final disposal of the suit." But it may be noted here that the said decision was rendered by this Court sitting in revision against an order of a civil court (the Munsiff). This Court while exercising its powers under Art. 226 as amended by the 42nd Amendment can issue any writ or direction only for the enforcement of any rights conferred by the provisions of Part III; or for the redress of any injury of a substantial nature by reason of the contravention of any other provisions of the Constitution or any provision of any enactment or Ordinance or any order, rule, regulation, bye-law, or other instrument made thereunder; or for the redress of any injury by reason of any illegality in any proceeding by or before any authority under any provision referred to in sub-cl. (b) where such illegality has resulted in substantial failure of justice. It will thus be seen that for obtaining redress of any injury caused by reason of any illegality in any proceedings by or before any authority, such illegality should have resulted in substantial failure of justice. Only on substantial grounds can the orders, more so, the discretionary interim orders of subordinate Tribunals, be interfered with. I have perused the impugned order. It could have been more happily worded. There was no reason for the members of the Tribunal to have made observations which are likely to prejudicially affect their decision on merits. However, since this is only an interim order it is sufficient if it is impressed on the members of the Tribunal that they should not be swayed by the observations made in the interim order while taking a decision finally on merits. It is not necessary either to quash the interim order or to modify it. The Tribunal is directed to expeditiously hear and dispose of the rival claims.

22. Hence, the writ petition is dismissed. The rule is discharged.

23. Parties are directed to bear their own costs.

Petition dismissed.

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E. S. VENKATARAMIAH AND N. VENKATACHALA, JJ.

Mudakappa, Appellant v. Rudrappa and others, Respondents.

Misc. Second Appeal No. 97 of 1975, D/- 28-2-1978.*

Karnataka Land Reforms Act (10 of 1962), S. 133 (as amended by Act 27 of 1976) — Dispute regarding lease-hold rights, whether joint family property or individual property — Jurisdiction of Tribunal. ILR (1975) Kant 1499, Overruled.

The question whether an individual is exclusively entitled to the lease-hold rights or whether the said individual and others are jointly entitled to the same on the ground that the lease-hold rights were originally held by the joint family, is a question which could be decided (for the purpose of disposing applications under S. 48-A) only by the Land Tribunal constituted under the Act.

(Para 12)

When one person applies under S. 48-A for registration of the lands as an occupant in his individual name and others apply for registration of the said lands as joint occupants, it becomes necessary for the Tribunal to decide whether the tenancy in question was held by one of them exclusively before the appointed day or by all the applicants jointly. Without deciding the said question the Tribunal cannot make an effective order under S. 48-A. Whenever a statute confers a duty on an authority to decide a question and a corresponding right on an individual, that authority has, by necessary implication, the power to decide all issues which are incidental and ancillary to the main question to be decided. Moreover, the said question could not be decided by the Civil Court

*(Against judgment and decree of Civil Judge, Haveri in R. A. No. 4 of 1974.)

in view of Section 132 of the Act. ILR (1975) Kant 1499, Overruled. (Para 12)

Cases Referred:	Chronological Paras
(1977) 2 Kant LJ 104	10
ILR (1975) Kant 1499	10, 13
(1975) R. F. A. No. 26 of 1970, D/- 11-6-1975 (Kant)	11

Murlidhar Rao, for Appellant; R. P. Hiremath, for Respondents.

VENKATARAMIAH, J. :— The plaintiff in O. S. No. 11/1972 on the file of the Munsiff and J. M. F. C., Haveri is the appellant in this appeal. He instituted the said suit for the permanent injunction against the defendants, respondents herein, restraining them from interfering with his possession of the three suit lands bearing R. S. Nos. 134 and 135 of Kittur village and R. S. No. 109 in Maidar village in Haveri Taluk, Dharwar District. The facts of the case briefly are these; There was one Mudakappa, who died several years ago leaving behind him four sons by name: Virupaxappa, Rudrappa (defendant-1), Chinnappa (Defendant-2) and Basappa. In the year 1963 there was a partition in the said family amongst the four sons. At that partition, the properties belonging to the family were divided. The plaintiff's case was that the three lands in question, which were being cultivated by his father Virupaxappa as a sole lessee were not the subject-matter of partition and that on his (Virupaxappa's) death he inherited the lease-hold rights in the said lands. He claimed that defendants 1 and 2 and Fakiravva (defendant-3), the widow of their brother Basappa had no right to interfere with his exclusive possession of the suit lands and was therefore entitled to an injunction as prayed for against them.

2. The defendants pleaded that the lease-hold rights in the suit lands originally belonged to the joint family consisting of the four sons of Mudakappa but were not divided amongst them at the partition which took place in the year 1953, since all the members of the family agreed to continue to enjoy the same jointly as lessees. They also pleaded that on the date of the suit they were in possession of the suit lands as joint lessees along with the plaintiff and that no decree for injunction could be passed against them. It was however, admitted by both the parties that the lease in question commenced more than 40 years ago.

3. On the basis of the pleadings, the trial Court framed three issues, viz.,

(1) Whether the plaintiff proves that he was in exclusive possession of the suit property?

(2) Whether the plaintiff proves that the defendants had interfered with his possession? and

(3) To what reliefs the parties are entitled?

4. At the conclusion of the trial, the learned Munsiff recorded findings on issues Nos. 1 and 2 in the negative and dismissed the suit with costs after holding that the lands in question were being enjoyed by all the members of the family as lessees.

5. Aggrieved by the decree of the trial Court, the plaintiff filed an appeal before the learned Civil Judge, Haveri in R. A. No. 4/1974. The learned Civil Judge, passed an order dated 26-2-1975 setting aside the judgment and decree passed by the trial Court and remanding the case to it to dispose of the same in accordance with Section 133 of the Karnataka Land Reforms Act, 1961 (hereinafter referred to as the Act) since he was of the opinion that the question whether the appellant was exclusively entitled to the leasehold rights or whether the appellant and respondents were jointly entitled to the same on the ground that the leasehold rights were originally held by the joint family, was a question which could be decided only by the Land Tribunal constituted under the Act and that the decision in the suit depended upon the finding to be recorded by the Land Tribunal on that question. Aggrieved by the order of remand passed by the lower appellate Court, the plaintiff has filed this miscellaneous second appeal under O. 43, R. (1) (u) of the Civil P. C. The above appeal first came up for disposal before a single Judge and on a reference made by him it has come up before us for disposal.

6. It has to be mentioned at this stage that after the decision was given by trial Court, the Act was amended by Karnataka Act 1 of 1974. By the said amending Act, which came into force on 1-3-1974 the original S. 44 of the Act was substituted by the new S. 44 by providing that all lands held by or in the possession of tenants (including tenants against whom a decree or order for eviction or a certificate for resumption was made or issued) immediately prior to the date of commencement of Karnataka Act 1 of 1974, other than lands held by them under leases permitted under S. 5, would, with effect on and from the said date, stand transferred to and vest in the State Government. The new S. 45 was substituted in place of the original S. 45 providing for registration of occupancy rights in the lands which had vested with the State Government under

S. 44 in favour of persons who were tenants in possession of the said lands immediately prior to the day on which Karnataka Act 1 of 1974 came into force. The original S. 48 was substituted by the new S. 48 providing for the establishment of Tribunals for the purpose of deciding certain questions specified in S. 112 (B) of the Act. The new S. 48-A was introduced in the Act. authorising the Tribunal to hold an enquiry into the question whether any person was entitled to be registered as an occupant under S. 45 and to make an order either granting or rejecting the application of any such person. Sub-sec. (5) of S. 48-A specifically provided that where an objection was filed disputing the validity of the applicant's claim or setting up a rival claim, the Tribunal should, after enquiry determine, by order, the person entitled to be registered as occupant and pass orders accordingly. Sub-sec. (6) of S. 48-A provided that the order of the Tribunal under that Section was final. Sub-sec. (7) of S. 48-A provided that the person who was registered as an occupant had to pay to the State Government as premium an amount specified in order to acquire the occupancy rights in question. S. 112 (B) also was suitably amended conferring power on the Tribunal to make necessary verification or to hold an enquiry and to pass orders in cases relating to registration of a tenant as occupant under S. 48-A; to decide whether a person was a tenant or not; and to perform such other duties and functions that were imposed on it by the provisions of the Act. Section 133 of the Act was also amended by Karnataka Act 1 of 1974. S. 133 is however since substituted by the new S. 133 by the Karnataka Act 27 of 1976. It now reads as follows:

"133. Suits, proceedings, etc. involving question required to be decided by the Tribunal.—

(1) Notwithstanding anything in any law for the time being in force—

(i) no Civil or Criminal Court or Officer or Authority shall, in any suit, case or proceedings concerning a land, other than proceedings under Chapter IV of this Act, decide the question whether such land is or is not agricultural land and whether the person claiming to be in possession is or is not a tenant of the said land from prior to 1st March, 1974;

(ii) such Court or Officer or Authority shall stay such suit or Proceedings in so far as such question is concerned and refer the same to the Tribunal for decision;

(iii) all interim orders issued or made by such Court, Officer or Authority, whether in the nature of temporary injunction or appointment of a receiver or otherwise, concerning the land shall stand dissolved or vacated, as the case may be;

(iv) the Tribunal shall decide the question referred to it under Cl. (1) and communicate its decision to such Court, Officer or Authority. The decision of the Tribunal shall be final:

(2) Nothing in sub-sec. (1) shall preclude the Civil or Criminal Court or the Officer or Authority from proceeding with the suit, case or proceedings in respect of any matter other than that referred to in that sub-section."

7. After Karnataka Act 1 of 1974 came into force, the plaintiff and defendants made applications before the Tribunal constituted under Section 48-A of the Act. The Land Tribunal, Haveri, by its order dated 31-3-1977, held that all the four applicants i. e., the plaintiff and defendants 1, 2 and 3 were jointly entitled to the leasehold rights of the lands in question and were therefore entitled to be registered as occupants jointly.

8. Aggrieved by the order of the Land Tribunal, Haveri, the appellant has filed a writ petition in W. P. 4694/1977 and we are told that the said writ petition is pending.

9. This appeal has to be disposed of in the light of the above events and the learned counsel for the parties have no objection to our disposing of this appeal after taking into consideration the above events.

10. It was argued by Sri Murlidhar Rao, learned Counsel for the appellant, that the question whether the leasehold rights belonged to the joint family or to Virupaxappa, the father of the appellant, was a question which could not be decided by the Land Tribunal as it was not one of the questions which was required to be decided by the Tribunal under the Act and, therefore the lower appellate Court was in error in setting aside the decree passed by the trial Court and remanding the case to it to dispose it of in accordance with S. 133 of the Act. In support of the above submission, he relied upon a decision of this Court in Korapolu Hengsu v. Sesu (ILR (1975) Kant 1499) in which it was held that when the dispute was whether the leasehold right in an agricultural land was joint family property or individual property, it could be decided only by the Civil Court and not by the Land Tribunal under the Act. That decision is rendered by a single Judge of this Court. But in

Mudakappa Virupaxappa Kori v. Channabasappa Rudrappa Kori (Criminal Revn. Petn. 473 of 1976, decided on 1-3-1977)* filed by the plaintiff himself against an order of acquittal passed by the Magistrate at Haveri in a case in which he had complained that the accused therein who were claiming joint rights with him had committed criminal trespass on two of the suit lands another learned Judge of this Court has held that whether a tenancy was held by an individual or by some individuals as joint tenants was a question which had to be decided by the Land Tribunal under the Act.

11. Sri Murlidhar Rao, next drew our attention to another decision of this Court rendered by a Division Bench in Kedari Yellappa Halagekar v. Jyotiba Yallappa Halagekar (R. F. A. 26/1970 decided on 11-6-1975) (Kant). The relevant part of the said decision reads as follows:

"The question whether the suit land is the individual property of the plaintiff or the joint family property of the parties, as contended by defendants 1 and 2, cannot be decided in this suit for permanent injunction where the only question is whether the plaintiff is in lawful possession of the suit land and defendants 1 and 2 are unlawfully interfering with his possession. .... The question whether the land was continued on lease and enjoyed by the plaintiff on behalf of the family or in his own individual right is a question which cannot be decided by the Tribunal under the Act. The learned Counsel on both sides did not seriously dispute the correctness of this proposition."

We are of the view, that no reliance can be placed on the above decision by the appellant because the question which arose for consideration was not seriously canvassed by either of the parties before this Court and the learned Judges who decided the case had not taken into consideration the amendments made in the Act by Karnataka Act 1 of 1974. The above case arose out of a suit instituted in the year 1967 and it has been disposed of on the basis of the law as it stood then without reference to the change in the law. This appeal has to be decided on the basis of Ss. 44, 45, 48-A, 112 (B), 132 and 133 of the Act as they stand now.

12. Section 132 provides that no Civil Court shall have jurisdiction to settle, decide or deal with any question which is by or under the Act required to be settled, decided or dealt with by the Deputy Commissioner, the Assistant Commissioner, the Tribunal, the Tahsildar, the Karnataka Revenue Appellate Tribunal or the State Government in exercise of their powers under the Act. It also further provides that no order of the Deputy Commissioner, the Assistant Commissioner, the Tribunal, the Tahsildar, the Karnataka Revenue Appellate Tribunal or the State Government made under the Act shall be questioned in any Civil or Criminal Court. The consequence of an agricultural land being held by a lessee immediately prior to 1-3-1974 is that with effect on and from the said date, it would stand transferred to and become vested in the State Government by virtue of S. 44 (1) of the Act. The tenants holding such lands, would as against the State Government, be entitled only to such rights or privileges and would be subject to such conditions as provided by or under the Act. Any other rights or privileges which may have accrued to them in such lands before the date of vesting against the landlord or other person would cease and would not be enforceable against the State Government. Under S. 45 of the Act, every tenant would be entitled subject to such restrictions and conditions that are imposed by the Act to be registered as an occupant in respect of the lands of which he was a tenant before the date of vesting and which he had been cultivating personally. Sec. 48-A prescribes the procedure to be followed by a person entitled to be registered as an occupant under Section 45. For securing such registration, he has to make an application to the Tribunal constituted under the Act for that purpose in accordance with law. Under subsection (5) of S. 48-A, where an objection is filed disputing the validity of the applicant's claim or setting up a rival claim, the Tribunal is required to hold an enquiry and determine whether the applicant is entitled to be registered as an occupant or not. Sec. 112 (B) expressly requires the Tribunal to make necessary verification or hold an enquiry in all cases relating to registration of a tenant as an occupant under S. 48-A, S. 133 of the Act, states that when, in any suit or proceedings concerning a land, the question whether such land is or is not an agricultural land or whether the person claiming to be in possession is or is not a tenant of the said land prior to 1st March, 1974, arises for consideration, such question should be referred to the Tribunal for its decision and the suit or proceedings should be disposed of in accordance with the finding of the Tribunal on the above question. When, as in this case, one person applies for registration of the lands as an occupant in his individual

*(Reported in (1977) 2 Kant LJ 104.)

name and three others apply for registration of the said lands in their name along with the other applicant as joint occupants, it becomes the duty of the Tribunal to decide whether only one of them was the sole tenant of the lands in question before the appointed day or whether all of them were jointly in possession of the lands as tenants. Without deciding the said question, it would not be possible for the Tribunal to make an effective order under S. 48-A of the Act. In order to decide the said question, it becomes necessary for the Tribunal to decide whether the tenancy in question was held by one of them exclusively or by all the applicants jointly. We have to hold that under S. 48-A, the Tribunal has that power having regard to the scope of that section. Whenever a statute confers a duty on an authority to decide a question and a corresponding right on an individual or individuals it has to be assumed that the statute, has, by necessary implication conferred on that authority the power to decide all issues which are incidental and ancillary to the main question to be decided. Otherwise the Tribunal will have to keep all the applications pending until such issues are decided by the Civil Court. In fact there is no procedure prescribed by the Act to refer such issues for the decision of the Civil Court. We do not think that it would be reasonable to hold that the Tribunal should await the decision of the Civil Court on such issues, in view of sub-section (5) of S. 48-A, which requires the Tribunal to hold an enquiry into all rival claims made in respect of the registration of the occupancy rights in respect of the agricultural lands before disposing of the applications made to it. We therefore hold that the Land Tribunal is competent to decide for the purpose of disposing of the applications under S. 48-A the question whether the lease-hold rights were held exclusively by the appellant or by the joint family consisting of the appellant and the respondents before the partition took place and thereafter by all of them as co-tenants till the appointed day. It is its duty to do so under the Act. The said question could not therefore be decided by the Civil Court in view of S. 132 of the Act.

13. In view of the foregoing we hold that the case Korapalu Hengsu v. Sesu (ILR (1975) Kant 1499) which takes a contrary view is not correctly decided and we overrule it.

14. The lower appellate Court was therefore right in setting aside the order of the trial Court and remanding the case to the trial court to dispose it of in accordance with S. 133 of the Act, on the date on which it made that order. But, since it is now stated before us that the Land Tribunal has already decided the said question on the applications made to it under S. 48-A and has held that both the appellant and the respondents were entitled to be registered as occupants jointly, it would be unnecessary to refer the very same question again under S. 133 of the Act to the Tribunal. In view of the above, the order of the learned Civil Judge has to be set aside and the case has to be remanded to him to dispose it of in the light of the decision of the Tribunal. It is ordered accordingly.

15. The parties are at liberty to produce a certified copy of the order of the Tribunal before the lower appellate Court. The lower appellate Court shall proceed to dispose of the appeal in the light of that order.

16. In the circumstances of this case, the appellant is liable to pay the costs of the respondents. Advocate's fee Rs. 100/-.

Appeal dismissed.

AIR 1978 KARNATAKA 140

M. RAMA JOIS, J.

S. Shivashankarappa and others, Petitioners v. The Davangere City Municipality, Davangere and others, Respondents.

Writ Petn. No. 1297 of 1978, D/- 20-2-1978.

Karnataka Municipalities Act (22 of 1964), S. 42 (9) First Proviso — Removal of President or Vice President — Resolution expressing want of confidence — Requisite majority of two-thirds of councillors — Calculation of — Total number of councillors, meaning of.

The requisite majority of two-thirds of the Councillors for the purpose of S. 42 (9) has to be calculated on the basis of the "total number of Councillors" and not on the basis of the number of "existing Councillors". In the context of S. 42 (9) the words "the total number of Councillors" can be understood only with reference to S. 11 of the Act which prescribes the total number of Councillors for Municipal Councils and when so understood, it becomes clear that calculation must be made with reference to the total number of Councillors prescribed for any Municipal Council under the said section, and not with reference to the actual number of

Councillors in office on the day when resolution expressing want of confidence in a President or Vice-President is moved. (1977) 2 Kant LJ 58 and AIR 1971 Assam 163, Rel. on. (Paras 10, 11)

Cases Referred:	Chronological Paras
(1977) 2 Kant LJ 58	12
AIR 1971 Assam 163	12

C. N. Kamath, for Petitioners; G. Masilamani (for Nos. 5 and 6) and K. Shivashankar Bhat, Govt. Advocate (for Nos. 2 to 4), for Respondents.

ORDER:—The question that arises for consideration in this writ petition is whether the number of Councillors required for the resolution expressing want of confidence in a President or Vice-President of a Municipal Council by which, they stand removed from their respective offices under S. 42 (9) of the Karnataka Municipalities Act, 1964 (hereinafter referred to as 'the Act'), is two-thirds of the actual number of Councillors or two-thirds of the total number of Councillors prescribed under S. 11 of the Act.

2. The petitioners in this writ petition are six Municipal Councillors of the Davangere City Municipal Council which is functioning under the provisions of the Act.

3. It is not disputed that number of Councillors of Davangere City Municipal Council fixed under S. 11 of the Act, is 35. It is also not disputed that out of 35 Councillors elected, one councillor died and another ceased to be a councillor and consequently, there are only 33 Councillors. Two resolutions dated 19-1-1978 (Exhibits A and B) expressing want of confidence in the President and the Vice-President were passed by a majority of 22 councillors out of 33 as against 11 councillors opposing the resolutions. Respondent No. 5 was the President and respondent No. 6 was the Vice-President of the Davangere City Municipal Council.

4. The case of the petitioners is that notwithstanding the passing of resolutions expressing want of confidence in respondents Nos. 5 and 6, they are continuing in the office of the President and Vice-President respectively, though they must be deemed to have vacated the offices in view of S. 42 (9) of the Act.

5. On the other hand, it is contended on behalf of respondents Nos. 5 and 6 that as the resolutions were passed by less than two-thirds of the total number of councillors, those resolutions are invalid and therefore, they are not obliged to vacate their offices.

6. S. 42 (9) of the Act prescribes the procedure for removing President or Vice-President as the case may be by passing resolution expressing want of confidence. The said Section reads as follows:

"Every President and every Vice-President of a Municipal Council shall forthwith be deemed to have vacated his office if a resolution expressing want of confidence in him is passed by a majority of not less than two-thirds of the total number of councillors at a special general meeting convened for the purpose:

Provided that no such resolution shall be moved unless notice of the resolution is signed by not less than one-third of the total number of councillors and at least ten days' notice has been given of the intention to move the resolution;

Provided further that where a resolution expressing want of confidence in any President or Vice-President has been considered and negatived by a Municipal Council, a similar resolution in respect of the same President or Vice-President shall not be given notice of or moved within one year from the date of the decision of the Municipal Council."

7. As can be seen from the first proviso to sub-sec. (9) of S. 42 of the Act, before passing a resolution expressing want of confidence in any President or Vice-President, a notice in writing signed by not less than one-third of the total number of councillors with at least ten days' notice has to be given to the concerned person. Thereafter, the resolution is required to be passed by a special general meeting and in such meeting, if two-thirds of the "total number of councillors", pass a resolution expressing want of confidence in the President or the Vice-President as the case may be, they shall be deemed to have vacated the office forthwith.

8. According to the petitioners for purposes of S. 42 (9) of the Act the requisite majority of two-thirds of the councillors has to be calculated with reference to the existing number of councillors viz., 33 and not to the total number of 35 councillors of the Davanagere City Municipal Council. Shri C. N. Kamath, learned Counsel appearing for the petitioners, contended that the two-thirds majority has to be calculated only with reference to the existing number of 33 councillors and the two vacancies should not be taken into account. In support of his contention, he relied upon the definition contained in S. 2 (6) of the Act, in which the word 'councillor' is defined. The said subsection reads as follows:

" 'Councillor' means any person who is legally a member of a Municipal Council."

On the basis of the definition contained in S. 2 (6) of the Act, he contended that the word 'councillor' used in S. 42 (9) of the Act means, any person who is legally a member of the Municipal Council and therefore, cannot include a person who was a councillor who is dead or who has ceased to be a councillor.

9. On the other hand, Sri G. Masilamani, learned Counsel appearing for respondents Nos. 5 and 6 and Sri K. Shivashankara Bhat, learned High Court Government Advocate appearing for respondents Nos. 2 to 4, submitted that requisite majority of two-thirds as per S. 42 (9) has to be calculated with reference to the total number of councillors fixed for the municipality.

10. The controversy has to be resolved on the interpretation of the relevant provisions of the Act. Sub-sec. (1) of S. 11 prescribes total number of councillors for various town and City Municipal Councils on the basis of population. The said Section reads as follows:

"11. Constitution of Municipal Councils. — (1) The Municipal Council shall consist of such number of councillors as is indicated in the following table:—

TABLE

	Population of municipality	Number of councillors.
(i) to (v)	xx	xx
(vi)	for a municipality with a population exceeding one lakh,	35

As already stated, Davanagere City Municipal Council is a municipality with a population exceeding one lakh and the total number of councillors fixed for that municipality is 35. In view of the wording of S. 11, it becomes clear that every municipality constituted under the Act has to consist of such number of councillors as prescribed in the said Section. S. 19 of the Act provides how casual vacancies arising after election in any municipality on account of resignation, non-acceptance of office or for any other reason, are required to be filled up. Proviso to S. 19 also provides that no election shall be held to fill a casual vacancy occurring within six months prior to the expiry of the term of office of councillors under sub-sec. (1) of S 18. When vacancies arise in any Municipal Council, the Municipal Council will be incomplete with reference to the strength prescribed in S. 11 of the Act. Therefore, in order to enable the Municipal Councils to function in spite of there being vacancies until the vacancies are filled up, a legal fiction is created by sub-sec. (4) of S. 80 of the Act and enables the remaining councillors to continue to function as Municipal Council. Sub-sec. (4) of S. 80 reads as follows:

"During any vacancy in a Municipal Council or committee the continuing councillors or members may act as if no vacancy had occurred."

The clear effect of sub-sec. (4) of S. 80 is that when there is any vacancy in a Municipal Council, the rest of the councillors are authorised to continue and function as full Municipal Council as if no vacancy had occurred. In other words, the effect is that though actually vacancies exist and are required to be filled up in accordance with S. 19 of the Act, or they are not required to be filled up in view of the proviso to S. 19, by legal fiction, the Municipal Council is deemed to consist of all the councillors as prescribed in S. 11 of the Act. Therefore, the total number of councillors referred to in S. 42 (9) of the Act has reference to the number of municipal councillors fixed under S. 11 of the Act. I am unable to accept the contention urged for the petitioners that the requisite majority of two-thirds of the councillors required for a resolution expressing want of confidence which has the effect of removing a person from the office of a President or a Vice-President as the case may be, under S. 42 (9) of the Act, has to be calculated only with reference to the existing number of councillors. If the intention of the legislature was that the two-thirds of the existing number of councillors, on any given day, when a resolution expressing want of confidence is passed against a President or a Vice-President as the case may be, alone should be taken into account, the legislature would have used the words "existing number of councillors" instead of the words "total number of councillors" in S. 42 (9) of the Act. The acceptance of the contention of the petitioners would amount to substituting the word 'existing' in place of the word 'total' in S. 42 (9) of the Act, which is not permissible. There is also a specific legislative object in prescribing the stringent requirement of two-thirds of the total number of councillors for passing a resolution against the President or Vice-President as the case may be, expressing want of confidence. Under the Act, a President or a Vice-President of a Municipal Council can be elected by the votes of an ordinary majority of members present and voting. Having been so elected, Presidents and Vice-Presidents hold important and high executive offices under the

Act in the concerned Municipal Council. The legislature has thought fit to provide security of tenure in the interest of ensuring the proper discharge of duties and responsibilities of President or Vice-President as the case may be, without the fear of being removed from the respective offices by the change of loyalties of a few municipal councillors. It is with this object in view that the majority of two-thirds of the total number of councillors has been prescribed for the validity of a resolution expressing want of confidence against a President or a Vice-President, as the case may be, under S. 42 (9) of the Act. Therefore, this provision has to be construed strictly. When it is so construed, the conclusion is inevitable that the requisite majority of two-thirds of the councillors for the purpose of sub-sec. (9) of S. 42 of the Act, has to be calculated on the basis of the "total number of councillors" and not on the basis of the "number of existing councillors."

11. I am unable to agree with the contention submitted on behalf of the petitioners that the difinition of the word 'councillor' given in S. 2 (6) of the Act makes any difference. The said definition only states a 'councillor' means any person who is legally a member of a Municipal Council and this is so unless the context otherwise requires. In the context of S. 42 (9) of the Act, which prescribes that two-thirds of "the total number of councillors", is the requisite majority for passing a resolution expressing want of confidence against a President or a Vice-President, as the case may be, the words "the total number of councillors" can be understood only with reference to S. 11 of the Act which prescribes the total number of councillors for Municipal Councils and when so understood, it becomes clear that calculation must be made with reference to the total number of councillors prescribed for any Municipal Council under the said Section, and not with reference to the actual number of councillors in office on the day when resolution expressing want of confidence in a President or Vice-President is moved.

12. The above view receives support from the decision of this Court in Bharamappa v. Town Panchayat Committee, Sounshi (1977) 2 Kant LJ 58 interpreting Section 37 of the Karnataka Village Panchayats and Local Boards Act, 1959 and also the decision of the Assam High Court reported in AIR 1971 Assam 168 (Samiruddin Ahmed v. SDO, Mangaldoi) interpreting — S. 27 (1) (b) of the Assam Gram Panchayats Act.

13. In the present case, the number of municipal councillors fixed for Davanagere City Municipal Council under S. 11 of the Act is 35. The two resolutions passed on 19-1-1978 were supported by 22 councillors. Though, the said number constitutes two-thirds of the existing number of councillors i. e., 33, it falls short of the two-thirds majority of the total number of councillors i. e., 35. Therefore, for the aforesaid reasons, I hold that the two resolutions dated 19-1-1978 (Exhibits A and B) passed by 22 councillors out of 33 of Davangere City Municipal Council expressing want of confidence in the President and the Vice-President who are impleaded as respondents Nos. 5 and 6 in this petition, not having been passed with the requisite majority as prescribed under S. 42 (9) of the Act, have not the effect of removing them from their respective offices.

14. In the result, the Rule is discharged and the writ petition is dismissed. No costs.

15. Sri K. Shivashankara Bhat, learned High Court Government Advocate, is permitted to file his memo of appearance within one week.

Petition dismissed.

AIR 1978 KARNATAKA 143

G. N. SABHAHIT, J.

Doddappa and others, Petitioners v. Basavanneppa Basappa Chinniwalar, Respondent.

Civil Revn. Petn. No. 1535 of 1975, D/- 31-1-1978.*

Registration Act (16 of 1908) Sections 49 and 17 — Unregistered lease — Effect — Person in permissive possession under a non-registered lease-deed is mere statutory tenant — Not entitled to notice to quit under S. 106 of the T. P. Act. (Transfer of Property Act (4 of 1882), S. 106).

A deed which is compulsorily registrable under S. 17 cannot be looked into, if it is not so registered, to create, declare, assign, limit or extinguish any right in immoveable property. That is what S. 49 lays down. Such a document could be looked into as evidence for collateral transactions or for a collateral purpose. If any person inducted into possession under a non-registered lease deed, pays rent and the same is accepted by the landlord, a lease is created and is terminable under S. 106 of the T. P. Act from month to month or year to year as the case may be.

*Against Order of 2nd Addl. Dist. J. Belgaum, D/- 10-6-1975.

FV/FV/C267/78/AS/DVT

Where on expiry of lease granted by the vendor of the landlord, he called upon the tenants to vacate the suit premises but they continued in possession under a non-registered lease-deed executed by the vendor before expiry of the earlier lease.

Held that when the earlier lease expired the original landlord (Vendor) was no longer the landlord and there was no chance of his doing anything to bring about the relationship of landlord and tenant thereafter. After the expiry of the lease granted by the original landlord the tenants were in permissive possession and were not trespassers but mere statutory tenants and no notice to quit is necessary in the case of a statutory tenant. AIR 1968 SC 794, 1963 (2) Mys LJ 494 and 1971 (1) Mys LJ 447 Rel. on. (1969) 1 SCWR 341, AIR 1963 SC 70 and AIR 1974 Mys 7 Referred. (Paras 17, 18, 19)

Anno: AIR Manual (3rd Edn.), Registration Act S. 49, N. 23.

Cases Referred: Chronological	Paras
AIR 1974 Mys 7 : (1973) 1 Mys LJ 541	15
(1971) 1 Mys LJ 447	16
(1969) 1 SCWR 341	13
AIR 1968 SC 794	16
AIR 1963 SC 70 : (1963) 3 SCR 229	13
(1963) 2 Mys LJ 494	16

W. K. Joshi, for Petitioners; K. I. Bhatta, for Respondent.

ORDER:— This Revision Petition is instituted by the tenants against the judgment and order dated 10-6-1975, passed by the Second Additional District Judge, Belgaum, in H. R. C. Appeal No. 60 of 1973 on his file, allowing the petition of the landlord for eviction of the tenants from the suit premises, on reversing the order dated 31-3-1973, passed by the Munsiff, Bailhongal, in H. R. C. No. 2 of 1971 on his file.

2. The landlord instituted action for eviction of the tenants from the suit premises under Clause (h) of the proviso to Sec. 21 (1) of the Karnataka Rent Control Act, 1961, before the Munsiff, Bailhongal, claiming possession from the tenants for the purpose of starting a Bakery. He required the suit premises bona fide and reasonably for his personal occupation.

3. The tenants resisted the petition. They contended that the petition was not maintainable as the landlord had not validly terminated the tenancy. They also contended that the requirement of the landlord was not bona fide and reasonable and that greater hardship would be caused to them if they were evicted from the suit premises.

4. The learned Munsiff, appreciating the evidence on record, held that the petition was not maintainable as there was no notice to quit issued to the tenants, though he found that the requirement of the landlord was bona fide and reasonable.

5. Aggrieved by the order of the learned Munsiff, the landlord went up in appeal before the District Judge and the learned District Judge, in the course of his judgment held that the tenancy was determined by efflux of time and as such, no notice to quit was necessary. He agreed with the finding of the learned Munsiff that the claim of the landlord was bona fide and reasonable. He further held that greater hardship would befall the landlord if he were not restored possession of the suit premises and in that view, ordered eviction of the tenants from the suit premises. It is against that order, that the tenants have instituted the present Revision Petition.

6. The learned Advocate appearing for the Revision Petitioners strenuously urged that the learned District Judge was not justified in holding that no notice to quit was necessary before instituting action under Sec. 21 (1) of the Rent Control Act. He did not choose to argue on merits.

7. The learned Advocate appearing for the respondent-landlord argued supporting the finding of the learned District Judge that no notice to quit was necessary as the tenants continued as statutory tenant.

8. The sole point, therefore, that arises for my consideration in this Revision Petition is, whether the learned District Judge was justified in holding that no notice to quit was necessary on the facts of this case as the tenancy was determined by efflux of time.

9. The relevant facts that are necessary to appreciate the contention raised before me are as under:

The present landlord purchased the suit property from the original landlord by a registered sale deed on 20-4-1967 under Ex. P-1. Even when he purchased the suit property, the tenants were already in occupation of the suit property. The vendor had executed Exhibit D-2 in favour of the tenants granting them a term lease for a period of 12 years commencing from 29-6-1959.

10. It is the case of the landlord that this lease expired on 29-6-1971 and soon thereafter, he called upon the tenants to vacate the suit premises and since they did not vacate, he instituted action for eviction of the tenants on 28-7-1971. In that view, he

submitted that no notice to quit was necessary as the tenancy was determined by efflux of time on 29-6-1971 and the landlord made his intention clear to the tenants not to continue the tenancy. It is on that basis that the learned District Judge has held that no notice to quit was necessary as the tenants were continuing on the land as statutory tenants after the expiry of lease on 29-6-1971.

11. As against this, the learned counsel appearing for the revision petitioners strenuously argued that the vendor of the present landlord had executed, under Exhibit D-3 dated 5-7-1965, a lease till 1981, that is, for a period of 10 years after the expiry of the earlier lease on 29-6-1971. As such, he submitted that it could not be said that the tenants became statutory tenants after 29-6-1971 when the period fixed under Exhibit D-2 expired. It was in that view he submitted that notice to quit was a sine qua non for the institution of the petition under S. 21 of the Act.

12. It is not in dispute that Exhibit D-3 purports to create a lease for a period of 10 years from 29-6-1971. The rental also is stipulated in the deed. Such a deed obviously requires registration under Sec. 77 of the Indian Registration Act. It is not registered. The point, therefore, that arises for my consideration is, whether the Court could look into Exhibit D-3 to hold that such a lease was created or at any rate to hold that it created a tenancy as contemplated under Section 106 of the Transfer of Property Act from month to month.

13. The learned Counsel for the revision petitioners relied upon a decision of the Supreme Court in the case of Rana Vidya Bhushan Singh v. Rati Ram, (1969) 1 SCWR 841. That was a case where a suit was brought against the defendant on the footing that he was a trespasser. The defendant contended that he was a tenant and that the jurisdiction of the Civil Court was ousted to entertain the suit because of Sec. 111 of the Himachal Pradesh Abolition of Big Landed Estates and Land Reforms Act, 1953. The defendant relied upon an unregistered agreement of lease dated 21-8-1951. That was for a period of 15 years and since it was not registered, the Courts did not admit the same into evidence to look into the terms of the lease. But the Courts, all the same, relying on the deed, held that the defendant was not a trespasser. In other words, the document was used to know the character of the possession of the defendant. The matter was ultimately taken up to the Supreme Court and the Supreme Court observed thus on that aspect:

"The agreement was unregistered. It could not create in favour of the defendant the right of a tenant for a period of fifteen years. The agreement was on that account inadmissible in evidence to support that claim. But in support of the plea that his possession was that of a tenant the defendant was entitled to rely upon the recitals contained in that agreement of lease ....

....

A document required by law to be registered, if unregistered, is inadmissible as evidence of a transaction affecting immoveable property, but it may be admitted as evidence of collateral facts, or for any collateral purpose, that is, for any purpose other than that of creating, declaring, assigning, limiting or extinguishing a right to immoveable property."

The Supreme Court in that case quoted and relied upon an earlier decision of the Supreme Court in the case of Padma Vithoba v. Mohd. Multani, (1963) 3 SCR 229 : (AIR 1963 SC 70), wherein it was specifically ruled that such an unregistered deed was admissible in evidence to show the character of possession of the occupant. Thus, the ruling relied upon by the learned Counsel would not help him to establish that the unregistered lease deed could be looked into to hold that the revision petitioners were tenants. At best, it can be looked into to find out that they are in permissive possession. The Supreme Court has clearly observed that it cannot be used for a purpose of creating, declaring, assigning, limiting or extinguishing a right to immoveable property. It is obvious that a lease creates an interest in immoveable property. Therefore, the deed cannot be looked into to hold that the revision petitioners are tenants. It can certainly be looked into to hold that they are in permissive possession.

14. In the aforesaid case of the Supreme Court, the tenancy in question was a statutory tenancy under the Land Reforms Act and the Supreme Court held that for holding that the defendant was not a trespasser, but, was protected under the Land Reforms Act, being in permissive possession, the unregistered deed could be looked into.

15. The aforesaid ruling of the Supreme Court is no doubt relied upon by this Court in the case of Abdul Razack v. H. K. Gopal Shetty, 1973 (1) Mys LJ 541 : (AIR 1974 Mys 7). All that is observed in this case is that the unregistered lease deed also should be looked into to find out the character of possession of the respondent in that case. In fact, this Court remitted the case to the

learned Munsiff with a direction to take into consideration the deed also along with other evidence to find out the status of the respondent in that case.

16. On the other hand, the learned Counsel for the respondent invited my attention to a ruling of this Court in the case of H. Mohammad Khan v. H. K. Gopal Shetty, 1963 (2) Mys LJ 494, wherein this Court has held that a person in occupation of property under an unregistered, but compulsorily registrable lease does not become a tenant from month to month and a notice terminating the tenancy under S. 106 of the T. P. Act is not necessary. That ruling was followed in a recent decision of this Court in the case of Ranga Naika v. Saraswathi, 1971 (1) Mys LJ 447. That is also the view taken by the Supreme Court of India in the case of Delhi Motor Co. v. U. A. Basrurkar, AIR 1968 SC 794.

17. Thus, it is a well-established proposition of law that a deed which is compulsorily registrable under Sec. 17 of the Registration Act, cannot be looked into, if it is not so registered, to create, declare, assign, limit or extinguish any right in immoveable property. That is what Sec. 49 of the Indian Registration Act lays down. It is equally well established that such a document could be looked into as evidence for collateral transactions or for a collateral purpose. Examining the facts of this case in that perspective, it becomes manifest that the unregistered lease deed at Exhibit D-3 cannot be looked into to hold that the said document proprio vigore creates any interest in the property, leased in this case, because, that would be using the document for the direct purpose for which it is executed. It can certainly be looked into for the collateral purpose, for example, to understand the character of possession of the person in whose favour the document is executed, to show, for example that he is not a trespasser and that he is in permissive possession.

18. It is also well established that if any person inducted into possession under a non-registered lease deed, pays rent and the same is accepted by the landlord, a lease is created and is terminable under Sec. 106 of the T. P. Act from month to month or year to year, as the case may be. In the instant case, therefore, all that can be said is that the tenants are in permissive possession by virtue of Exhibit D-3 and that they are not trespassers. It cannot be held on the basis of Exhibit D-3 that they are tenants, without more, as that would infringe the express provision of law in Sec. 49 of the Registration Act. Even after the expiry of the lease under Exhibit D-2, the tenants would continue as statutory tenants, which also amounts to permissive possession in law and it cannot be said that a person in permissive possession is entitled to any notice to quit under Sec. 106 of the T. P. Act. His position is nothing better than that of a statutory tenant. It may at once be observed that apart from Exhibit D-3, there are no other circumstances brought on record to establish that the present revision petitioners have become contractual tenants.

19. It may also be mentioned in this context that when Exhibit D-3 came to be executed on 5-7-1965, the period of lease under Exhibit D-2, was not still over. It was valid up to 29-6-1971; and before that period was over, the original landlord sold his rights in favour of the present landlord on 20-4-1967 under Exhibit P-1. As such, when the lease under Exhibit D-2 expired on 29-6-1971, the original landlord was no longer the landlord and there was no chance of his doing anything to bring about the relationship of landlord and tenant after the period of lease under Exhibit D. 2 expired. In the circumstances. I hold that the revision petitioners remained as mere statutory tenants after the expiry of lease under Exhibit D-2 from 29-6 1971 and it is well established that no notice to quit is necessary in the case of a statutory tenant. That being so, I hold that this revision petition is devoid of merits and has to be dismissed and I dismiss the same. No costs.

17. The tenants, however, are granted six months' time to vacate the suit premises.

Revision dismissed.

AIR 1978 KARNATAKA 146

K. JAGANNATHA SHETTY, J.

Lingaiah, Appellant v. Chikkahonnalagaiah and others, Respondents.

Misc. Second Appeal No. 86 of 1975, D/- 10-1-1978.*

Limitation Act (9 of 1908), Art. 116 — Suit to recover mortgage-money on personal covenant — Limitation — When commences. (T. P. Act (4 of 1882), S. 68).

Where a person executes mortgage and also agrees to repay loan within stipulated period the mortgagee has right under Sec-

*(Against judgment and decree passed by Addl. Civil J. Bangalore, D/- 18-11-1974.)

tion 68 of T. P. Act to sue for mortgage money. This right is independent of the right to enforce mortgage. The limitation to file suit for mortgage money starts from the date of expiry of the stipulated period to refund the loan not from the date of execution of mortgage and is governed by Art. 116 of the Limitation Act (1908). AIR 1964 SC 1295, Rel. on. (Para 4)

Anno: (i) AIR Comm. Limitation Act (3rd Edn), S. 116, N. 19 and 20; (ii) AIR Comm. T. P. Act (4th Edn.), S. 68, N. 21.

Cases Referred: Chronological Paras

AIR 1969 Mys 20 : (1967) 2 Mys LJ 56 3
AIR 1964 SC 1295 3, 4

M. Dasappa, for Appellant; M. Papanna, for Respondent No. 1.

JUDGMENT:— The suit for recovery of money instituted by respondent-1 was dismissed by the trial Court on the preliminary question that it was barred by limitation, but the Civil Judge, in the appeal preferred by the plaintiff, reversed that decree and remanded the matter for a decision on the merits. So the 1st defendant appeals.

2. On 14th May 1967 the 1st defendant, who is the father of defendants 2 to 6, borrowed from the plaintiff a sum of Rs. 1,600/- executing a registered mortgage deed mortgaging the suit schedule properties and also agreeing to repay the money in five years from the date of the said mortgage. The mortgage deed purports to be a usufructuary mortgage, but the mortgagor did not deliver possession of the properties to the plaintiff. He continued to remain in possession and also defaulted to pay the loan. Plaintiff, therefore, brought a suit to recover the amount of Rs. 2,000/- inclusive of the interest said to be due as orally agreed upon by the parties. He has also asked for sale of the suit schedule properties for realisation of the decretal amount in the event of the defendants failing to pay the same.

The suit was based on the cause of action which, according to the plaintiff, was on 14th May 1962, the stipulated date for the repayment of the amount and the failure thereof by the mortgagor.

3. One of the contentions raised by the defendants was that the suit was barred by time and ought to have been brought within twelve years from the date of execution of the mortgage and not from the stipulated date for the repayment of loan by the mortgagor. The trial Court following the decision of this Court in Puttamadamma v. Puttappa (1967 (2) Mys LJ 56) : (AIR 1969 Mys 20) accepted the contention of the defendants and held that the suit was barred by limitation and accordingly dismissed the suit. But, the learned Civil Judge, in the appeal preferred by the plaintiff, reversed that decree holding that the decision of this court in Puttamadamma's case is not a good law in view of the decision of the Supreme Court in Monimala Devi v. Indu Bala (AIR 1964 SC 1295). He held that the plaintiff was entitled to bring the suit for recovery of the mortgage money within twelve years from 14th May 1962, the date prescribed for repayment as per the covenants in the mortgage deed.

It seems to me that it is not necessary to consider the correctness of the view taken in Puttamadamma's case. Upon the facts revealed in that Judgment, there was no stipulation by the mortgagor to repay the mortgage-money within any prescribed period. If there was any such covenant, the mortgagee could have enforced the covenant to recover the mortgage-money under S. 68 (1) (a) of the Transfer of Property Act. That right conferred by S. 68 is not a right to enforce the mortgage, but only a right to sue for the mortgage-money on the personal covenant or to claim compensation when the mortgagee is deprived of his security. For a proper elucidation, let me set out Section 68:

"68. Right to sue for mortgage-money.—

(1) the mortgagee has a right to sue for the mortgage-money in the following cases and not others, namely :—

(a) where the mortgagor binds himself to repay the same;

(b) where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property is wholly or partially destroyed or the security is rendered insufficient within the meaning of Section 66, and the mortgagee has given the mortgagor a reasonable opportunity of providing further security enough to render the whole security sufficient, and the mortgagor has failed to do so;

(c) where the mortgagee is deprived of the whole or part of his security by or in consequence of the wrongful act or default of the mortgagor;

(d) where, the mortgagee being entitled to possession of the mortgaged property, the mortgagor fails to deliver the same to him,

or to secure the possession thereof to him without disturbance by the mortgagor or any person claiming under a title superior to that of the mortgagor:

Provided that, in the case referred to in Cl. (a), a transferee from the mortgagor or from his legal representative shall not be liable to be used for the mortgage-money".

4. In Monimala Devi's case (AIR 1964 SC 1295) the Supreme Court while explaining the scope of S. 68 has observed thus (at p. 1299):

"..... The right conferred by S. 68 is again not a right to enforce the mortgage but a right to sue for the mortgage money on the personal covenant or to claim compensation when the mortgagee is deprived of his security. A suit for enforcement of the personal covenant to pay the mortgage money when mortgagor has bound himself to repay the same is governed by Art. 116 of the Limitation Act. Similarly the right to sue where the mortgagee is deprived of the mortgage security or where he is not secured in his possession of the mortgaged property or where possession is not delivered to him as agreed, the claim maintainable by the mortgagee is one for compensation and the period of limitation for a suit to recover the mortgage money is governed by Art. 120 of the Limitation Act from the date of destruction or deprivation of the mortgage security possession and not from the date when the mortgage money is repayable".

From the above observations, it is clear that the suit to recover the mortgage-money on the basis of the personal covenant of the mortgagor is governed by Art. 116 of the Limitation Act (1908) which is similar to Art. 62 of the Limitation Act, 1963. It provides for 12 years when the money sued for becomes due. The money sued for becomes due in the instant case only after five years from the date of mortgage. The suit instituted on 4th Nov. 1971 must, therefore, be held within time.

In the result, the appeal fails and is dismissed. No costs.

Appeal fails.

AIR 1978 KARNATAKA 148
FULL BENCH

V. S. MALIMATH, K. JAGANNATHA SHETTY, M. K. SRINIVASA IYENGAR, P. P. BOPANNA AND N. VENKATACHALA, JJ.*

H. Puttappa and others, Petitioners v. The State of Karnataka and others, Respondents.

Writ Petn. Nos. 8461, 8462, 8298, 9520, 9654 and 10301 of 1976, 49 and 5120 to 5122 of 1977, D/- 3-2-1978.

(A) Constitution of India, Seventh Schedule, List II, Entry 32 — Karnataka Co-operative Societies Act (11 of 1959) as amended by Act 70 of 1976 and by Ordinance 7 of 1977, S. 14-A — Validity — Falls within Entry 32 — (Karnataka Co-operative Societies Act, S. 14-A).

[Per Full Bench]

Having regard to the nature of the legislation and the scope of Entry 32, it cannot be said that S. 14-A of the Karnataka Co-operative Societies Act in essence falls outside entry 32 or falls into another entry assigned to Parliament. The section is primarily concerned with the co-operative societies, with regard to its amalgamation, division or reorganisation, and thus quite fairly and squarely falls within entry 32 List II. (Paras 11, 37)

Anno: AIR Comm. Const. of India, Seventh Schedule, List II, Entry 32, Notes 2, 4.

(B) Constitution of India, Art. 14 — Karnataka Co-operative Societies Act (11 of 1959), as amended by Act 70 of 1976 and by Ordinance 7 of 1977, Section 14-A — Validity — Not violative of Art. 14 — Principles of natural justice to be followed — (Karnataka Co-operative Societies Act, S. 14-A).

[Per Full Bench]

S. 14-A of the Karnataka Co-operative Societies Act, no doubt, does not make a

*(Note: In this case, the Judges of the Full Bench differ in their views on some points. The judgments in the case are, however, printed in the order in which they are given in the certified copy. The first judgment is not, therefore, necessarily the judgment expressing the majority view—Ed.).

precise classification of the co-operative societies, in respect of which amalgamation or division or reorganisation may be effected. It leaves the selective application of the law to be made by the Registrar or the Deputy Registrar. But the selective application of the law for any one of the purposes set out in the section is not unguided. The legislature has prescribed the guidelines to the statutory authorities for the exercise of discretion. Therefore, it cannot be said that the power conferred upon the authorities was arbitrary or violative of Art. 14. The amalgamation, division or reorganisation of co-operative societies could be ordered only when the statutory authorities are satisfied that such action is essential either in public interest or in the interest of co-operative movement or for the purpose of securing the proper management of any co-operative society. The section, therefore, not only lays down the policy, but also provides safeguards to ensure that the co-operative societies are not dismantled unnecessarily. The section confers power on the Registrar and the Deputy Registrar. They are the controlling authorities for co-operative societies. They must, therefore, be held to be familiar with the working of all the co-operative societies. They are required to exercise their power having regard to the guidelines provided by the Legislature. Therefore, the omission to provide for a right of appeal against their action is not so much relevant. The mere fact that there is no provision for appeal is no ground to hold that there is a possibility of abuse of the power. The guidelines provided by the Legislature are themselves the best safeguard to ensure that the societies are not disturbed arbitrarily. When such safeguards are provided by the Legislature, it is necessary that the authority which makes an order under the section, complies strictly with all the conditions laid down by law to be satisfied by him before he makes an order. It cannot also be said that there are no guidelines for making an order under sub-sec. (2) of S. 14-A. The guiding principles provided under sub-sec. (1) equally govern the action of the Deputy Registrar while constituting the first committee, selecting suitable person as Chairman, Managing Director or Secretary of the amalgamated co-operative society and fixing their term of office. If there is any lapse in following those guidelines, it may be a different matter. AIR 1953 SC 104 and AIR 1974 SC 2009, Rel. on. (Paras 12, 13, 14 15)

Per majority; Malimath and Srinivasa Iyengar, JJ. contra: On the question of affording opportunity to the affected co-operative societies, no doubt, there is no express provision provided for that purpose. But the omission to provide for it is not conclusive of the fact that the statutory authorities should not follow the rules of natural justice. There is no warrant for the inference that the Legislature by enacting S. 14-A has excluded the application of any or all the rules of natural justice. Such inference should not be drawn merely on the history of the legislation. The Court should take into consideration all the circumstances of the case including the nature of the power conferred, the purpose for which it is conferred and the consequences of the exercise of the power. If the purpose for which the power conferred is likely to be defeated by giving an opportunity to the person concerned, the courts may be justified in not insisting on the principles of natural justice. If there is any other public purpose in the case, which could conceivably outweigh the necessity of fair procedure, the courts may be equally justified in holding that the legislature by implication has intended to deny the said principles. Judged from all the circumstances, this is not a case where the Court should hold that the Legislature by necessary implication has excluded the application of any or all the principles of audi alteram partem. (Paras 14, 29)

Malimath and Srinivasa Iyengar, JJ.: S. 14-A does not expressly exclude the operation of the principle of audi alteram partem. But S. 14-A as it now stands after its amendment by Act 70 of 1976 and Ordinance 7 of 1977 does not contain any provision providing for an opportunity of presenting objections to the societies likely to be affected by the proposed order of the Registrar or the Deputy Registrar. The Legislature which had made express provision in this behalf

by Act 30 of 1975 has, by omitting those provisions subsequently, expressed its intention to exclude opportunity of hearing being given to the affected societies. When the Legislature has said that no opportunity of hearing should be given to the affected societies or persons, the Courts have no right to invoke the principles of audi alteram partem and hold that the authority must follow the said principle before exercising its power under S. 14-A of the Act. By necessary implication the principle of audi alteram partem has been excluded from operation. (Para 41)

Anno: AIR Comm. Const. of India, Art. 14, N. 42 (ZE).

(C) Constitution of India, Art. 19 (1) (c) — Karnataka Co-operative Societies Act (11 of 1959) (as amended by Act 70 of 1976), S. 14-A — Validity— (Per majority) not violative of Article 19 (1) (c) — (Karnataka Co-operative Societies Act, S. 14-A).

(Per majority; Malimath and Srinivasa Iyengar, JJ. Contra): Protection against the impairment of the guarantee of fundamental rights is to be determined by the nature of the right, the interest of the aggrieved party and the degree of harm resulting from the State action. Man is a social animal. He is gregarious and loves to combine with his fellowmen in numerous forms of associations in the course of his activities. Freedom of association thus becomes a cherished objective of man's efforts in the pursuit of happiness. This freedom implies that several individuals get together and form voluntarily an association with a common aim, legitimate purpose and having a community of interests. It only comprehends the right to form an association of citizens, political, economic, religious, cultural, fraternal and social which have become an indispensable ally in the struggle to preserve democracy against totalitarianism. The industrial association known as labour trade union which has been the most important single force in the struggle for industrial democracy has also been included in that right. The content of this right must necessarily include the right to continue the association with its composition as voluntarily agreed upon by the persons forming the association. Any law altering the composition of the association compulsorily will be a breach of that right. Article 19 (1) (c) guarantees rights to the citizens as such and not to corporate bodies or associations. The Karnataka Co-operative Societies Act provides no compulsion for anybody to form a co-operative society. The Act also does not preclude any one from going out of his co-operative society. When these two principles are not restricted by the Act, it cannot be said that the fundamental right guaranteed by Article 19 (1) (c) has been impaired or infringed. As soon as citizens form an association, the right is guaranteed to them by Art. 19 (1) (c). The association so formed cannot lay claim to the fundamental right guaranteed by Art. 19 (1) (c) on the basis of their being an aggregation of citizens. The provisions in the Act govern the duties and privileges, rights and liabilities, property and funds, the audit, inspection and surcharge, the dissolution and amalgamation of co-oprative societies and its members. The Act thus regulates the economic interests of the members and controls the trading activities of the societies in the interest of the public or in the interest of the advancement of the co-operative movement. The process of amalgamation and division or reorganisation of co-operative societies relates only to structural alterations in the corporate bodies and cannot be construed as a restriction on the right guaranteed to the citizens by Art. 19 (1) (c). The Act by S. 4, authorises registration of an association of citizens as a co-operative society if it is likely to be economically sound. But an association cannot claim and obtain registration as a co-operative society as its fundamental right guaranteed by Art. 19 (1) (c). Article 19 (1) (c) does not gurantee any fundamental right to an association to obtain registration as a corporate body. AIR 1971 SC 966, Dist; AIR 1976 Andh Pra 340 (FB), Rel. on. (Paras 18, 19, 20, 21)

Per Malimath and Srinivasa Iyengar JJ.: When two or more co-operative societies are amalgamated under Section 14-A of the Act, members of the old societies automatically become members of the new society without their consent and against their will. When such a new co-operative society

is registered, a new legal person is created by the process of incorporation and the old societies cease to exist. Consequently, the membership of the old societies gets terminated. Persons who thus cease to be members of the old societies are free as citizens to join or not to join the new society. But, by compulsion they are automatically made members of the new society formed by amalgamation. Compulsory membership brought about by S. 14-A is not a restriction on the members' right but a restriction on the citizens' freedom of association. It is obvious that a law providing that every citizen in the taluka shall be deemed to be a member of the Taluka co-operative society offends Art. 19 (1) (c) of the Constitution. There is no difference between such a law and S. 14-A which makes the members of the old societies, members of the new societies without their consent and against their will. The citizen by joining as a member of a co-operative society does not surrender his fundamental rights under Art. 19 (1) (c). Membership of a co-operative society is not a charter entitling the State to act in violation of Art. 13 of the Constitution. The State Act 70 of 1976 by which S. 14-A was incorporated in the Karnataka Co-operative Societies Act not having received the assent of the President as required by the first proviso to Art. 31-A (1) of the Constitution has not acquired immunity from attack on the ground that it infringes Art. 19 (1) (c) of the Constitution. Section 14-A of the Act offends Article 19 (1) (c) of the Constitution, and is therefore void. (Paras 56, 58, 59)

Anno: AIR Comm. Const. of India, Art. 19, N. 46.

(D) Constitution of India, Art. 31 (1), (2) — Karanataka Co-operative Societies Act (11 of 1959) (as amended by Act 70 of 1976 and Ordinance 7 of 1977), S. 14-A — Validity — Not violative of Art. 31 (1) and (2) — (Karnataka Co-operative Societies Act, Section 14-A).

Per Malimath and Srinivasa Iyengar JJ.: The deprivation of the property, if any, of the members of the co-operative societies sought to be amalgamated by S. 14-A of the Karnataka Co-operative Societies Act cannot be said to offend Art. 31 (1) as the same is not brought about by any executive action but by law made by the State Legislature. The provisions of Article 31 (2) also cannot be invoked in view of Art. 31 (2) (A). Sec. 14-A does not provide for transfer of ownership or right to possession of any property to the State or to a Corporation owned or controlled by the State. S. 14-A cannot be deemed to provide for compulsory acquisition or requisition of property in view of Article 31 (2-A). Section 14-A is not void as offending Art. 31 (1) or (2) of the Constitution. (Para 61)

Anno: AIR Comm. Const. of India, Art. 31, Notes 5, 10.

(E) Karnataka Co-operative Societies Act (11 of 1959) (as amended by Act 70 of 1976 and Ordinance 7 of 1977), S. 14-A — Order passed by Authority mechanically without applying his mind are liable to be quashed.

Per Malimath and Srinivasa Iyengar, JJ.: The power of amalgamation can be exercised by the Registrar or the Dy. Registrar only when he forms an opinion that it is essential to do so in the public interest or in the interest of co-operative movement or for the purpose of securing proper management of any co-operative societies. Such measure which causes least interference should be adopted under S. 14-A having regard to the use of the expression "essential" in sub-sec. (1) of S. 14-A. The formation of the necessary opinion by the Registrar or the Deputy Registrar contemplated by sub-sec. (1) can only be made after examining the working and structure of the concerned co-operative societies. Sec. 14-A does not give blanket power to amalgamate the co-operative societies in such a manner as to make them viable units of a prescribed capital and area of operation. The power under sub-sec. (1) of S. 14-A cannot be exercised bearing in mind only the policy of the State and the abstract norms that the authority has formulated in this behalf. The Registrar or the Deputy Registrar can make an order under sub-sec. (1) of S. 14-A only if he forms the necessary opinion after examining the working and structure and all relevant aspects of each co-operative society sought to be dealt with. What the Deputy Registrar said he had done was to form an opinion on

examination of the working of several agricultural co-operative societies in the district that many of them could effectively function to subserve the interest of the rural people, viz., to meet their credit requirements. That merely because many of the societies were not functioning effectively the Deputy Registrar could not make that as the basis for amalgamating other societies, the working of which he had not examined or the working of which was otherwise satisfactory. As the Deputy Registrar had not formed the necessary opinion after examining the working and structure of the societies sought to be amalgamated, he could not have exercised the power of amalgamation under sub-sec. (1) of S. 14-A of the Act. As all the impugned orders were stereotyped orders, this was another circumstance indicating that there was no application of the mind of the Deputy Registrar to the requirements of sub-section (1) of S. 14-A before he passed the impugned orders. As the impugned orders had been passed mechanically and without the application of the mind of the Deputy Registrar, the same were liable to be quashed.

(Para 62)

Cases Referred: Chronological	Paras
AIR 1977 SC 2279	9, 11
AIR 1976 Andh Pra 340 (FB)	22, 53
AIR 1974 SC 2009	12
AIR 1973 SC 106	47
AIR 1972 SC 896	28
ILR (1972) Andh Pra 1140	54
AIR 1971 SC 40	28, 41
AIR 1971 SC 966	18, 22, 51
AIR 1971 SC 1737	18, 52
1971 AC 297: (1969) 3 All ER 275, Wiseman v. Borneman	27, 28
AIR 1970 SC 564	18, 47, 54
AIR 1970 SC 1789	26
AIR 1970 SC 150	26, 27, 41
(1970) 1 O. R. 237, Voyager Exportation Ltd. v. Ontario Securities Commission	26
AIR 1968 Pat 211	37
AIR 1967 SC 1269	41
AIR 1967 SC 1836	38
AIR 1965 SC 40	46
1964 AC 40: (1963) 2 All ER 66, Ridge v. Baldwin	26
AIR 1963 SC 812	50, 51
AIR 1962 SC 159	8
AIR 1962 SC 171	21, 46, 47
AIR 1962 SC 263	20
AIR 1959 Mys 96: 36 Mys LJ 204	8
AIR 1958 SC 538	38
AIR 1958 Andh Pra 78	48
AIR 1956 SC 676	49
AIR 1953 SC 375	11
AIR 1953 SC 404: 1953 Cri LJ 1621	12
AIR 1952 SC 196: 1952 Cri LJ 966	9
AIR 1951 All 674 (FB)	48
(1723) 1 Str 557: 93 ER 698	26

In W. P. No. 8461 of 1976: T. S. Ramachandra, for Petitioners; B. Veerabhadrappa, (for No. 23), Basavaraj, (for Nos. 11 and 22) R. N. Byra Reddy Advocate General and S. G. Doddakale Gowda 1st Addl. Govt. Advocate for the State; In W. P. No. 49 of 1976: B. Veerabhadrappa, for Petitioners, R. N. Byra Reddy, Advocate General and S. G. Doddakale Gowda 1st Addl. Govt. Advocate (for Nos. 1 to 3) and K. I. Bhatta, (for No. 6) for Respondents; In W. P. No. 8298 of 1976: S. C. Javali, for Petitioner; R. N. Byra Reddy Advocate General and S. G. Doddakale Gowda 1st Addl. Govt. Advocate. for Respondent No. 4; In W. P. No. 9520 of 1976: K. Channabhasappa for R. B. Sadashivappa, for Petitioner; K. Mallegowda, for Respondent; R. N. Byra Reddy Advocate General and S. G. Doddakale Gowda 1st Addl. Govt. Advocate, for the State; In W. P. No. 9654 of 1976: K. Channabasappa, for C. M. Desai, for Petitioner; R. N. Byra Reddy, Advocate General and S. G. Doddakale Gowda 1st Addl. Govt. Advocate, for Respondents Nos. 1 and 2; In W. P. No. 10301 of 1976: B. K. Venkatakrishna for M. C. Rayanna, for Petitioner; R. N. Byra Reddy Advocate General and S. G. Doddakale Gowda 1st Addl Govt. Advocate, for Respondents Nos. 1 and 2; In W. P. No. 5120 to 5122 of 1977: Kadidal Manjappa, for Petitioner; R. N. Byra Reddy Advocate General and S. C. Doddakale Gowda 1st Addl. Govt. Advocate, for Respondents Nos. 1 and 2.

K. JAGANNATHA SHETTY, J. (for himself and P. P. Bopanna and N. Venkatachala JJ.):— These writ petitions challenge the constitutional validity of Section 14-A of the Karnataka Co-operative Societies Act, 1959 (hereinafter referred to as "the Act") and the legality of the orders made thereunder whereby the Deputy Registrars of different districts have directed the amalgamation of co-

operative societies of more than eight hundred. Almost all the affected societies have approached this Court with similar contentions. For the present disposal, however, we have taken only a few of those writ petitions.

2. The petitioners in most of the writ petitions are the amalgamating co-operative societies. But in some, the members of such societies have also joined as petitioners. The orders which they attack are all stereotyped. They provide for compulsory amalgamation of co-operative societies which are primary credit societies. It was uniformly stated that the amalgamation was found to be necessary in public interest and to secure the proper management of co-operative societies. It was further stated that the amalgamation was to meet the credit requirement of rural people particularly the weaker sections, and to make arrangements for the distribution of fertilizers and essential consumer articles. The orders appear to have been based on certain uniform norms apparently as expert committee of the Reserve Bank of India.

The said orders also provide for incidental and consequential matters. The first committee of the amalgamated society has been constituted with a Chairman. The members nominated thereof appear to have been selected at the sweet will of the Deputy Registrars. The term of the office of the committee shall be three years, but liberty has been reserved to the joint Registrars at any time to limit the term of any member (including the Chairman) to a shorter period and nominate another person in his place.

3. The constitutional validity of S. 14-A was attacked on the grounds: (i) that it is beyond the legislative power and a colourable legislation; (ii) that it conferred unguided and arbitrary power on the Deputy Registrar and so violative of Art. 14 of the Constitution; and (iii) that it contravenes Art. 19 (1) (c) of the Constitution inasmuch as it nullifies the liberty of the members to have a co-operative society of their choice. As against the orders of amalgamation, the contention urged was with regard to the nature of the power conferred under S. 14-A and the need to observe the principles of audi alteram partem. Since the impugned orders were made without any opportunity to the petitioners, it was urged that they were nullity. Incidentally, it was also contended that the sole purpose of the Government in enacting S. 14-A was to confer on the Registrar and Deputy Registrar the power to destroy all the co-operative societies controlled and managed by the members belonging to opposition parties and to pack those societies with the henchmen of the Ruling Party.

4. The respondents have filed a common statement of objections in which the history of the legislation has been traced and the necessity to enact S. 14-A has been explained. It was stated that in the State of Karnataka there are 8500 Agricultural Credit Co-operative Societies, out of which only 2500 are viable and the remaining 6000 societies are not viable and 1175 societies are either defunct or not functioning properly. It was also stated that most of the existing societies do not serve the weaker sections of the community and big landlords or rich farmers are the real beneficiaries of the credit facilities offered by the societies. It was further stated that an Expert Study Group appointed by the Reserve Bank of India examined in depth the credit structure of the co-operative societies in the rural areas, followed by the examination of another Expert Committee appointed by the Government of India, popularly called as "Shivaraman Committee." In accordance with their recommendations, the co-operative societies in the rural areas were chosen as the principal agency for meeting credit needs and in order to achieve these objectives, S. 14-A was enacted by the State Legislature. It was denied that the power conferred under the said section was arbitrary or unguided. It was stated that the statutory authorities have to exercise the power having regard to: (a) the public interest; (b) the interest of the co-operative movement; and (c) for purpose of securing the proper management of co-operative societies. On the question of observing the rules of natural justice before making the impugned orders, it was contended that the power under S. 14-A is administrative and the Legislature while enacting the

said section, has specifically excluded the application of the principles of natural justice.

5. We will now proceed to consider the relevant contentions urged for the petitioners while ignoring the contention that relates to the alleged motive behind the legislation as it is totally irrelevant for the courts to judge the validity of any enactment. The first contention that falls for decision is, whether S. 14-A providing for compulsory amalgamation, division or reorganisation of co-operative societies is beyond the competency of the Legislature, or is a colourable piece of legislation. For immediate reference, we set out the section hereunder:

"14-A. (1) Notwithstanding anything contained in this Act or the rules made thereunder and the byelaws of the co-operative societies concerned, where the Registrar is satisfied that it is essential in public interest or in the interest of co-operative movement or for the purpose of securing the proper management of any co-operative society that any two or more co-operative societies should be amalgamated to form a single co-operative society or any co-operative society should be divided or any co-operative society should be reorganised, then, the Registrar shall order the amalgamation, division or reorganisation of such co-operative societies.

(2) The order shall,—

(a) Provide for the devolution of the assets and liabilities of the co-operative society or societies amalgamated, divided or reorganised, and the date on which the devolution takes effect;

(b) specify,—

(i) the composition, strength, names and the term of office of the members (including the Chairman) of the first committee;

(ii) who shall be the Managing Director/Secretary, of the new co-operative society or each of the new co-operative societies as the case may be; and

(iii) the bye-laws which the new co-operative society or each of the new co-operative societies shall, until amended in accordance with the provisions of the Act and the rules, follow.

(3) Every such order shall be published in the official Gazette and shall, unless otherwise specified in the order, come into force on such publication.

(4) The order referred in sub-sec. (1) may contain such incidental, consequential and supplemental provisions as may, in the opinion of the Registrar, be necessary to give effect to amalgamation, division or reorganisation, as the case may be.

(5) Notwithstanding anything contained in the Transfer of Property Act, 1882 (Central Act 4 of 1882) or the Registration Act, 1908 (Central Act 16 of 1908) in the event of amalgamation, the registration of the amalgamated co-operative society and in the event of division, the registration of new co-operative societies shall with effect from the date specified in the order of amalgamation or division in each case, be sufficient conveyance to vest the assets and liabilities of the amalgamating co-operative societies or the original co-operative society in the amalgamated co-operative society or the new co-operative societies as the case may be.

(6) The amalgamation of co-operative societies or division or reorganisation of a co-operative society shall not affect any right or obligation of the co-operative societies so amalgamated or the co-operative society so divided or reorganised or render defective any legal proceedings which might have been continued or commenced by or against the co-operative societies which have been amalgamated or divided or re-organised and accordingly such legal proceedings may be continued or commenced by or against the amalgamated co-operative society, the reorganised co-operative society or the new co-operative societies as the case may be."

By this section, the power to amalgamate, divide or reorganise co-operative societies has been conferred upon the Registrar; but by Karnataka Ordinance No. 7 of 1977, the said power has also been conferred on the Deputy Registrar in respect of co-operative societies whose area of operation is less than a taluk. In other respects the framework of the section is kept undisturbed.

6. Here it is not necessary for us to verge upon the scheme of the sec-

tion. It may be sufficient, if we remember the broad outlines of the section. The argument advanced for the petitioners largely depended on the compulsive nature of the power conferred, the principles of "co-operation" and the meaning to be given to the words "co-operative society" found in the legislative entry 32, List II in the Seventh Schedule. It was urged that the "Co-operative society" envisaged in the said legislative entry, is a co-operative society built upon the free choice and action of the members, and the law relating to its compulsory amalgamation is an antithesis of "co-operation" and, therefore, it is a colourable legislation.

The contention was sought to be justified with a flash-back on the purpose and development of co-operative movement right from its inception. The history of the co-operative movement, to put it briefly, runs like this: The father of that movement was Robert Owen (1771 to 1828). He was also the founder of the British Socialism. He did not trust the State to solve economic problems but put his hope in voluntary association based on the principle of mutual help. He thus advanced the concept of co-operation as the basis of a new social and economic order. His movement was built upon the free choice and action of the people. That movement spread in all democratic countries of the West and Rochdale Pioneers in England for the first time established their Equitable Society in 1884 for self help and mutual help.* The rules of co-operation were also traced to Rochdale Pioneers. Those rules consisted of Voluntary Association, Democratic Management, self-help, mutual help, open door policy, no profit motive, etc.

7. These, in fact, were the real principles of the 'co-operation.' Co-operative Society was a democratic society in which no one was compelled to join it or prevented from withdrawing from it. There was no element of compulsion either in its formation or in its working. But as days rolled on, that Principle had undergone modifications as the movement was extended from country to country. They did not remain as gospel preached from the pulpit although the core of the movement remained the same. The co-operative movement under the capitalist system remained as a corrective for the evils of that system. "Co-operation" in a socialist country remained as a part of that system. But in a communist country, "co-operation" was adopted as a State dominated society.** Denmark however, stands aloof. That country appears to defy even what Harold J. Laski says "Man is not, in fact, born free.† It is said that there is even now no law in that country to regulate the working of dairy societies. The whole structure is based on the civic sense and spirit of sacrifice of the people.†** Thus, the co-operative movement has never been a cloistered virtue of any particular system of Government. It has always been recognised to be a scheme of social reform in the modern world.

8. At one stage, it was urged for the petitioners, that we must try to ascertain. the meaning of "co-operation" as existed when the Constitution was enacted and should give that conception alone to the "co-operative society" found in Entry 32 List II. Certainly, it will not be difficult for us to trace that conception and for a proper understanding we will try to ascertain it also. But, we must state that it is not a correct principle of construction. It will be unreasonable to confine the intention of the Legislature to the meaning attributable to the word used at the time the law was made assuming for a moment any such meaning was then available. The Courts have given modern meaning even to the words found in ancient statutes although the statutes are ordinarily designed to meet the fugitive exigencies of the hour. In Senior Electric Inspector v. Laxminarayan Chopra, AIR 1962 SC 159 at p. 163 the Supreme Court held

*"Co-operation in Foreign Lands" by Dr. C. B. Mamoria and Dr. R. D. Saksena.

**A Manual of Co-operative Law and Practice 1958 by B. J. Surridge and Margret Digby, page 5.

†A grammer of Politics by Harold J. Laski 4th Edn. P-18.

†*Theory, History and Practice of Co-operation by R. D. Bedi. P. 26.

that "wireless receiving station" clearly comes within the definition of "Telegraph" in the Telegraph Act (1885) and observed:

"It is more reasonable to confine its intention only to the circumstances obtaining at the time the law was made. But in a modern progressive society it would be unreasonable to confine the intention of a Legislature to the meaning attributable to the word used at the time the law was made. for a modern Legislation making laws to govern a society which is fast moving must be presumed to be aware of an enlarged meaning the same concept might attract with the march of time and with the revolutionary changes brought about in social, economic, political and scientific and other fields of human activity. Indeed, unless a contrary intention appears, an interpretation should be given to the words used to take in new facts and situations, if the words are capable of comprehending them."

In this context, it may be useful to refer to the observation made by Hegde, J., while he was in this Court in P. Nathmal Sanchethi v. Dasarath (1958) 36 Mys LJ 204 at p. 207: (AIR 1959 Mys 96 at p. 98). He gave a wider meaning to the word "wages" as found in S. 60 (1) (h) of the Code of Civil Procedure and held that its conception should take within its fold the bonus paid to the Industrial workers. He said:

"Life is dynamic. So are our laws. They grow with the nation. The words acquire new meaning with the passage of time. The newly acquired meanings are in consonance with the new ideas. The march of time is not a matter of indifference to Courts. It is neither possible nor wise to create a gulf between society and its laws. Laws are not prison houses nor are the Judges required to go by antiquated meanings of words and ideas corroded by the process of time."

9. If these are the principles that may govern the interpretation of words in a statute, what then should be the rules of construction of a word in the Constitution? Needless to state that they should govern with full force, because, the "Constitution" according to Benjamin N. Cardoza, "states or ought to state not rules for the passing hour, but principles for expanding future."* "We must never forget" Marshall's mighty statement "that it is a constitution that we are expounding." We should not also forget the warning given to Judges (although in a different context) by Patanjali Sastri, C. J., in State of Madras v. V. G. Row, AIR 1952 SC 196 at p. 200:

"...The sobering reflection that the constitution is meant not only for people of their way of thinking, but for all ..."

That apart, we are trying to grasp the meaning of the words "co-operative society" found in the legislative entry. It is a settled principle that we must always give the most liberal construction to words conferring legislative power. We must give such meaning so that they may have effect in their widest amplitude. It is an accepted principle of construction that "none of the legislative items in the List should be read in a narrow restricted sense and each general word should be held to extend to all ancillary and subsidiary matters which can fairly and reasonably be said to be comprehended." R. S. Joshi v. Ajit Mills Ltd., AIR 1977 SC 2279 at p. 2295, para 46.

10. The principles being thus explained, let us turn to the co-operative movement in our country. Long before the Constitution came into force, the co-operative movement in this country was regulated and governed by an Act called "the Co-operative Societies Act, 1912." If we peruse the provisions of that Act, it becomes clear that the Indian Co-operative movement was never a spontaneous development in its formal phase. It was a creation of the statute which has its object the promotion of the economic interests of its members in accordance with the co-operative principles (See S. 4 of the 1912 Act). It was no doubt a democratic body, but the Registrar had always a large measure of control. That appears to be the scheme of every co-operative movement made from time to time. It was Government initiated and has since its inception been largely nurtured and

*Nature of the Judicial Process by Benjamin N. Cardozo — A Yale Paperbound Page 83.

guided by the Government.† That has become inevitable in the context of widespread poverty and illiteracy among the rural population. The provisions of the Act are in pari materia with the provisions of the Co-operative Societies Act, 1912. S. 47 of the 1912 Act, like S. 112 herein, prohibited the use of word "co-operative" by any person for trading purpose unless the co-operative society was registered. S. 39 of the 1912 Act, like S. 72, herein provided for compulsory dissolution of societies. We are referring to these provisions only to show that the "co-operative principles" as mooted by Robert Owen or Rochdale Pioneers with all their pristine purity of voluntaryism had never existed in this country at least for the promotion of economic interests. It, however, remained as a welfare movement aiming at the betterment of the poor man's lot. Its principles, according to us, are no more than the rules of business varying from time to time by statutory enactments keeping, of course, undisturbed the democratic structure of the organisation.

Indeed, in the context of planning where period is fixed to achieve certain objectives, voluntary principle in the co-operative movement has perforce to undergo modification. The official rod has to intervene to introduce certain amount of compulsion or control to bring speedy results. Such compulsion or control was all the more found to be necessary and justified in this country since the State or Reserve Bank or other financial institutions have been major partners in most of the credit co-operative societies. R. D. Bedi in his book "Theory, History and Practice of Co-operation"* states:

"In these days, when free enterprise is giving place to planned economy, there seems to be little room for a strict adherence to the policy of laissez-faire. Planning envisages the fixation of targets with a certain amount of surety about their achievement. Voluntary principle, which leaves the acceptance of schemes to the sweet will of the people, does not seem to fit in the system of planning. Late Prof. D. G. Karve once remarked that, "In the overall context of a planned society in which direction by the State is elementary, its voluntary character becomes a historical, not a fundamental feature of co-operation." The planning Committee (1964) also remarked that voluntary principle hampered planning and must undergo some modification. It also recommended that in certain kinds of societies for example, consolidation of holdings, irrigation and farming societies, resolution passed by two-thirds majority should be binding on the remaining person also."

11. The voluntary principle is no doubt a precious asset of the co-operative movement and should remain as a golden rule, but then, it cannot be held to be a constraint on the plenary powers of legislation under entry 32, List II. The principles of co-operation must be left to the good sense of our elected representatives and responsible Government.

There is also no substance in the contention that S. 14-A is colourable legislation. The rule against colourable legislation was first explained by Mukherjea, J. (Afterwards C. J.) in K. C. Gajapati Narayan Deo v. State of Orissa, AIR 1953 SC 375. The learned Judge observed therein:

"The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears on proper examination to be a mere pretence or disguise. ... In other words, the rule lays down that a Legislature cannot go outside its sphere of competence whether directly or indirectly."

The above principle has been reiterated by Krishna Iyer, J., in R. S. Joshi v. Ajit Mills Ltd., AIR 1977 SC 2279 at p. 2286 Para 16—

"..... It is very important to notice that if the legislature is competent to pass the particular law, the motives which impel it to pass the law are really irrelevant. To put it more relevantly to the case on hand, if a legislation apparently enacted under one

†Preface: Page viii Co-operative Movement in India by E. M. Hough.

*See — Theory, History and Practice of Co-operation by R. D. Bedi, 9th Revised Edition, 1974 page 27.

Entry in the List, falls in plain truth and fact, within the content, not of that Entry but of one assigned to another legislature, it can be struck down as colourable even if the motive were most commendable ....."

Having regard to the nature of the legislation and the scope of Entry 32, we cannot say that S. 14-A in essence falls outside the said entry, or falls into another entry assigned to Parliament. The section is primarily concerned with the co-operative societies with regard to its amalgamation, division or reorganisation, and thus quite fairly and squarely falls within entry 32 List II.

12. We shall now take up the contention, whether S. 14-A conferred unguided and arbitrary power on the Registrar and Deputy Registrar and so is void being in contravention of Art. 14.

For this purpose, we must have a close look at the Section. Sub-sec. (1) of S. 14-A begins with non-obstante clause. It confers power on the Registrar and Deputy Registrar to amalgamate, divide or reorganise co-operative societies, notwithstanding anything contained in the Act, Rules or the Bye-laws of the Co-operative societies. They could take action only when they are satisfied: (i) that it is essential in public interest; or (ii) in the interest of co-operative movement; or (iii) for the purpose of securing the proper management of any co-operative society. Sub-sec. (2) provides the terms upon which the order shall be made. The order shall provide for the devolution of the assets and liabilities of the co-operative societies, the composition, strength, names and the term of office of the members of the first committee. It must also specify who shall be the Managing Director/Secretary and the bye-laws to be applicable to the amalgamated societies. Sub-sec. (4) provides power to make other incidental or consequential orders. Complimentary to this are the provisions contained in sub-secs. (5) and (6). The Section, no doubt, does not make a precise classification of the co-operative societies, in respect of which amalgamation or division or reorganisation may be effected. It leaves the selective application of the law to be made by the Registrar or the Deputy Registrar. But the selective application of the law for any one of the purposes set out in the section is not unguided. The legislature has prescribed the guidelines to the statutory authorities for the exercise of discretion. Therefore, it cannot be said that the power conferred upon the authorities was arbitrary or violative of Art. 14. The scope of Article 14 has been well settled by a catena of decisions of the Supreme Court. It is not necessary to have a lengthy review of those cases. It may be sufficient to refer to the observation made in Kedar Nath v. State of West Bengal, AIR 1953 SC 404 wherein, Patanjali Sastri C. J. at p. 409 Para 14, said:

"That if the impugned legislation indicates the policy which inspired it and the object which it seeks to attain, the mere fact that the legislation does not itself make a complete and precise classification of the persons or things to which it is to be applied, but leaves the selective application of the law to be made by the executive authority in accordance with the standard indicated or the underlying policy and object disclosed is not a sufficient ground for condemning it as arbitrary and, therefore, obnoxious to Art. 14."

But in a given case, if the discretion exercised by the statutory authority is proved to be arbitrary or in utter disregard to the policy laid down by the Legislature, then that particular action could be condemned as obnoxious to Art. 14. On this principle, the learned Chief Justice continued:

"..... but as has been pointed out, if it be shown in any given case that the discretion has been exercised in disregard of the standard or contrary to the declared policy and object of the legislation, such exercise could be challenged and annulled under Article 14."

Coming to the recent decision of the Supreme Court in Maganlal Chhaganlal (P) Ltd. v. Greater Bombay Municipality, AIR 1974 SC 2009 at p. 2022 para 16. Alagriswami, J., while upholding the validity of the provisions of Chapter V-A of the Bombay Municipal Corporation Act and the provisions of the Bombay Government Premises (Eviction) Act, 1955, observed at page 2022:

"The provision of these two Acts cannot be struck down on the fanciful theory that power would be exercised in such an unrealistic fashion. In considering whether the officers would be discriminating between one set of persons and another, one has got to take into account normal human behaviour and not behaviour which is abnormal. It is not every fancied possibility of discrimination that we must take into account."

13. Having regard to these principles, we cannot think that S. 14-A has conferred discretionary power, unguided and uncontrolled. It is not a power-packed section without any guiding principles. The amalgamation, division or reorganisation of co-operative societies could be ordered only when the statutory authorities are satisfied that such action is essential either in public interest or in the interest of co-operative movement or for the purpose of securing the proper management of any co-operative society. The section, therefore, not only lays down the policy, but also provides safeguards to ensure that the co-operative societies are not dismantled unnecessarily.

14. But learned counsel for the petitioners highlighted the two omissions made by the Legislature, to reinforce their contention that the power conferred under S. 14-A is arbitrary. It is said that there is no provision for appeal against the abuse of powers; and there is also no provision to afford reasonable opportunity to the co-operative societies before any action is taken. It is true that these circumstances are sometimes relevant to judge whether the statutory power is arbitrary and uncontrolled. But each case has to be considered, having regard to the nature of the power conferred and the authority on whom it has been conferred. In the present case, the section confers power on the Registrar and the Deputy Registrar. They are the controlling authorities for co-operative societies. They must therefore, be held to be familiar with the working of all the co-operative societies. They are required to exercise their power having regard to the guidelines provided by the Legislature. Therefore, the omission to provide for a right of appeal against their action is not so much relevant in the instant case. The mere fact that there is no provision for appeal is no ground to hold that there is a possibility of abuse of the power. Article 14 does not demand "a fanatical approach." The guidelines provided by the Legislature are themselves the best safeguard to ensure that the societies are not disturbed arbitrarily. When such safeguards are provided by the Legislature, it is necessary that the authority which makes an order under the section, complies strictly with all the conditions laid down by law to be satisfied by him before he makes an order.

On the question of affording opportunity to the affected co-operative societies, no doubt, there is no express provision provided for that purpose. But the omission to provide for is not conclusive of the fact that the statutory authorities should not follow the rules of natural justice. We, however, do not want to examine that question at this stage. We shall have occasion to go over the ground again a little later.

15. On this part of the case, we have to still consider one other contention urged for the petitioners. It was urged that sub-sec. (2) of S. 14-A contains no guidelines either for appointment of members, Chairman or Secretary of the first committee or for determining their period in office. It was also urged that the Deputy Registrar has arbitrarily nominated persons amongst whom some are not even the primary members of the societies and some are chronic defaulters, ignoring altogether the elected members of the amalgamating societies.

We do not agree that there are no guidelines for making an order under sub-sec. (2) of S. 14-A. The guiding principles provided under sub-sec. (1) equally govern the action of the Deputy Registrar while constituting the first committee, selecting suitable persons as Chairman, Managing Director or Secretary of the amalgamated co-operative society and fixing their term of office. If there is any lapse in following those guidelines, it may be a different matter and we are not concerned with that for the present.

16. The next question that falls to be determined is, whether S. 14-A is violative of Art. 19 (1) (c) of the Constitution. In some writ petitions as noticed earlier, the shareholders of the co-operative societies are also the petitioners. They have contended that the compulsory amalgamation of their societies has violated their fundamental right of freedom of association as guaranteed under Art. 19 (1) (c). This contention, however, was countered by the respondents on two grounds: Firstly, that S. 14-A deals with only the co-operative societies which are corporate bodies and as such, the corporate bodies have no fundamental rights guaranteed under Art. 19 and secondly, the co-operative society is a creature of the Act recognised for the purpose of sound business and its compulsory amalgamation has nothing to do with the right guaranteed to the citizens to form an association.

17. We shall make it clear, at the outset, that if S. 14-A purports to restrict the right of citizens as guaranteed under Art. 19 (1) (c), the validity of it presents little problem as it cannot be said to be a law imposing reasonable restrictions, in the interests of the sovereignty and integrity of India or public order or morality as provided under Art. 19 (4). The frame work of the law under S. 14-A is to provide for compulsory amalgamation, division or reorganisation of co-operative societies and as such falls evidently outside the matters covered under Article 19 (4).

18. The question urged for the petitioners may be examined from three aspects: Firstly, on the nature of the right; second, the interest which the petitioners complain of; and third, the injury resulting from the operation of S. 14-A. These were also the principles emphasised by Shah, J. (later C. J.) in R. C. Cooper v. Union of India, AIR 1970 SC 564 at p. 593 para 46. The learned Judge observed that protection against the impairment of the guarantee of fundamental rights is to be determined by the nature of the right, the interest of the aggrieved party and the degree of harm resulting from the State action. Therefore, we shall proceed to examine the nature of the right guaranteed to the citizens under Art. 19 (1) (c).

De Toequeville said:*

"In democratic countries, the science of association is the mother of science; the progress of all the rest depends upon the progress it has made."

Aristotle** said long ago that man is a social animal. He is gregorious and loves to combine with his fellowmen in numerous forms of associations in the course of his activities. Freedom of association thus becomes a cherished objective of man's efforts in the pursuit of happiness. This freedom, as observed by the Supreme Court in D. A. V. College v. State of Punjab, AIR 1971 SC 1737 at p. 1746 Para 30 implies that several individuals get together and form voluntarily an association with a common aim, legitimate purpose and having a community of interests. In our view, it only comprehends the right to form an association of citizens. political, economic religious, cultural, fraternal and social which have become an indispensable ally in the struggle to preserve democracy against totalitarianism. The industrial association known as labour trade union which has been the most important single force in the struggle for industrial democracy has also been included in that right. The content of this right must necessarily include as observed by the Supreme Court in Smt. Damayanti v. Union of India, AIR 1971 SC 966 the right to continue the association with its composition as voluntarily agreed upon by the persons forming the association. It was also observed therein that the right to form an association includes the right to its continuance and any law altering the composition of the association compulsorily, will be a breach of that right.

With that, we may turn to the nature of the right or interests the infringement of which has been complained of by the members of the co-operative societies. Their only grievance as we see it, is that without their consent, they have been made

*De Toequeville, Democracy in America 134 (Bowen ed. 1863).

**See: The Legal Pillars of Democracy page 135 by Venkata Subba Rao.

members of the amalgamated co-operative societies and that has affected their right to form an association as guarnteed under Art. 19 (1) (c). To put it more elaborately, the compulsory amalgamation, dissolution, division and reconstruction of co-operative societies, or the addition of some more members without the consent of the existing members, will be violative of the freedom to form an association which includes within it, the continuance of the association as originally formed.

19. We consider this argument, is without force. There appears to be some misconception on the relative rights of the citizens and that of a co-operative society. The Co-operative society with which we are concerned is a corporate body. Article 19 (1) (c) guarantees rights to the citizens as such and not to corporate bodies or associations. The Act provides no compulsion for anybody to form a co-operative society. The Act also does not preclude any one from going out of his co-operative society. When these two principles are not restricted by the Act, we fail to see how the fundamental right guaranteed by Article 19 (1) (c) has been impaired or infringed.

As soon as citizens form an association, the right is guaranteed to them by Art. 19 (1) (c). The association so formed also cannot lay claim to the fundamental right guaranteed by Article 19 (1) (c) on the basis of their being an aggregation of citizens. In other words, the association cannot complain about the restrictions in the Act as restrictions against the right conferred by Art. 19 (1) (c). The provisions in the Act govern the duties and privileges, rights and liabilities, property and funds, the audit, inspection and surcharge, the dissolution and amalgamation of co-operative societies and its members. The Act thus regulates the economic interests of the members and controls the trading activities of the societies in the interests of the public or in the interests of the advancement of the co-operative movement. The process of amalgamation and division or reorganisation of co-operative societies relate only to structural alterations in the corporate bodies and cannot be construed as a restriction on the right guaranteed to the citizens by Article 19 (1) (c).

20. The Act by S. 4. authorises registration of an association of citizens as a co-operative society if it is likely to be economically sound. But an association cannot claim and obtain registration as a co-operative society as its fundamental right guaranteed by Article 19 (1) (c). Article 19 (1) (c) does not guarantee any fundamental right to an association to obtain registration as a corporate body. The Supreme Court in Raghubar Dayal Jai Prakash v. Union of India, AIR 1962 SC 263 at p. 270 Para 12 considered almost similar questions. In that case, Ss. 5, 6 and 10 of Forward Contracts (Regulation) Act (1952) were challenged on the ground that they were violative of Art. 19 (1) (c). S. 6 of the said Act empowers the Government to grant recognition to the association specifying the goods or classes of goods with respect to which forward contracts may be entered into between the members of such association or through or with any such member. Section 6 (2) contains conditions which ought to be complied with by association before recognition was granted. Complimentary to this were the provisions contained in S. 10 which empower the Central Government to direct rules to be made, with power in case the recognised association fails to take action to comply with the order of the Government. Dealing with these provisions and their impact on the right to form an association, Rajagopala Ayyangar, J., speaking for the constitution Bench observed at p. 270:

"In the first place, the restriction imposed by S. 6 of the Act is for the purpose of recognition and no association is compelled to apply to the Government for recognition under that Act. An application for the recognition of the association for the purpose of functioning under the enactment is a voluntary act on the part of the association and if the statute imposes conditions subject to which alone recognition could be accorded or continued, it is a little difficult to see how the freedom to form the association is affected unless of course, that freedom implies or involves a guaranteed right to recognition also. Could it be contended that there is a right in the as-

sociation guaranteed by the Constitution to obtain recognition?"

21. Let us consider the question from another angle. Section 112 prohibits persons other than a co-operative society from trading or carrying on business under the name "co-operative" or the equivalent in any Indian language. The association of citizens must, therefore, be registered as a co-operative society under the Act for doing business or carrying on like other activities. It is now a settled principle that the freedom to form an association guaranteed to the citizens by Art. 19 (1) (c) does not include the freedom to achieve any object of the association. The amalgamation, compulsive or consensual pertains to the rights of the latter category. The law on this question has been succinctly summarised by the Supreme Court in All India Bank Employees' Association v. National Industrial Tribunal (Bank Disputes) Bombay, AIR 1962 SC 171 para 19 thus:

"The resulting position may be illustrated thus: If an association were formed for the purpose of carrying on business, the right to form it would be guaranteed by sub-cl. (c) of cl. (1) of Art. 19 subject to any law restricting that right conforming to cl. (4) of Art. 19. As regards its business activities. however, and the achievement of the objects for which it was brought into existence its rights would be those guaranteed by sub-cl. (g) of clause (1) of Art. 19 subject to any relevant law on the matter conforming to clause (6) of Art. 19; while the property which the association acquires or possesses would be protected by sub-cl. (f) of clause (1) of Art. 19 subject to legislation within the limits laid down by clause (5) of Art. 19."

It was further observed at para 20:

"While the right to form a union is guaranteed by sub-cl. (c), the right of the members of the association to meet would be guaranteed by sub-clause (b), their right to move from place to place within India by sub-clause (d), their right to discuss their problems and to propagate their views by sub-clause (a), their right to hold property would be that guaranteed by sub-cl. (f) and so on — each of these freedoms being subject to such restrictions as might properly be imposed by cls. (2) to (6) of Art. 19 as might be appropriate in the context. It is one thing to interpret each of the freedoms guaranteed by the several Articles in Part III in a fair and liberal sense, it is quite another to read each guaranteed right as involving or including concomitant rights necessary to achieve the object which might be supposed to underlie the grant of each of those rights, for that construction would, by a series of ever expanding concentric circles in the shape of rights concomitant to concomitant rights and so on, lead to an almost grotesque result."

22. We will now refer to the case Damayanti v. Union of India, AIR 1971 SC 966 upon which strong reliance was placed by counsel for the petitioners. In that case, Parliament passed a law under Entry 63 of List II of Serventh Schedule to the Constitution whereby a Hindi Sammelan was constituted as a corporate body materially affecting the management and the property of the previous committee of members of the society registered under the Societies Registration Act. The Supreme Court held that the Act in so far as it interfered with the composition of the society in constituting the Sammelan violated the rights of the members of the original society to form an association. The facts of that case are far removed from those of the case on hand. Therefore, we do not think that the principles stated therein are of much assistance to the petitioners herein. When the Sammelan in that case was registered under the Societies Registration Act, it became not a body corporate. Even the properties did not vest in such society. The properties vested in the governing body of the society. The Hindi Sammelan registered under the Societies Registration Act was really an association of persons. Therefore, the Supreme Court said on the facts of that case that the enactment of the Central Government was violative of Art. 19 (1) (c) of the Constitution.

The view that we take finds full support from the decision of the Full Bench of the High Court of Andhra Pradesh in K. Suryanarayana v. The District Co-operative Officer-cum Election Officer, the West Godavari

Co-op. Sugars Ltd., AIR 1976 Andh Pra 340. While repelling the similar contention it was held therein that the right to form a co-operative society under the Co-operative Societies Act is not a fundamental right and it is only a right given under the Act, subject to its provisions and the rules framed thereunder.

23. Before parting with this part of the case, we may refer to one other contention urged for the petitioners. It was urged that under the model Bye-laws made applicable to the amalgamated societies, it was provided that the members of the amalgamating societies automatically become the members of the amalgamated societies and the said members have no right to withdraw their membership for three years. It was urged that that restriction is violative of Art. 19 (1) (c). We do not think that it is necessary to deal with this contention in detail. The Deputy Registrar has imposed that restriction by the model bye-laws framed by him as incidental or consequential to the order of amalgmation. Even assuming that that restriction is bad, it does not invalidate the order of amalgamation, if it is otherwise according to law. The bye-laws have no statutory force. They are only executive instructions.

24. This takes us to the question whether the power conferred under S. 14-A is judicial or administrative and whether it was obligatory for the Deputy Registrar to have afforded an opportunity to the societies in accordance with the principles of natural justice before the impugned orders were made.

25. Before examining the question, it will be necessary to recall the contention urged by learned Advocate General. He urged that under the Karnataka Act No. 39 of 1975 introducing S. 14-A as it then was, provided provisions making it obligatory for the Registrar to afford an opportunity to the co-operative societies and to consider the representations, if any, from them before any final order was made on the question of amalagamation or division. But that provision has been deleted by Karnataka Act No. 70 of 1976 and also by Karnataka Ordinance No. 7 of 1977. He also urged that that omission was decisive, making the legislative intention clear that the Court should not supply the requirement of audi alteram partem.

It is true that the provisions relating to audi alteram partem in the Karnataka Act 39 of 1975 have been omitted in S. 14-A with which we are concerned. But that, in our view, is not at all conclusive of the intention of the Legislature and has little relevance to determine the nature of the power conferred on the statutory authorities. The question of applicability of audi alteram partem cannot be approached merely on the relative terms of those two enactments. It must rest on a consideration of the necessity to observe a fair procedure in the exercise of the power conferred by Sec. 14-A. The question to be answered, in our opinion, is this: "Is it fair that the Registrar or Deputy Registrar should go on amalamating, dividing or reorganising the co-operative Societies without any kind of opportunity to them."

26. Sec. 14-A as introduced by Karnataka Act 70 of 1976 does not provide that the co-operative Societies need not be heard before any order of amalgamation is made. In the absence of such a provision, we have to examine whether audi alteram partem that made its first appearance in the Garden of Eden where even Adam had been called upon by God to meet the charge of having eaten the forbidden fruit, before suffering expulsion (R. v. Cambridge University (1723) 1 Str. 557) should be applied to these cases or not.

According to learned Counsel for the petitioners, the case on hand presents little difficulty for the application of principles of natural justice because the statutory authorities under Sec. 14-A are required to act judicially. They placed reliance on the decision of the Supreme Court in Rampur Distillery and Chemical Co. Ltd. v. Company Law Board, New Delhi (AIR 1970 SC 1789 at p. 1793 Para 13). Therein the Supreme Court considered the scope of S. 326 of the Companies Act (1956). The said section conferred power on the Central Government to accord approval for appointment or re-appointment of Managing Agent if it is satisfied that the appointment is not against the public interest, etc.

The Supreme Court after examining the scope of the said section, held that that power was quasi-judicial and not administrative. But we do not think that it is necessary to examine the nature of the power conferred under S. 14-A. It is really unnecessary to examine whether the power is judicial, quasi-judicial or administrative at least for two reasons. Firstly, there is no point in labelling such functions for the application of rules of natural justice, because administrative power has never been considered as antithesis of judicial power and secondly, it will be extremely difficult to distinguish the administrative power from quasi-judicial power.

On the first point, Lord Hodson in the oft cited case Ridge v. Baldwin. 1964 AC 40 at p. 130 observed:

"..... The answer in a given case is not provided by the statement that the giver of the decision is acting in an executive or administrative capacity as if that was the antithesis of a judicial capacity. The cases seem to me to show that persons acting in a capacity which is not on the face of it judicial but rather executive or administrative have been held by the Courts to be subject to the principles of natural justice."

On the second point, Hegde, J., in A. K. Kraipak v. Union of India, AIR 1970 SC 150 at p. 154 Para 13 observed:

"The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated."

The difficulty in drawing a line between these two powers has been felt by the Courts in the Overseas countries as well. In the Canadian case of Voyager Exportation Ltd. v. Ontario Securities Commission, (1970) 1 OR 237 it was observed:

"That that distinction between "administrative" and "judicial" is as elusive as the Scarlet Pimpernel."

27. Whatever might have been the medieval concept of natural justice, it must be admitted, that in recent years it has a wide ranging application in many Governmental action. Although the precise content of it was doubted from time to time, its general applicability to Governmental action was never doubted by the Judges. One vital principle, that is, the right of a person to be given a fair hearing, before he suffers in some way under the official rod, has been consistently applied by the Courts, and today, it has become one of the most essential elements in the rule of law as Professor H. W. R. Wade puts it:**

"The subject-matter contains the very kernel of the problem of administrative justice."

Its principal aim, as observed by Hegde, J., in A. K. Kraipak's case, AIR 1970 SC 150 at p. 154, Para 13. is to secure justice or to put it negatively to prevent miscarriage of justice, and they can be operative only in areas not covered by any law validly made. The learned Judge had also a warning to give:

"The concept of rule of law would lose its validity if the instrumentalities of the State are not charged with the duty of discharging their functions in a fair and just manner."

(Underlining is our)

Lord Morris of Borth-y-Gest has gone a step further in Wiseman v. Borneman, 1971 AC 297 at p. 309 and said:

".....We do not search for prescriptions which will lay down exactly what must, in various divergent situations, be done. The principles and procedures are to be applied which, in any particular situation or set of circumstances, are right and just and fair. Natural justice, it has been said, is only "fair play in action." Nor do we wait for directions from Parliament." (Underlining is our)

28. These decisions have no doubt brought out prominently the purpose of the application of the sacred maxim audi alteram partem. But, its application in a given case as observed by the Supreme Court in Union of India v. P. K. Roy, AIR 1972 SC 896 at p. 898 Para 12 depends upon the nature of the jurisdiction conferred on the administrative authority, upon the character of the rights of the persons affected, the scheme and policy of the statute and other relevant circumstances disclosed in the case. It is therefore necessary to examine these

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aspects of the matter with particular reference to the relevant provisions in the Act.

Sections 4 to 15 provide for registration, amalgamation, transfer of assets and liabilities and division of co-operative societies. S. 9 renders the registration of a co-operative society as a body corporate with perpetual succession and a common seal, with power to hold property, enter into contracts, institute and defend suits, etc. Section 14 provides for consensual amalgamation, transfer of assets and liabilities and division of co-operative societies. Section 14-A provides for compulsory amalgamation, division and reorganisation of co-operative societies. Section 15 provides for automatic concellation of registration certificates in the event of such amalgamation or division of societies. Section 30 provides for supersession of committees of a co-operative society. If a committee persistently makes default or is negligent in the performance of duties, the Registrar could supersede it, but not without giving an opportunity to state its objections. It is relevant to state that while superseding the committee of management the society as a corporate body, is kept undisturbed and its management is only transferred to the Administrator appointed by the Registrar. But, when a co-operative society is compulsorily amalgamated, the entire corporate body is disintegrated with cancellation of its registration, deprivation of its property and loss of office by its officers. The President, Vice President, Chairman or Secretary are officers of the societies as defined under S. 2 (g) of the Act. They will automatically cease to hold their office without any such corresponding right in the amalgamated society. When such serious civil consequences and losses, pecuniary and otherwise, result from the order of compulsory amalgamation, is it reasonable to assume that the legislature has impliedly intended to deny even the minimal requirement of rules of natural justice! We cannot assume that. We must always presume that the Legislature acts reasonably with awareness of the modern approach of the Courts in matters affecting the rights of persons. They are presumed to intend justice and to avoid injustice, or in the words of Hegde. J., in Union of India v. J. N. Singh, AIR 1971 SC 40 at p. 42 Para 7 "that it must be presumed that the legislatures and the statutory authorities intend to act in accordance with the principles of natural justice." To put it negatively in the words of Lord Guest in Wiseman v. Borneman, 1971 AC 297 at p. 309 "Legislature is not to be presumed to act unfairly."

29. In our judgment, there is no warrant for the inference that the Legislature by enacting S. 14-A has excluded the application of any or all the rules of natural justice. Such inference should not be drawn merely on the history of the legislation. The Court should take into consideration all the circumstances of the case including the nature of the power conferred, the purpose for which it is conferred and the consequences of the exercise of the power. If the purpose for which the power conferred is likely to be defeated by giving an opportunity to the person concerned, the courts may be justified in not insisting on the principles of natural justice. If there is any other public purpose in the case, which could conceivably outweigh the necessity of fair procedure, the courts may be equally justified in holding that the legislature by implication has intended to deny the said principles. But we do not find any one of these things in these cases. Judged from all the circumstances, we are firmly of the opinion that this is not a case where we should hold that the Legislature by necessary implication has excluded the application of any or all the principles of audi alteram partem.

30. It is not in dispute that all the orders impugned in these petitions were made without affording any opportunity to the amalgamating co-operative societies. They must, therefore, be held to be void on this ground alone.

31. In the result, the rule issued in each of these petitions is made absolute. The impugned orders are quashed.

V. S. MALIMATH, J.:— **32.** As in these writ petitions the constitutional validity of S. 14-A of the Karnataka Co-operative Societies Act, 1959 (hereinafter referred to as the Act)

and the orders made thereunder are challenged and as common questions of law arise for consideration, they were heard together and are being disposed of by this common order.

33. The first writ petition is by the members of the concerned co-operative society, the second is by the members and the co-operative society and the remaining writ petitions are by the concerned co-operative societies. In these cases S. 14-A of the Act and the orders made under the said provision amalgamating two or more co-operative societies have been challenged. In order to appreciate the contentions, a brief summary of the relevant provisions of the Act and the legislative history is necessary.

34. The Preamble to the Act shows that it was enacted to consolidate and amend the laws relating to Co-operative Societies in the State of Karnataka. The principal Act received the assent of the President on the 11th of August, 1959. The expression 'Co-operative society' is defined in Section 2 (c) of the Act to mean a society registered or deemed to be registered under the Act. Section 4 provides that a Co-operative society which has as its objects the promotion of the economic interests or general welfare of its members, or of the public, in accordance with Co-operative principles, or a Co-operative society established with the object of facilitating the operations of such a society, may be registered. It further provides that a co-operative society shall not be registered if it is likely to be economically unsound, or the registration of which may have an adverse effect on development of the co-operative movement. Section 5 provides for registration of the co-operative society with or without unlimited liability. Section 6 provides for application for registration of a co-operative society and enumerates the information to be furnished in the application. Section 7 provides that if the Registrar is satisfied (a) that the application complies with the provisions of this Act and the rules; (b) that the objects of the proposed society are in accordance with S. 4; (c) that the aims of the proposed society are not inconsistent with the principles of social justice; (d) that the proposed bye-laws are not contrary to the provisions of this Act and the rules; and (e) that the proposed society complies with the requirement of sound business and has reasonable chances of success; the Registrar may register the co-operative society and its bye-laws. It further provides that if the Registrar is unable to dispose of the application within six months, he shall report to the State Government, stating the reasons therefor and where the Registrar refuses to register a proposed co-operative society, he shall forthwith communicate his decision, with the reasons therefor, to the person making the application. The Registrar is required to maintain a register of all co-operative societies registered or deemed to be registered under the Act. Section 8 contemplates issuance of a certificate of registration by the Registrar. Section 9 provides that the registration of a co-operative society shall render it a body corporate by the name under which it is registered having perpetual succession and a common seal, and with power to hold property, enter into contracts, institute and defend suits and other legal proceedings and to do all things necessary for the purposes for which it was constituted. Whereas S. 10 provides for change of name of the co-operative society, S. 11 provides for change of liability. Section 12 provides for amendment of bye-laws of the co-operative society and S. 13 provides for the date of coming into operation of the bye-laws. Section 14 provides for voluntary amalgamation, transfer of assets and liabilities and division of co-operative societies. Section 14-A which provides for compulsory amalgamation, division and reorganisation of co-operative societies, as substituted by Act 70 of 1976 and further amended by Karnataka Ordinance 7 of 1977, reads as follows :—

"14-A. Power to direct amalgamation, division and reorganisation in public interest.

(1) Notwithstanding anything contained in this Act or the rules made thereunder and the bye-laws of the co-operative societies concerned, where the Registrar or in case of Co-operative society where the area of operation is less than a taluk, the Deputy

Registrar concerned is satisfied that it is essential in public interest or in the interest of the co-operative movement or for the purpose of securing the proper management of any co-operative society that any two or more co-operative societies should be amalgamated to form a single co-operative society or any co-operative society be divided or any co-operative society should be reorganised then, the Registrar or the Deputy Registrar as the case may be shall order the amalgamation, division or reorganisation of such Co-operative societies.

(2) The order shall,—

(a) provide for the devolution of the assets and liabilities of the co-operative society or societies amalgamated, divided or reorganised and the date on which the devolution takes effect;

(b) specify,

(i) the composition. strength, names and the term of office of the members (including the Chairman) of the first committee;

(ii) who shall be the Managing Director/Secretary, of the new Co-operative society or each of the new co-operative societies, as the case may be; and

(iii) the bye-laws which the new-co-operative society or each of the new co-operative societies shall, until amended in accordance with the provisions of the Act and the rules, follow.

(3) Every such order shall be published in the official Gazette and shall, unless otherwise specified in the order, come into force on such publication.

(4) The order referred to in sub-sec. (1) may contain such incidental, consequential and supplemental provisions as may, in the opinion of the Registrar, be necessary to give effect to amalgamation, division or reorganisation as the case may be.

(5) Notwithstanding anything contained in the Transfer of Property Act, 1882. (Central Act 4 of 1882), or the Registration Act, 1908 (Central Act 16 of 1908), in the event of amalgamation, the registration of the amalgamated Co-operative society and in the event of division, the registration of new Co-operative Societies shall with effect from the date specified in the order of amalgamation or division in such case, be sufficient conveyance to vest the assets and liabilities of the amalgamating Co-operative Societies or the original Co-operative Society in the amalgamated Co-operative Society or the new Co-operative Societies, as the case may be.

(6) The amalgamation of Co-operative Societies or reorganisation of a Co-operative Society shall not affect any right or obligation of the Co-operative Societies so amalgamated or the Co-operative Society so divided or reorganised or render defective any legal proceedings which might have been continued or commenced by or against the Co-operative Societies which have been amalgamated or divided or reorganised and accordingly such legal proceeedings may be continued or commenced by or against the amalgamated Co-operative Society, the reorganised Co-operative Society or the new Co-operative Societies as the case may be."

Section 15 provides for cancellation of registration of certificates of Co-operative Societies consequent upon amalgamation or division of Co-operative Societies effected under S. 14-A of the Act. Section 16 provides for membership of Co-operative Societies. Section 17 provides for disqualification for membership. Section 26 provides that subject to the provisions of the Act, the rules and the bye-laws, the final authority of a Co-operative Society shall vest in the general body of members. It further provides for constitution of a Committee to exercise all or any of the powers of the general body as may be specified in the bye-laws. Section 30 empowers the Registrar to supersede the Committee of Management of any Co-operative Society if it persistently makes default or is negligent in the performance of the duties imposed on it by the Act or the rules or bye-laws or commits any act which is prejudicial to the interests of the Society or its members, or is otherwise not functioning properly. Section 30A empowers the State Government to appoint a Special Officer for a Co-operative Society if it is not functioning in accordance with the provisions of the Act, the rules made thereunder or its bye-laws or any order, direction or circular issued by

the State Government or the Registrar. Section 30B empowers the State Government to issue directions to any Co-operative Society if such directions are necessary in public interest or for the purpose of securing proper implementation of Co-operative and other development programmes approved or undertaken by the State Government or to secure proper management of the business of the Co-operative Society or for preventing the affairs of the Co-operative Society being conducted in a manner detrimental to the interests of the members or of the depositors or of the creditors thereof. The Society, to whom directions are issued, is bound to comply with the same. Section 40 provides that it shall be the duty of the State Government to encourage and promote the co-operative movement including encouragement of Co-operative farming in the State and to take such steps in this direction as may be necessary. The principal Act, which came into force on the 1st of June, 1960 did not contain any provision for compulsory amalgamation, division or reorganisation of Co-operative Societies. There was only provision in S. 14 for voluntary amalgamation or division of Co-operative Societies. By Act 39 of 1975, S. 14A was also introduced empowering the Registrar to compulsorily amalgamate, divide or reorganise Co-operative Societies. Sub-sec. (2) of S. 14A, as introduced by Act 39 of 1975, required the Registrar to send a draft of the proposed order to the concerned Societies and to consider their objections before passing final orders. By Ordinance 4 of 1976, S. 14-A was amended and sub-ss. (2) and (4) of S. 14A were omitted. The said Ordinance was replaced by Act 19 of 1976. By Karnataka Ordinance 19 of 1976, sub-ss. (1) and (3) of S. 14A were substituted. The said Ordinance was replaced by Karnataka Act 70 of 1976 which was given retrospective effect from 20-1-1976. Act 70 of 1976 was not reserved for the assent of the President. By Karnataka Ordinance 7 of 1977, Section 14-A was further amended retrospectively with effect from 20-1-1976 empowering the Deputy Registrar in the case of a Co-operative Society where the area of operation is less than a taluka to exercise the power of amalgamation, division or reorganisation of Co-operative Societies. It is under the provisions of S. 14-A as substituted by Karnataka Act 70 of 1976 that large number of Co-operative Societies in the State have been amalgamated or reorganised, which have been challenged in more than 500 writ petitions pending in our Court. We have now heard only these cases which were ready.

35. Arguments advanced by the learned counsel appearing for the petitioners may briefly be summarised as follows:—

(1) That the Legislature which is competent to make law in respect of Co-operative Societies under Entry 32 of List II of the VII Schedule to the Constitution, is not competent to enact S. 14A providing for compulsory amalgamation of Co-operative Societies inasmuch as compulsion is the antithesis of co-operation or Co-operative Societies.

(2) That S. 14-A confers arbitrary power on the Registrar and the Deputy Registrar in the matter of amalgamating, dividing and reorganising the Co-operative Societies and is therefore void as offending Art. 14 of the Constitution.

(3) That S. 14A is void on the ground that it infringes the fundamental right of freedom of association guaranteed by Art. 19 (1) (c) of the Constitution.

(4) That S. 14A is void on the ground that it infringes the fundamental rights guaranteed by Art. 19 (1) (f) and (g) of the Constitution.

(5) That S. 14A is void on the ground that it offends Art. 31 (1) and (2) of the Constitution.

(6) That the impugned orders are illegal and void on the ground that they have been passed without giving an opportunity to show cause to the persons affected by them.

(7) That the impugned orders are illegal and invalid as they have been made by the Registrar without the application of his mind and without his being satisfied about the requirements of sub-s. (1) of S. 14-A of the Act.

36. I will first examine the contention bearing on the question of legis-

lative competence raised by the petitioner in W. P. No. 10301 of 1976. The contention as formulated by the petitioner, reads as follows:—

"8. Section 14A suffers from various infirmities, in that it does not contain the principles that should guide the authorities in reorganising the Societies. It has given arbitrary powers to the Registrar. Though in principle the object of compulsorily reorganising the Societies by amalgamating one with the other is the fundamental object of the law, the Act does not provide for the Registrar to take into consideration factors which are relevant for the achievement of the object. Although the Act has not provided any guidelines, Government should have prescribed the guidelines by making the Rules under S. 14A. In the instant case no such guidelines have been prescribed by the Rules either. In matter of this type the Act or the Rules should have prescribed the relevant guidelines such as the continuity of the area, the geographical situation and pattern with the facilities of means of communications avoiding any inconvenience to the officers and members of the Society; economic and administrative factors; homogenity of the area; classes of different Societies. implications of the concerned Societies; the existence or otherwise of the panchayats, hospitals, schools, shady places, post and telegraphic office, Banks, Roads, etc., and other means of communications and total membership of the Societies etc. Section 14A while delegating power has given unguided and uncontrolled power to the Registrar while reorganising the Societies."

The learned Advocate-General submitted his arguments, taking the stand that the State Legislature is competent to enact S. 14-A, under item "Co-operative Societies" in Entry 32 List II of VII Schedule to the Constitution. He did not rely upon any other entry. Entry 32 reads as follows:—

"Incorporation, regulation and winding up of corporations other than those specified in List I, and Universities; unincorporated trading, literary, scientific, religious and other Societies and Associations; Co-operative Societies."

It is clear from Entry 32 that "Co-operative Societies" is a distinct entry. What was urged on behalf of the petitioners is that a Co-operative Society is a voluntary association and that therefore formation of a new Co-operative Society by compulsorily amalgamating two or more Co-operative Societies without the consent of the members of those Societies is an antithesis of a Co-operative Society. It was maintained that a new Co-operative Society that is formed by compulsory amalgamation cannot in truth and in substance be regarded as a Co-operative Society because it is not a product of voluntary association. It was submitted that a Society formed by co-operation that becomes a Co-operative Society and not a Society formed by compulsion. Shri Venkatakrishnan, learned counsel for the petitioner, pointed out that Mr. Calvert in his book "Law and Practice of Co-operation" defines "Co-operative Society" as "A form of organisation wherein the persons voluntarily associate together as human beings on a basis of equality, for the promotion of economic interests of themselves." He further invited our attention to the following passages at pages 8 to 10 in the book "Co-operation in Foreign Lands" by Dr. C. B. Mamoria and Dr. R. D. Saksena III Edition, where the authors have traced the origin of Co-operative Society and summarised the principles of co-operation as follows:—

"Co-operative principles are those practices which are essential to the achievement of the co-operative enterprise or movement. The principles of co-operation are normally traced to Rochdale pioneers who established their Equitable Society in 1844, though their origin goes back to Robert Owen and Dr. William Kind of Brinhton and to some of the Letipian Socialists. The Co-operative principles, though revolutionary in character, were never stridently announced from the pulpit or the platform and though of deep philosophical import, they were not enunciated in any weighty tone of a learned philosopher. They were simply the rules of business recorded in the proceedings of a small consumer society of a handful of weavers who come together for providing common mutual services. But herein lies

the secret of the profound combination of vision and realism in the principle of co-operation when seen together as a totally (sic). More than a century has elapsed since the principles were first enunciated; through the years they have been examined and commented upon, refurbished and reburnished, but their original statement remains almost unaltered in all the essential aspects.

Co-operative principles were reformulated by a commission appointed by the International Co-operative Alliance in 1964 under the Chairmanship of D. G. Karve of India, with Mr. A. Bonner (of England), Mr. Harvard. A. Cavden (of U.S.A.), Prof. D. R. Henzler (of Germany) and Prof. I. Istanov (of USSR) as members. It submitted its report in 1966.

The Commission laid down the following essential principles and ideas:

(i) Open and Voluntary Membership.
(ii) Democratic administration.
(iii) Self-help and Mutual help.
(iv) Principles of service.
(v) Distribution of Surplus.
(vi) Political and Religious neutrality.
(vii) Proper weighment and supply of unadulterated goods.
(viii) Principle of education.
(ix) Co-operation among co-operatives.

In the first place it is purely a "Voluntary Association." There is no compulsion for anyone to join it. "A Co-operative Philosophy of Society", says J. J. Woreley, "must rest on free-Universal Association democratically governed, conditioned by equity and personal liberty". As such the membership of a co-operative organisation is always open to all people irrespective of differences of caste, creed, colour, community or race. The universality of co-operation can brook no discrimination. They may join it at their sweet-will for achieving the common economic goal. On the other hand they may also quit its membership on their own accord. Rightly it has been remarked by H. Calvert that, unless such a freedom is given to the people, a truly co-operative spirit cannot be developed amongst the members." The development of such a spirit full of loyalty, honesty and unselfishness is the sine qua non of the success of co-operation.

Voluntaryism is thus considered to be a cardinal principle of co-operation. No one can be compelled to join it or prevented from withdrawing from it. It provides an incentive for better work and develops initiative among the members of Co-operative Societies. Super-imposed direction always stands in the way of smooth working of the co-operative institutions.

But this principle is now undergoing modification and in order to bring speedy results, a small measure of compulsion is being introduced. In planned economy also, it is subject to proper control. In socialistic countries such as China and Russia, this principle of voluntaryism is not accepted but it is State-controlled.

There is some justice for making co-operation compulsory in backward countries as Calvert points out, "Compulsory Co-operation, wisely conducted, is compulsory adult education in business methods." But such a compulsion cannot develop the healthy spirit in the co-operative field and it cannot be called co-operation in its true sense but a scheme of social reform by the State."

It appears from these observations that though voluntary character of the association may historically be regarded as an important aspect of the co-operative movement, compulsory co-operation is not regarded as something which is the antithesis of co-operative movement. Whether voluntary co-operation should be preferred or compulsory co-operation should be preferred are really matters of policy. Calvert has gone to the extent of saying that compulsory co-operation wisely conducted may be justified on the ground that it is really compulsory adult education in business methods. R. D. Bedi in "Theory, History and Practice of Co-operation" 9th Edition. has stated as follows at pages 26 to 28:—

"Element of Compulsion in Co-operation.

Voluntary association is an important principle of Co-operation, in so far as it enlarges the freedom of indi-

viduals, provides incentive for work and develops initiative. The principle of "All for each and each for all" requires that there should be freedom of choice regarding the persons with whom to associate. There should, therefore, be no compulsion for joining the Society, nor should there be any restrictions on withdrawals. Patronage of the Society by the members should also be left to their free will.

In all democratic countries of the West, co-operative movement grew spontaneously and naturally, built upon the free choice and action of the people. In DENMARK, there is even now no law to regulate the working of dairy Societies. The whole structure is based on the civic sense and spirit of self-sacrifice created in the people through the educational system in the country. In the rest of the Western world also, the movement grew on the basis of a free initiative of the people.

There is, however, a feeling that strict adherence to this principle is not always conducive to the interests of the people. Co-operation is a welfare movement aiming at the betterment of the poor man's lot. A panacea as it is, for all socio-economic ills of mankind, it should have made a much faster headway than it has actually been able to make in India and some other countries. The enthusiastic co-operators, therefore, who are dissatisfied with the crawl of the movement along years of persuasion manifest a tendency to sacrifice this principle to some extent in the interest of accelerating the pace of the movement.

In these days, when free enterprise is giving place to planned economy, there seems to be little room for a strict adherence to the policy of laissez-faire. Planning envisages the fixation of targets with a certain amount of surety about their achievement. Voluntary principle, which leaves the acceptance of schemes to the sweet will of the people, does not seem to fit in the system of planning. Late Prof. D. G. Karve once remarked that, 'In the overall context of a planned society in which direction by the State is elementary, its voluntary character becomes a historical, not a fundamental feature of co-operation'. The Planning Committee (1964) also remarked that voluntary principle hampered planning and must undergo some modification. It also recommended that in certain kinds of societies for example, consolidation of holdings, irrigation and farming societies, resolution passed by two-thirds majority should be binding on the remaining persons also.

The introduction of an element of compulsion in co-operatives can be justified on some grounds, viz.;

1. For people of under-developed countries, who are mostly illiterate and who do not understand the implications and advantages of co-operation, compulsion can be more effective. Voluntary association is being suggested to them for scores of years now but the suggestion has fallen mostly on deaf ears. In their own interest, therefore, they should, like a patient, be compelled to swallow the bitter pill.

2. In some countries the movement has not made much headway. In India also, it was revealed in the Rural Credit Survey Report that even though the co-operation movement was introduced 50 years back, it had not been able to meet a major portion of the needs of the people; had left a large majority of the people out of its fold and there were large tracts in which the movement was non-existent. In order to speed up the pace of its development, it is suggested that compulsion should be introduced.

3. It is argued that voluntary principle is derogatory to the spirit of planning and as such the voluntary character of the movement in a planned economy is out of date and should be discarded.

4. It may also be argued that in these days when more and more stress is being placed on scientific management of Co-operative Societies, free-will, initiative and incentive do not play a significant role in the success of the societies and, therefore. undue importance should not be given to the principle of voluntaryism.

A rational approach to the problem would show that there is much to be said in favour of voluntary association also."

In "Indian Co-operative Laws vis-a-vis Co-operative Principles" by P. E.

Weeraman, R. C. Dwivedi and P. Seshadri written on behalf of International Co-operative Alliance, it is stated that the principle of voluntary and open membership of Co-operative Societies is one of the basic features of a Co-operative Society. The authors have also examined the provisions for compulsory amalgamation and division contained in the various State enactments and expressed their view as follows at pages 68 and 69.

"(c) Compulsory Division and Amalgamation.

Acts: The State Acts contain provisions clothing the Registrar with power to direct the amalgamation of Societies or the division of an existing Society. The relevant sections are as follows:—

Andhra Pradesh: Sec. 15.
Himachal Pradesh: Sec. 14.
Kerala: S. 14 (8) & (9).
Madhya Pradesh: Secs 16 (2) & (3), 17 (A).
Maharashtra: Secs. 17, 18, 19 (1), 20.
Mysore: Sec. 14A.
Orissa: Sec. 14 (3) (i) (ii).
Punjab: Sec. 13.
Uttar Pradesh: Secs. 125, 126.
West Bengal: Secs. 18A, 18B, 18C.
Delhi: Sec. 16 (1).

Comments: When groups of persons join together into a Society they do so voluntarily. It is therefore incorrect to take away a part of this group compulsorily and form them into a separate society, or to compel this group to join another group. Such compulsion infringes the Principles of Voluntary Association and Democratic Control. These are matters for the societies to decide of their own free will.

Commission Reports: The Committee on Co-operative Law (1956) observed:

'Therefore, what is necessary is not a provision in the Act which will facilitate amalgamation of Societies against the wishes of their members, but a provision that will facilitate such amalgamation, if the members so desire.'

The Working Group on Co-operation, Administrative Reforms Commission, 1968, observed:

'The following statutory powers given to Registrar.....are repugnant to the voluntary and democratic character of the co-operative institutions':

(i) Power of the Registrar to direct Co-operative Societies to amend their bye-laws.

(ii) Power of the Registrar to direct amalgamation or division of Societies.

(iii) Power given to Government nominee in the Board of Directors to veto majority decisions of the Board or refer the matter to the Government for final decision.

We strongly recommend that there should be no further delay in removing the above objectionable features from the co-operative legislations in the States where they have been included."

It is thus seen that there is no unanimity in the views expressed by leading men in the co-operative field on the question as to whether voluntary character of the association is one of the essential and basic features of a Co-operative Society. One of the authors has gone to the extent of saying that compulsory element may be justified as being in the interest of the persons who are subject to such compulsion. Late Prof. D. G. Karve. one of the leading persons in the field of co-operation in India has given to the principle of voluntary association a status in the historical development of co-operative movement and points out that it cannot be regarded as a fundamental feature of co-operation. (Theory, History and Practice of Co-operation—R. D. Bedi, page 27). The concept of Co-operative Society is changing and it is not possible to say that it bears the only meannig as given to it by Rochdale Pioneers in England. It is not possible, therefore, to hold that a Co-operative Society formed by the process of compulsory amalgamation is the antithesis of Co-operative Society or co-operative principles.

37. The language of the entry should be given the widest scope of which its meaning is fairly capable of in interpreting an entry in the VII Schedule. If two reasonable views are possible, the one giving widest scope should be preferred. It is also well-settled that each entry should be

understood as entitling the Legislature to make provisions for all ancillary and subsidiary matters which can fairly and reasonably be comprehended in the entry. Provisions regarding amalgamation, division and reorganisation of Co-operative Societies are in the nature of ancillary and incidental provisions which can be made under the entry "Co-operative Societies". This view of mine receives support from the decision of the Patna High Court in Harakh Bhagat v. Asstt. Registrar, Co-operative Societies, Barh AIR 1968 Pat 211 in para 8. The question as to whether there should be voluntary character and if so to what extent is a matter of legislative policy. If an element of compulsion is involved, the question as to whether the same is likely to result in infringement of any of the fundamental rights is altogether a different matter. A law which is well within the legislative competence of the State may, however, be bad if it infringes any of the fundamental rights conferred by Part III of the Constitution. In my judgment, S. 14A of the Act is within the competence of the State Legislature under Entry 32 of List II of VII Schedule to the Constitution.

38. It was next contended that Section 14A confers arbitrary power on the Registrar or the Deputy Registrar in the matter of amalgamation, division and reorganisation of Co-operative Societies and that therefore the said provision is void as violating Art. 14 of the Constitution. What has been conferred by S. 14A is executive power and not power to legislate. It was therefore conceded by the learned counsel appearing for the petitioners that the question of excessive delegation of legislative powers does not arise in these cases, though at one stage such an argument was sought to be advanced. All the learned counsel for the petitioners, therefore, confined their attention to the conferment of unguided or uncontrolled discretionary power on the Registrar and the Deputy Registrar. If a power is conferred on an executive authority without any guidance, it can be exercised by it in any way it likes, in other words arbitrarily. If the power can be exercised arbitrarily, there will be negation of the principle of equality before law which is one of the fundamental rights guaranteed by Art. 14 of the Constitution. If the Legislature provides guidance in the matter of exercise of the executive power, the authority is bound to exercise the same in accordance with those guidelines or policy laid down by the Legislature. Obligation to follow the guidelines or the policy laid down by the Legislature thus prevents the authority from acting arbitrarily. These are well recognised principles enunciated by the Supreme Court in various decisions, viz.. Ram Krishna Dalmia v. S. R. Tendolkar AIR 1958 SC 538 at page 548 and Satwant Singh v. D. Ramarathnam, Asstt. Passport Officer AIR 1967 SC 1836 at p. 1845.

39. The real question for examination is, as to whether it can be said that S. 14A confers upon the Registrar and the Deputy Registrar unguided or uncontrolled discretionary power in the matter of amalgamation, division or reorganisation of Co-operative Societies. Power has been conferred on the Registrar and the Deputy Registrar to amalgamate, divide or reorganise Co-operative Societies. This power can be exercised only if the concerned authority is satisfied that it is essential in public interest or in the interest of co-operative movement or for the purpose of securing the proper management of Co-operative Society. The power cannot, therefore, be said to be unguided or uncontrolled. The concerned authority can exercise the power only if it is satisfied that it is essential to amalgamate, divide or reorganise the Co-operative Societies in public interest or in the interest of co-operative movement or for the purpose of securing proper management of any Co-operative Society. Public interest, interest of co-operative movement or securing proper management of a Co-operative Society are the guidelines subject to which the power has to be exercised. The power cannot be exercised merely because the Registrar or the Deputy Registrar is satisfied that it is in public interest or in the interest of co-operative movement or for the purpose of securing proper management. He has further to be satisfied that it is essential to amalga-

mate, divide or reorganise a co-operative society. In other words. only the most appropriate measure among the three alternatives, viz., amalgamation, division or reorganisation which causes minimum interference that has to be chosen. In my opinion, there are sufficient guidelines to regulate the discretionary power conferred by Article 14-A of the Act.

40. It was next contended that there are two other features of the section which render it violative of Art. 14 of the Constitution. The first is that there is no provision affording opportunity to affected persons to present their objections. The second is that there is no provision for correction of the errors that may be committed by the Registrar or the Deputy Registrar by way of appeal. Absence of provision for submission of objections by affected persons or absence of provision for correction of errors are matters which are relevant for considering if the restriction imposed by the statutory provision is an unreasonable restriction on the fundamental rights guaranteed by Article 19 of the Constitution. I fail to see how merely because an opportunity to the affected person to file his objection is not given and there is no provision for appeal that it can be said that the provision is, on that account, violative of Art. 14 of the Constitution.

41. Some of the learned counsel for the petitioners urged that the principle of audi alteram partem (hear the other side) is attracted and that therefore we must presume that the Registrar and the Deputy Registrar, as the case may be, is under a duty to give an opportunity to the affected persons of presenting their objections. It is well settled that the principle of audi alteram partem can be invoked when the Statute is silent about the procedure to be followed by the authority or the opportunity of being heard is not by necessary implication taken away. In Union of India v. J. N. Singh, AIR 1971 SC 40 the principle has been stated in very clear terms by Justice Hegde in para 7 in the following terms:

"....

Rules of natural justice are not embodied rules nor can they be elevated to the position of fundamental rights. As observed by this Court in Kraipak v. Union of India, AIR 1970 SC 150, "the aim of rules of natural justice is to secure justice or to put it negatively to prevent miscarraige of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law but supplement it.' It is true that if a statutory provision can be read consistently with the principles of natural justice, the Courts should do so because it must be presumed that the legislatures and the statutory authorities intend to act in accordance with the principles of natural justice. But, if on the other hand, a statutory provision either specifically or by necessary implication excludes the application of any or all the rules of principles of natural justice then the Court cannot ignore the mandate of the legislature or the statutory authority and read into the concerned provision the principles of natural justice. Whether the exercise of a power conferred should be made in accordance with any of the principles of natural justice or not depends upon the express words of the provision conferring the power, the nature of the power conferred, the purpose for which it is conferred and the effect of the exercise of that power." (Underlining is mine).

Section 14-A does not expressly exclude the operation of the principle of audi alteram partem. I will therefore examine if the same has been excluded by necessary implication. It is necessary to point out that for the first time Section 14-A was introduced in the Act providing for compulsory amalgamation of co-operative societies by Act 39 of 1975. Section 14-A introduced by the Act did contain sub-sec. (2) which required the authority to send a draft of the proposed order to the co-operative societies concerned and to consider the suggestions and objections that may be received from them. But, the said sub-sec. (2) was subsequently deleted by Karnataka Ordinance 4 of 1976 which in turn was replaced by Karnataka Act 19 of 1976. Sub-sections (1) and (3) of Section 14-A were substituted by Karnataka Ordinance 19

of 1976 which was replaced by Karnataka Act 70 of 1976. Section 14-A as it now stands after its amendment by Act 70 of 1976 and Ordinance 7 of 1977 does not contain any provision providing for an opportunity of presenting objections to the societies likely to be affected by the proposed order of the Registrar or the Deputy Registrar. The Legislature which had made express provision in this behalf by Act 39 of 1975 has, by omitting those provisions subsequently, expressed its intention to exclude opportunity of hearing being given to the affected societies. That is also the stand taken by the State in its statement of objections. In paragraph 10 of the statement of objections, it is stated as follows:—

"The contention of the petitioners that by the reorganisation and formation of a new Society, the erstwhile societies are supreseded and the same is in violation of the principles of natural justice, is not correct and is not tenable. In the reorganisation of societies, to achieve the purposes and objects of the Act, there is no supersesion of the Committees of Management of Societies as such calling for issue of a show cause notice and the application of the principles of natural justice. Even otherwise Section 14-A as introduced by the Ordinance specifically excludes the application of the principles of natural justice in the reorganisation of Societies.

(Underlining is mine)

When the Legislature has said that no opportunity of hearing should be given to the affected societies or persons, the Courts have no right to invoke the principles of audi alteram partem and hold that the authority must follow the said principle before exercising its power under Section 14-A of the Act. As by necessary implication the prinicple of audi alteram partem has been excluded from operation, the question as to whether the power conferred by S. 14-A is of a quasi-judicial nature or not does not assume much importance. As an order made under S. 14-A (1) will have civil consequences adversely affecting the rights of the concerned societies, the principle of audi alteram partem could have been invoked applying the rule laid down by the Supreme Court in State of Orissa v. Binapani Dei, AIR 1967 SC 1269 and A. K. Kraipak v. Union of India AIR 1970 SC 150 if its application was not excluded by necessary implication. As in my opinion, the principle of audi alteram partem has been excluded by the Legislature by necessary implication, it is not possible to accede to the contention of the petitioners that the impugned orders which have been made without giving the persons affected an opportunity of hearing are void on that ground. If the power under Section 14-A is exercised arbitrarily and not in accordance with the guidelines laid down by the Legislature, such executive action may be struck down and not the Section itself which does not authorise exercise of arbitrary power.

42. Another argument that was advanced by Shri. Javali, Senior Advocate, is about the existence of two sets of provisions dealing with identical situations but providing for different results and consequences. It was maintained that Section 30-B of the Act entitles the State Government to give certain directions to the co-operative society or societies if it is satisfied that it is in public interest or for the purpose of securing proper implementation of co-operative and other development programmes approved or undertaken by the State Government or to ensure the proper management of the co-operative society generally or for preventing the affairs of the co-operative society being conducted in a manner detrimental to the interests of the members or of the depositors or of the creditors thereof, it is necessary to issue such directions. Though some of the guidelines for exercise of the power under Section 30-B may be similar to the guidelines given in Section 14-A of the Act, it is necessary to point out that whereas the power of issuing directions to the co-operative societies under Section 30-B can be exercised by the State Government only when it is satisfied that it is necessary to issue such directions, [the power under S. 14-A can be exercised by the Registrar or the Deputy Registrar, as the case may be, when he is satisfied that it is essential for him to amalgamate, divide or reorganise

the co-operative society. The power conferred on the State Govt. under Sec. 30-B and the power conferred on the Registrar and the Deputy Registrar under Section 14-A are different and mutually exclusive. If the principle of harmonious construction is applied, as we ought to, it follows that whereas smaller power of giving directions under S. 30-B can be exercised by the State Government when it can set right matters by issuing such directions,] a much larger power can be exercised by the Registrar or the Deputy Registrar under Section 14-A when matters cannot be rectified by mere issue of directions under Section 30-B and it becomes necessary to amalgamate, divide or reorganise the concerned co-poerative societies. As the two provisions are expected to operate in two different fields, it cannot be held that sub-sec. (1) of Section 14-A is void as violating Article 14 of the Constitution.

43. The only other sub-section of Section 14-A in regard to which arguments were advanced is sub-sec. (2). The said provision empowers the Registrar or the Deputy Registrar to make provision in the order for devolution of assets and liabilities, the date on which the devolution is to take effect, the composition. strength, names and the term of office of the members (including the Chairman), of the first committee, the name of the Managing Director or the Secretary of the new Co-operative society or each of the new Co-operative societies, as the case may be; and the bye-laws which the new Co-operative society or each of the new co-operative societies shall follow until amended in accordance with the rules. These, in my opinion, are incidental and consequential matters in regard to which the Registrar or the Deputy Registrar has to make provision consequent upon his making the order under sub-sec. (1) of Section 14-A of amalgamating, dividing or reorganising the co-operative society. The said power has to be exercised bearing in mind the guidelines given in sub-sec. (1) of S. 14-A, viz., public interest, interest of co-operative movement or the purpose of securing proper management of the co-operative society concerned. As there is sufficient guidance in this matter, it cannot be said that arbitrary power has been conferred by sub-sec. (2) and is therefore void as offending Article 14 of the Constitution.

44. I shall now take up for consideration the contention urged in some of the writ petitions filed by citizens who were the original members of the societies which have been compulsorily amalgamated that Section 14-A of the Act infringes their fundamental right of freedom of association conferred by Article 19 (1) (c) of the Constitution. Their case is that they are citizens who had voluntarily become members of the co-operative society which is registered under the Act. As a result of compulsory amalgamation of the society which they had voluntarily joined, they ceased to be its members and have been made members of the newly formed society consisting of other new members, against their wishes and by compulsion. This result that flows from the order made under Section 14-A, it was maintained, infringes their fundamental right of freedom of association. It was maintained that it is in recognition of this fundamental right of the citizens to form association that the Act, as originally framed, did not contain any provision compelling a citizen to become member of a co-operative society. When the societies in question were registered, there was no provision in the Act for compulsory amalgamation or division of co-operative societies but there was however a provision for voluntary amalgamation of co-operative societies in Section 14 of the Act. It is only by later amendments that Section 14-A was introduced empowering the Registrar and the Deputy Registrar to compulsorily amalgamate, divide or reorganise the co-operative societies. It is their case that by compulsory amalgamation of their co-operative societies, the members of the societies sought to be amalgamated are made members of the amalgamated co-operative socey without their consent and against their will. It is also their case that they have been forced to associate themselves with others with whom they are not willing to associate themselves. It is this compulsive element that is involved in Section 14-A according to

the petitioners that offends Art. 19 (1) (c) of the Constitution. It was maintained that as the restriction imposed is not in the interest of the sovereignty and integrity of India or public order or morality, it is not saved by Article 19 (4). For proper consideration of these contentions, it is necessary to ascertain the consequences flowing from the exercise of power conferred by S. 14-A of the Act.

45. Section 14-A of the Act empowers the Registrar or the Deputy Registrar to amalgamate, divide or reorganise co-operative societies without consulting the societies sought to be affected. The power under the said section can be exercised even if all the concerned societies and their members oppose the action sought to be taken under Section 14-A. When compulsory amalgamation is made under S. 14-A, several consequences automatically flow. When two co-operative societies are amalgamated and the new co-operative society registered, the old societies which were distinct legal persons on account of their incorporation under Section 9, cease to exist. The legal personality of the old societies is destroyed or brought to an end. The newly formed society by amalgamation when registered, gets incorporated by the operation of Section 9 of the Act and thus becomes a legal person quite distinct and different from the old societies. When the old societies thus cease to exist, the membership automatically comes to an end. This result is brought about not on account of the volition of the members but on account of the compulsion of law. Though S. 14-A in terms does not expressly state that the members of the old co-operative society or societies automatically become members of the new society on amalgamation, it is clear that that is the consequence which naturally flows when an order is made under that section. Even if all the members of all the societies sought to be amalgamated oppose, amalgamation can be brought about resulting in citizens who were members of the old societies becoming members of the new society against their wishes. There is provision in sub-section (5) in regard to devolution of assets and liabilities of the old co-operative societies on the new co-operative society or societies. No provision has been made to the effect that it is only those who give consent that will become members of the new society consequent upon amalgamation. There is also no provision to the effect that it is only those who express their consent that become the members of the new societies formed by division. There is provision for devolution of assets and liabilities and in regard to institution and continuance of legal proceedings. There is also provision for specifying composition, strength, names and term of office of the members including the Chairman of the first committee and the Managing Director or Secretary of the new society or societies. From the scheme of Section 14-A, it is clear that when two or more co-operative societies are amalgamated and the new co-operative society is registered, citizens who were members of the old societies automatically become members of the new society. The learned Advocate General also took the stand that when there is amalgamation or division under S. 14-A, those who were the members of the old co-operative society or societies automatically become members of the new co-operative society or societies by the operation of law and not on their volition. The learned Advocate General while conceding that persons who were members of the old societies thus become members of the new societies by the compulsion of law, maintained that such compulsion is permissible in law. The question to be answered, therefore, is as to whether S. 14-A which provides for compulsory membership of the co-operative societies consequent upon amalgamation, imposes any restriction on the fundamental right of freedom of association guaranteed by Art. 19 (1) (c) of the Constitution.

46. The learned Advocate General maintained that when a citizen becomes a member of an association, which is formed into a co-operative society and registered under the Act, his rights and liabilities are regulated by the Act and therefore he cannot complain that his freedom of association is affected by anything done under the Act. In support of this con-

tention of his, reliance was placed on the decision in The Tata Engineering and Locomotive Co. Ltd. v. State of Bihar AIR 1965 SC 40. As the discussion in para 29 of the judgment is relevant, the same is extracted below :—

"Mr. Palkhivala sought to draw a distinction between the right of a citizen to carry on trade or business which is contemplated by Art. 19(1)(g) from his right to form associations or unions contemplated by Art. 19(1)(c). He argued that Art. 19(1)(c) enables the citizens to choose their instruments or agents for carrying on the business which it is their fundamental right to carry on. If citizens decide to set up a corporation or a company as their agent for the purpose of carrying on trade or business, that is a right which is guaranteed to them under Art. 19 (1)(c). Basing himself on this distinction between the two rights guaranteed by Art. 19(1)(g) and (c) respectively. Mr. Palkhivala somewhat ingeniously contended that we should not hesitate to lift the veil, because by looking at the substance of the matter, we would really be giving effect to the two fundamental rights guaranteed by Art. 19(1). We are not impressed by this argument either. The fundamental right to form an association cannot in this manner be coupled with the fundamental right to carry on any trade or business. As has been held by this Court in All India Bank Employees' Association v. National Industrial Tribunal (Bank Disputes) Bombay 1962-3 SCR 269: (AIR 1962 SC 171) the argument which is thus attractively presented before us overlooks the fact that Art. 19, as contrasted with certain other articles like Arts. 26, 29 and 30 guarantees rights to the citizens as such, and associations cannot lay claim to the fundamental rights guaranteed by that Article solely on the basis of their being an aggregation of citizens, that is to say, the right of the citizens composing the body. The respective rights guaranteed by Art. 19(1) cannot be combined as suggested by Mr. Palkhivala, but must be asserted each in its own way and within its own limits; the sweep of the several rights is no doubt wide, but the combination of any of those two rights would not justify a claim such as is made by Mr. Palkhivala in the present petitions. As soon as citizens form a company, the right guaranteed to them by Art. 19(1)(c) has been exercised and no restraint has been placed on that right and no infringement of that right is made. Once a company or a corporation is formed, the business which is carried on by the said company or corporation is the business of the company or corporation and is not the business of the citizens who get the company or corporation formed or incorporated, and the rights of the incorporated body must be judged on that footing and cannot be judged on the assumption that they are the rights attributable to the business of individual citizens. Therefore, we are satisfied that the argument based on the distinction between the two rights guaranteed by Art. 19(1)(c) and (g) and the effect of their combination cannot take the petitioners' case very far when they seek to invoke the doctrine that the veil of the corporation should be lifted. That is why we have come to the conclusion that the petitions filed by the petitioners are incompetent under Art. 32. even though in each of these petitions one or two of the shareholders of the petitioning companies or corporation have joined."

It was pointed out that once a company or corporation is formed, the business which is carried on by the said company or corporation is the business of the company or corporation and is not the business of the citizens who get the company or corporation formed or incorporated and the rights of the incorporated body must be judged on that footing and cannot be judged on the assumption that they are the rights attributable to the business of the individual citizens. It was also pointed out in that case that as soon as citizens form a company, the right guaranteed to them by Art. 19(1)(c) has been exercised and no restraint has been placed on that right and no infringement of that right is made. It is, therefore, clear that that was a case in which the restrictions that were really placed on the company were sought to be challlenged by its mem-

bers on the ground that the said restrictions must be regarded as restrictions on the fundamental rights of the members. The Supreme Court repelled that contention holding that once the company is formed, if restrictions are imposed on the company, they cannot be regarded as restrictions imposed on the members of the company. The Supreme Court has pointed out in that case that no restraint was placed on the freedom of association of the members guaranteed by Art. 19(1)(c) of the Constitution. The principle laid down in that case is not of assistance in this case, inasmuch as petitioners are not contending that the restrictions placed on the co-operative society must be regarded as the restrictions on its members and that it is on that footing that Section 14A should be struck down as offending the fundamental right guaranteed by Article 19(1)(c) of the Constitution. As already stated the case of the petitioners is that they are made members of the new co-operative society against their will which restriction is imposed not on the co-operative societies amalgamated but on the petitioners.

47. Another decision relied upon by the learned Advocate General is R. C. Cooper v. Union of India AIR 1970 SC 564. The discussion in paras 13 and 14 of the judgment being relevant is extracted below:—

"13. A company registered under the Companies Act is a legal person, separate and distinct from its individual members. Property of the Company is not the property of the share-holders. A shareholder has merely an interest in the Company arising under its Articles of Association, measured by a sum of money for the purpose of liability, and by a share in the profit. Again a director of a company is merely its agent for the purpose of management. The holder of a deposit account in a Company is its creditor; he is not the owner of any specific fund being with the company. A shareholder, a depositor or a director may not therefore be entitled to move a petition for infringement of the rights of the company, unless by the action impugned by him, his rights are also infringed.

14. By a petition praying for a writ against infringement of fundamental rights, except in a case where the petition is for a writ of habeas corpus and probably for infringement of the guarantees under Articles 17, 23 and 24, the petitioner may seek relief in respect of his own rights and not of others. The shareholder of a Company, it is true, is not the owner of its assets; he has merely a right to participate in the profits of the Company subject to the contract contained in the Articles of Association. But on that account the petitions will not fail. A measure executive or legislative may impair the rights of the Company alone, and not of its shareholders; it may impair the rights of the shareholders and not of the Company: it may impair the rights of the shareholders as well as of the Company. Jurisdiction of the Court to grant relief cannot be denied, when by State action the rights of the individual shareholder are impaired, if that action impairs the rights of the Company as well. The test in determining whether the shareholder's right is impaired is not formal; it is essentially qualitative; if the State action impairs the right of the shareholders as well as of the Company, the Court will not, concentrating merely upon the technical operation of the action, deny itself jurisdiction to grant relief."

That was a case in which the petitioner was a shareholder and a director of a company which was acquired under the statute. The Act was struck down as infringing the fundamental right of the shareholders of the company under Article 19 (1) (f) and (g). Though the Statute providing for nationalisation of Banks sought to affect the banks, the Court on examination of the law held that it also infringes the fundamental rights of the members under Article 19(1)(f) and (g) of the Constitution. The said decision is a clear authority for the proposition that the fundamental rights of the citizens as citizens are not lost when they associate to form a company, and that they can enforce the same. This decision, therefore, helps the petitioners to maintain that though Section 14A providing for amalgamation, division or reorganisa-

tion of co-operative societies seeks to affect the rights of the co-operative societies as such, if the same also affects the rights of the citizens who are the members of the co-operative societies, they are entitled to relief at the hands of the Court. This principle has been reiterated in a subsequent decision in Bennett Coleman and Co. Ltd. v. Hindustan Times Ltd. AIR 1973 SC 106 wherein the Supreme Court has observed as follows in paragraph 22 of the judgment:

"In the Bank Nationalisation case, (1970) 3 SCR 530: (AIR 1970 SC 564) (supra) this Court held the statute to be void for infringing the rights under Articles 19(1)(f) and 19(1)(g) of the Constitution. In the Bank Nationalisation case (supra) the petitioner was a shareholder and a director of the company which was acquired under the statute. As a result of the Bank Nationalisation case (supra) it follows that the Court finds out whether the legislative measure directly touches the company of which the petitioner is a shareholder. A shareholder is entitled to protection of Article 19. That individual right is not lost by reason of the fact that he is a shareholder of the company. The Bank Nationalisation case (supra) has established the view that the fundamental rights of shareholders as citizens are not lost when they associate to form a company. When their fundamental rights as shareholders are impaired by State action their rights as shareholders are protected. The reason is that the shareholders' rights are equally and necessarily affected if the rights of the company are affected. The rights of the shareholders with regard to Article 19 (1) (a) are projected and manifested by the newspapers owned and controlled by the shareholders through the medium of the corporation. In the present case, the individual rights of freedom of speech and expression of editors, Directors and shareholders are all exercised through their newspapers through which they speak. The press reaches the public through the newspapers. The shareholders speak through their editors. The fact that the companies are the petitioners does not prevent this Court from giving relief to the shareholders, editors, printers who have asked for protection of their fundamental rights by reason of the effect of the law and of the action upon their rights. The locus standi of the shareholder petitioners is beyond challenge after the ruling of this Court in the Bank Nationalisation case (supra). The presence of the company is on the same ruling not a bar to the grant of relief."

The decision next relied upon by the learned Advocate General is the one reported in All India Bank Employees' Association v. National Industrial Tribunal AIR 1962 SC 171. Paras 19 to 21, on which reliance was placed, may be extracted as follows:—

"(19) The resulting position may be illustrated thus: If an association were formed for the purpose of carrying on business, the right to form it would be guaranteed by sub-cl. (c) of Cl. (1) of Article 19 subject to any law restricting that right conforming to cl. (4) of Art. 19. As regards its business activities, however, and the achievement of the objects for which it was brought into existence, its rights would be those guaranteed by sub-cl. (g) of Cl. (1) of Art. 19 subject to any relevant law on the matter conforming to cl. (6) of Art. 19; while the property which the association acquires or possesses would be protected by sub-cl. (f) of Cl. (1) of Art. 19 subject to legislation within the limits laid down by Cl. (5) of Art. 19.

(20) We consider it unnecessary to multiply examples to further illustrate the point. Applying what we have stated earlier to the case of a labour union the position would be this: While the right to form a union is guaranteed by sub-cl. (c) the right of the members of the association to meet would be guaranteed by sub-cl. (b), their right to move from place to place within India by sub-cl. (d), their right to discuss their problems and to propagate their views by sub-cl. (a), their right to hold property would be that guaranteed by sub-cl. (f) and so on — each of these freedoms being subject to such restrictions as might properly be imposed by Cls. (2) to (6) of Art. 19 as might be appropriate in the context. It is one thing to interpret each of the freedoms guaranteed

by the several Articles in Part III in a fair and liberal sense. it is quite another to read each guaranteed right as involving or including concomitant rights necessary to achieve the object which might be supposed to underlie the grant of each of those rights, for that construction would, by a series of ever expanding concentric circles in the shape of rights concomitant to concomitant rights and so on, lead to an almost grotesque result.

(21) There is no doubt that in the context of the principles underlying the Constitution and the manner in which its Part III has been framed the guarantees embodied in it are to be interpreted in a liberal way so as to subserve the purpose for which the Constitution-makers intend them and not in any pedantic or narrow sense, but this however does not imply that the Court is at liberty to give an unnatural and artificial meaning to the expressions used based on ideological considerations. Besides it may be pointed out that both under the Trade Unions Act as well as under the Industrial Disputes Act the expression 'union' signifies not merely a union of workers but includes also unions of employers. If the fulfilment of every object for which a union of workmen was formed were held to be a guaranteed right, it would logically follow that a similar content ought to be given to the same freedom when applied to a union of employers which would result in an absurdity. We are pointing out this not as any conclusive answer, but to indicate that the theory of learned Counsel that a right to form Unions guaranteed by sub-cl. (c) of Cl. (1) of Art. 19 carries with it a fundamental right in the union so formed to achieve every object for which it was formed, with the legal consequence that any legislation not falling within Cl. (4) of Art. 19 which might in any way hamper the fulfilment of those objects, should be declared unconstitutional and void under Art. 13 of the Constitution is not a proposition which could be accepted as correct."

It is clear from this decision that the right to form an association guaranteed by Art. 19 (1) (c) does not carry with it a fundamental right of the association to achieve the object for which it was formed. Another principle laid down by this decision is that if any restriction on the trade or business is imposed by law on the association, the said restriction can only be regarded as a restriction on the fundamental right guaranteed by Article 19 (1) (g) and cannot be regarded as a restriction on the fundamental right of freedom of association guaranteed by Article 19 (1) (c) of the Constitution. But, it is not the case of the petitioners that their fundamental right of freedom of association must be regarded as having been infringed on account of any restriction imposed on the trade or business of the co-operative society of which they were members. Therefore, if S. 14-A restricts the freedom of association of the petitioner who are members of the old societies, the same has to be declared as void unless the restriction imposed falls under Art. 19 (4) and the question of applying Art. 19 (6) of the Constitution does not arise.

48. A Full Bench of the Allahabad High Court in Raja Suryapalsingh v. U. P. Government, AIR 1951 All 674 laid down that no person can be made a member of an association against his will. This is what is stated in paras 128 and 129 of the decision :—

"(128) Under Cl. (4) of Art. 19 a law imposing a reasonable restriction on the right of assocn. can be made only in the interest of public order or morality. The Advocate-General has refd. us to the Declaration of Human Rights adopted by the United Nations Organisation where the right of assocn. is expressed both in its positive as well as in its negative form, & he places reliance on the fact that in Art. 19 there is no such negative restriction. It appears, however, to us clear that the right to form an assocn. or union necessarily implies that a person is free to refuse to be member of an assocn. or union if he so desires.

(129) There is no doubt, we think that under the Common Law a person cannot be made a member of a Corpn. without his consent:

'If the inhabitants of a town are incorporated yet everyone must be admitted before he becomes a corporator. The Crown can't oblige a man to be a corporator, without his consent; he shall not be subjected to the

inconveniences of it without accepting it & assenting to it': per Lord Mansfield in R. v. Askew, (1768) 4 Burr. 2186 at p. 2200'

....."

This decision has been followed by the Andhra Pradesh High Court in M. Sitharamachary v. Senior Deputy Inspector of Schools, Gannavaram, AIR 1958 Andh Pra 78 wherein it is held that the right to form an association or union necessarily implies that a person is free to refuse to be a member of an association or union. In that case, Rules 3 and 4 in Government Order No. Ms. 418 Education and Public Health. dated the 24th February, 1939, in so far as they empower the authorities to make it obligatory on the part of every teacher in an elementary school to become a member of the Association sponsored by the Government was declared to be void as offending Art. 19 (1) (c) of the Constitution.

49. In Tika Ramji v. State of Uttar Pradesh, AIR 1956 SC 676. The Supreme Court has observed as follows in para 49 of the judgment:

'There is also another fallacy in their argument and it lies in ignoring that no canegrower is prevented from resigning his membership of a Canegrowers' Co-operative Society. These are voluntary organisations which a canegrower is entitled to join or not at his choice. If he has once joined it he is also entitled to resign his membership at his choice and the only obstacle to his right of resignation, as has been laid down in the by-laws of the society, is the fact of his being indebted to the society, or the fact of his being a surety for debt due by another member of the society.

Until these debts are discharged and also until the crushing season during which the Canegrowers Co-operative Society has entered into an agreement with the occupier of a factory is over, a member of a Society cannot resign his membership. These restrictions do not fetter his right to resign his membership of the society. If he became a member of the society he is bound by the bye-laws of the society and can only resign his membership after fulfilling all the conditions which are laid down in the bye-laws of the society."

It is clear from this decision that a co-operative society is a voluntary organisation which a citizen is entitled to join or not at his choice. It is because there was freedom to become or not to become a member or having become a member to resign from membership. that the Supreme Court held that the question of offending Article 19 (1) (c) did not arise in that case. It, therefore, follows that if there was an element of compulsion in the matter of membership such a provision would have offended Article 19 (1) (c) of the Constitution. There may be restriction on the citizen's right to join or not to join an association. There may also be restrictions in regard to his continuance as a member of the association. There may be restrictions at either of those stages or at both the stages. Even if no restriction is imposed in regard to continuance of the membership, the restriction imposed in regard to the citizen's initial right to join or not to join an association cannot be sustained unless it is a reasonable restriction falling under Art. 19 (4) of the Constitution.

50. In O. K. Ghosh v. E. X. Joseph, AIR 1963 SC 812, the Supreme Court was required to consider the question of validity of R. 4-B of the Central Civil Services (Conduct) Rules, 1955. The said rule provided that a Government servant can become member of an association of Government employees if the association obtains a recognition and continues to enjoy it. It further provided that if the association does not secure recognition from the Government or the recognition granted to it is withdrawn, Government servants must cease to be members of the said association. The Supreme Court held that the said rule is void as it offends the fundamental right of freedom of association. It is clear from this decision that if compulsion is brought about either in the matter of becoming a member of an association or in the matter of continuance of membership, the provision imposing such a restriction offends Article 19 (1) (c) of the Constitution.

51. Another important decision bearing on the question is the one in Smt. Damayanti v. Union of India AIR

1971 SC 966. That was a case in which an association by the name Hindi Sahitya Sammelan was formed and was registered under the Societies Registration Act, 1860. The Hindi Sahitya Sammelan Act, 1962 was enacted, as a result of which the old Hindi Sahitya Sammelan which was a society ceased to exist and a new incorporated body by the name Hindi Sahitya Sammelan was brought into existence. The newly constituted Sammelan under the Act was composed of not only all persons who are members of the old Society but of others who have been given the right to be members of the society, without the consent of the pre-existing members of the society. The said Act was challenged on the ground that the fundamental right of freedom of association of the members of the society was infringed by that Act. Dealing with this question, this is what the Supreme Court observed in paras 5 and 6 of the judgment:

"5. .....

It will thus, be seen that the Sammelan, which has come into existence under the Act, is not identical with the Sammelan which was registered as a Society under the Societies Registration Act, 1860. Certain persons have been added as members by the Act and by the Rules. Admission of future members is no longer at the choice of the original members who had formed the Association. Persons, in whose admission as members the members of the Society had no hand, can become members and get the right of associating with them in the Sammelan, without the original members having any right to object. This is clear interference with the right to form an association which had been exercised by the members of the Society by forming the Society with its constitution under which they were members and future members could only come in as a result of their choice by being elected by their Working Committee. We are unable to agree with the High Court that the new Sammelan, as constituted under the Act, is identical with the society and that all the rights of forming an association, which were being exercised by members of the society, have been kept intact under the Act.

6. It was argued that the right guaranteed by Art. 19 (1) (c) is only to form an association and, consequently any regulation of the affairs of the Association, after it has been formed will not amount to a breach of that right. It is true that it has been held by this Court that, after an association has been formed and the right under Art. 19 (1) (c) has been exercised by the members forming it, they have no right to claim that its activities must also be permitted to be carried on in the manner they desire. Those cases are, however, inapplicable to the present case. The Act does not merely regulate the administration of the affairs of the society, what it does is to alter the composition of the society itself as we have indicated above. The result of this change in composition is that the members, who voluntarily formed the Association, are now compelled to act in that Association with other members who have been imposed as members by the Act and in whose admission to membership they had no say. Such alteration in the composition of the Association itself clearly interferes with the right to continue to founction as members of the Association which was voluntarily formed by the original founders. The right to form an association, in our opinion. necessarily implies that the persons forming the Association have also the right to continue to be associated with only those whom they voluntarily admit in the Association. Any law, by which members are introduced in the voluntary Association without any option being given to the members to keep them out. or any law which takes away the membership of those who have voluntarily joined it, will be a law violating the right to form an association. If we were to accept the submission that the right guaranteed by Art. 19 (1) (c) is confined to the initial stage of forming an Association and does not protect the right to continue the Association with the membership either chosen by the founders or regulated by the rules made by the Association itself, the right would be meaningless because, as soon as an Association is formed, a law may be passed interfering with its composition so that the Association formed may not be able to function at all. The right

can be effective only if it is held to include within it the right to continue the Association with its composition as voluntarily agreed upon by the persons forming the Association. This aspect was recognised by this Court, though not in plain words, in the case of G. K. Ghosh v. E. X. Joseph, (1963) Supp 1 SCR 789 : (AIR 1963 SC 812)." The principle laid down by the Supreme Court in this case is that the right to form an association includes the right to its continuance and any law altering the composition of the association compulsorily will be a breach of the right to form an association. It is also an authority for the proposition that no person can be made a member of an association without his consent and against his will. This decision is a direct authority which fully supports the petitioners' case.

52. Our attention was also invited to another decision of the Supreme Court in D. A. V. College, Jullundur v. State of Punjab AIR 1971 SC 1737. That was a case of compulsory affiliation to the University of a college run by an association. The Statute only provided for affiliation of the College run by the Association to the University. The Supreme Court pointed out that as the law did not interfere with the rights of the members of the association which owns the college, the question of infringement of Art. 19 (1) (c) did not arise.

53. In Kammareddy Suryanarayana v. The District Co-operative Officer-cum-Election Officer, The West Godawari Co-operative Sugars Ltd., AIR 1976 Andh Pra 340 (FB) a Full Bench if the Andhra Pradesh High Court was required to examine if S. 21-C of the Andhra Pradesh Co-operative Societies Act offends Art. 19 (1) (c). By Section 21-C, a bar was imposed on holding office of a member of committee of the co-operative society for the third time in succession. The Court held that the restriction imposed is not on a citizen so as to entitle him to invoke Article 19 (1) (c), but that the restriction is on his right as a member of the Co-operative society. The relevant discussion in this behalf contained in para 22 is as follows :—

"22. We do not think that the right to form a society under the Co-operative Societies Act has anything to do with the fundamental right guaranteed under Art. 19 (1) (c) of the Constitution. The society in question is a creature of the statute formed under the provisions of the Andhra Pradesh Co-operative Societies Act, which we have referred to in this judgment as the Act. It is under the provisions of the Act, the Rules framed thereunder and the bye-laws made in accordance with them by the society, the Committee is constituted and the appointment of its members are made. According to those provisions the members of the Committee are to be appointed either by nomination or election. The right of the Ist petitioner to contest the election for membership of the committee emanated only out of the provisions of the Act, the rules and the bye-laws. That right he cannot claim otherwise than under those provisions. His right to become a member of the society or a member of the Committee is not the common law a general right given to him to form an association and which is guaranteed under Art. 19 (1) (c) of the Constitution. The Act under which the society is formed confers certain rights and privileges on the societies that is in effect on their members and also imposes certain obligations and restrictions on the societies and their members. A person claiming rights under those provisions is also bound by any restrictions imposed thereunder. There is no compulsion to form or become a member of a society under the Act. One is free to form or become a member of a society under the Act or not. A society can also be formed as a right guaranteed under Art. 19 (1) (c) without registering it under the Act. But the only disability for such a society which does not get itself registered under the Act is that it will not get the special benefits and the special privileges which have been guaranteed by the provisions of the Act. The restriction on the consecutive membership in the committee in question applies only to societies registered under the Act. It has no application to societies formed and not registered under the provisions of the Act. If a society is formed and is registered under the Act and its members claim special privileges and advantages conferred by the Act and the

Rules framed thereunder, they cannot turn round and say that they are not bound by any restrictions imposed by some provision of the Act or the Rules in the interest of good and fair administration and working of the society on the ground that they are violative of the fundamental right to form Associations guaranteed under Art. 19 (1) (c) of the Constitution and the restrictions imposed are not those contemplated under clause (4) of Art. 19 and therefore they are not bound by them."

So far as membership is concerned, it has been emphasized that there is no compulsion and that one is free to form or become a member of the Society. It is only if a person chooses to become a member of the society to claim special rights and privileges under the Act that he cannot complain of the other provisions by which restrictions are imposed on the rights he acquires as a member. If the restrictions are not confined to the rights he has acquired as a member but are restrictions on his rights as a citizen, he can challenge them by invoking Article 19 (1) (c), just as a citizen who has not become a member is entitled to. The distinction between the rights of a person before he becomes a member of a co-operative society and his rights after he becomes a member has been clearly brought out. It is in exercise of the citizens' fundamental right of freedom of Association that he decides to join or not as a member of a co-operative society. Any restriction on this right of becoming or not becoming a member is therefore a restriction on the freedom of Association guaranteed under Art. 19 (1) (c). Any restrictions only on his rights as a member under the Act are those which he has willingly agreed to be subject to when he chose to become a member. Such restriction cannot be assailed as offending Art. 19 (1) (c) of the Constitution if they are restrictions on the rights he has acquired as a member. If on amalgamation under S. 14-A a person is made a member of the new society against his will. the freedom of association which he had of becoming or not becoming a member of the new society will be infringed. Such restriction cannot be regarded as a restriction of his rights as a member of the old co-operative society as he automatically ceased to be a member of the old society on its amalgamation.

54. In D. Papi Reddy v. Deputy Registrar of Co-operative Societies, Nellore South Circle, ILR (1972) Andh Pra 1140 the validity of S. 15 of the Andhra Pradesh Co-operative Societies Act, 1964 providing for compulsory amalgamation and division of co-operative societies was challenged on the ground it offends Art. 19 (1) (c). The Court repelled the challenge, holding that the Act having received the assent of the President is immune from the attack that it infringes Arts. 14, 19 and 31 of the Constitution. But, no such protection is available to S. 14-A of the Act with which we are concerned, as the amending Act by which it was introduced in the main Act was not reserved for the assent of the President. After repelling the challenge as aforesaid, the Court has also examined the contention on the assumption that Art. 19 (1) (c) was available for the petitioners. It further held that if the co-operative society cannot take advantage of Art. 19 not being a citizen, its members also cannot invoke the Article. It was held that the freedom of association is not affected because there is no vested right to form a registered society and that the provision which only affects the continuance of the society does not infringe Art. 19 (1) (c). Support for the conclusion was drawn from the fact that the members are not compelled to continue as members of the co-operative society because they can withdraw from membership of the amalgamated society and form their own societies. This view is clearly opposed to the principles laid down by the Supreme Court in the case of Rustom Cavasjee Cooper. AIR 1970 SC 564 discussed earlier. The Supreme Court has held that a citizen does not lose his rights under Art. 19 by becoming a member of an association which is a corporation and that he can challenge any law made to affect such a corporation if it offends his rights under Art. 19 (1). That a citizen has no fundamental right to registration of a co-operative society or that the provision for compulsory amalgamation affects the society cannot come in the

way of the citizen invoking Art. 19 (1) (c) if the said provision also affects his freedom of association. That a member of the amalgamated society is free to withdraw from membership and form another association does not mean that no fetter was imposed on the freedom he has of choosing not to become a member of the amalgamated society. With great respect, I cannot persuade myself to follow this decision which conflicts with the principles laid down by the Supreme Court.

55. Following are the principles that emerge from the decisions discussed above:—

(i) An association like a co-operative society which is incorporated not being a citizen cannot claim any fundamental rights under Art. 19 of the Constitution.

(ii) A citizen does not abdicate his fundamental right of freedom of association guaranteed by Art. 19 (1) (c) of his becoming a member of an association like a company or a co-operative society incorporated under an Act.

(iii) The fundamental right of freedom of association necessarily implies that a citizen is free to join or not to join as a member of an association.

(iv) There is no fundamental right to registration of a co-operative society. That right flows only from the Act.

(v) When a citizen voluntarily joins an association incorporated under an Act, it implies that he has agreed to the regulation of the rights he has acquired as a member in accordance with the provisions of that Act. He cannot therefore complain that such restrictions offend Art. 19 (1) (c).

(vi) The source of the right of a citizen to join or not to join a co-operative society is Art. 19 (1) (c) and not the Act. Any restriction on this right offends Art. 19 (1) (c).

(vii) A restriction imposed on the right of an association to carry on trade or business cannot be regarded as a restriction on the freedom of association of its members as the right to achieve the object of the association does not fall under Article 19 (1) (c). Such restriction can be justified only under Article 19 (6) and not under Article 19 (4).

(viii) A law which affects the rights of an association whether incorporated or not may also affect the freedom of association of its members who are citizens. In such a case, the members can challenge the law as offending Article 19 (1) (c).

(ix) Co-operative society is a voluntary organisation which a citizen is free to join or not to join. A provision which deprives the citizen of such a freedom offends Article 19 (1) (c).

(x) A State enactment providing for amalgamation of co-operative societies, which has not received the assent of the President, can be challenged as offending Article 19 (1) (c) of the Constitution.

56. I have already held that when two or more co-operative societies are amalgamated under Section 14-A of the Act, members of the old societies automatically become members of the new society without their consent and against their will. When such a new co-operative society is registered, a new legal person is created by the process of incorporation and the old societies cease to exist. Consequently, the membership of the old societies gets terminated. Persons who thus cease to be members of the old societies are free as citizens to join or not to join the new society. But, by compulsion they are automatically made members of the new society formed by amalgamation. Compulsory membership brought about by S. 14-A is not a restriction on the members' right but a restriction on the citizens' freedom of association. It is obvious that a law providing that every citizen in the taluka shall be deemed to be a member of the Taluka co-operative society offends Art. 19 (1) (c) of the Constitution. I do not find any difference between such a law and S. 14-A which makes the members of the old societies, members of the new societies without their consent and against their will. The citizen by joining as a member of a co-operative society does not surrender his fundamental rights under Art. 19 (1) (c). Membership of a co-operative society is not a charter entitling the State to act in violation of Art. 13 of the Constitution.

57. But, it was maintained that when the citizens voluntarily joined

the old societies. they agreed to regulation of their rights in accordance with the Act. If action to amalgamate is taken under the provisions of the Act, it was maintained, the same cannot be challenged by the members. Support for this contention was sought to be derived from Sections 16 and 105-A of the Act. Sub-section (3) of Section 16 provides that any person may make an application seeking admission as a member of a co-operative society. If his application is refused, he can prefer an appeal to the Registrar under S. 105-A of the Act. The Registrar is competent to allow the appeal and to direct admission of the applicant as a member of the co-operative society. Thus the applicant will become a member against any wishes of the members of the society who had refused admission to him. Provisions of Ss. 16 and 105-A cannot be regarded as imposing restrictions on the freedom of association of the citizens, as they are restrictions imposed on the members and not on the rights of the citizens. As S. 14-A was introduced in the Act after the co-operative societies which have been amalgamated in these cases were formed and registered under the Act it cannot be said that the citizens who joined them as members, agreed to be bound by restrictions to be imposed by S. 14-A of the Act.

58. It is true that Section 366 of the Companies Act, 1956 provides for compulsory amalgamation of companies which may result in the members of the old companies compulsorily becoming members of the new company formed by the process of amalgamation. But that section cannot be challenged in view of Art. 31-A (1) (c) of the Constitution. But, the State Act by which Section 14-A was incorporated in the Act not having received the assent of the President as required by the first proviso to Article 31-A (1) of the Constitution, has not acquired immunity from attack on the ground that it infringes Art. 19 (1) (c) of the Constitution.

59. As in these cases, the petitioners have been made members against their will, which is the consequence that necessarily flows from amalgamation under S. 14-A, it follows that the fundamental right of freedom of association of the petitioner is infringed. Section 14-A which thus infringes the fundamental right of freedom of association of the petitioners can be sustained only if the restriction imposed on the freedom of association of the petitioners falls under Article 19 (4) of the Constitution. Under the said provision, reasonable restrictions can be imposed on the freedom of association only in the interest of sovereignty and integrity of India or public order or morality. As it is not the case of the State that the restriction imposed by S. 14-A of the Act is a reasonable restriction falling under Art. 19 (4) of the Constitution, I have no hesitation in holding that S. 14-A of the Act offends Art. 19 (1) (c) of the Constitution, and is therefore void.

60. Though the petitioners have also invoked Art. 19 (1) (f) and (g) of the Constitution, for want of adequate and satisfactory pleadings, learned counsel for the petitioners did not press their contentions. Therefore, it is unnecessary to deal with the same.

61. A feeble argument was advanced by learned counsel appearing for some of the petitioners that S. 14-A is void on the ground that it violates Art. 31 (1) and (2) of the Constitution. The deprivation of the property, if any, of the members of the co-operative societies sought to be amalgamated cannot be said to offend Art. 31 (1) as the same is not brought about by any executive action but by law made by the State Legislature. The provisions of Art. 31 (2) also cannot be invoked in view of Art. 31 (2-A). S. 14-A does not provide for transfer of ownership or right to possession of any property to the State or to a Corporation owned or controlled by the State. Section 14-A cannot be deemed to provide for compulsory acquisition or requisition of property in view of Article 31 (2-A). I, therefore, hold that S. 14-A is not void as offending Art. 31 (1) or (2) of the Constitution.

62. In Writ Petitions Nos. 5120 to 5122 of 1977, the impugned orders of amalgamation have been challenged also on the ground that they have been passed by the Deputy Registrar mechanically

without examining the working of the individual societies sought to be amalgamated. It is also their case that the the norms set out in the impugned orders for effecting amalgamation are also contrary to the provisions of the Act. It is, therefore, contended that the impugned orders are liable to be struck down on the ground that they have been made in contravention of S. 14-A, even assuming that the said section is not void as offending any of the fundamental rights of the citizens. All the impugned orders are similarly worded. It is enough for the purpose of considering the petitioners' contentions to extract the relevant portion of the order made in W. P. Nos. 5120 to 5122 of 1977, which reads as follows:—

"Karanataka Gazette.
Published by Authority (Extraordinary Bangalore, Tuesday. May 19, 1977) (Vaishaka 20, Saka Era 1899). Part IX (No. 366).

Office of the Deputy Registrar of Co-operative Societies Tumkur District Tumkur.
No DRT/S-847-869/77-78 dated 28th April 1977.

Whereas the powers of the Registrar of Co-operative Societies under S. 14-A of the Karnataka Co-operative Societies Act, 1959 (Karnataka Act 11 of 1959) have been conferred on the Deputy Registrar of Co-operative Societies.

Whereas on an examination of the working of the several Agricultural Credit Co-operative Societies (by whatever name called) in the District, it is found that many of them either by the inadequacy of their resources or the limits of their restricted territorial operation cannot effectively function to subserve the interest of the larger sections of the rural people, to wit, to meet the credit requirements for:

(a) Agricultural production programme.

(b) Consumption purposes of the weaker sections and to make arrangements for the distribution of fertilisers and essential consumer articles.

Whereas it is the policy of the State to channelise credit facilities in rural areas for the aforesaid purposes primarily through Co-operative Societies.

Whereas it is considered essential in public interest and in order to secure proper management of co-operative societies and also to carry out the aforesaid purposes in an effective manner, to reorganise such Co-operative Societies into broad Agricultural Service Co-operative Societies or Farmers Service Co-operative Societies, as the case may be, by suitably amalgamating them and whereas necessary including new areas within their area of operation having regard to the broad norms specified below.

Norms in respect of Agricultural Service (Co-operative Societies (Vyavasaya Seva Sahakari Sangha).

(1) to (6) .....

Norms for Farmers Service Co-operative Societies (Ryatara Sevasahakari Sangha)

(1) to (6) .....

Now therefore, I, H. A. Markandaiya, Deputy Registrar of Co-operative Societies, Tumkur District, Tumkur in exercise of the powers conferred on me by S. 14-A of the Karnataka Co-operative Societies Act, 1959 (Karnataka Act 11 of 1959) being satisfied that in the public interest and in the interest of the Co-operative movement and for the purpose of securing the proper management of co-operative societies it is essential to do so hereby order as follows:—

1. The order shall come into force on 10th May 1977.

2. The Co-operative Societies specified in column (3) of the Schedule below (hereinafter referred to as the amalgamating co-operative societies, shall be amalgamated into a single co-operative society specified in the corresponding entry in column (2) thereof, with the headquarters and certificate) of registration number specified therein.

3. The area of operation of each such single co-operative society shall comprise the villages specified in column (4) of the said schedule.

4. All the members of the amalgamating co-operative societies shall be the members of the corresponding single co-operative society.

.....

The preamble to the order states that the Deputy Registrar, on examination of the working of the several agricultural credit co-operative societies in the district, found that many of them either by the inadequacy of their reso-

urces or the limits of their restricted territorial operation cannot effectively function to subserve the interests of the larger sections of the rural people, to wit, to meet the credit requirements for agricultural production programme and consumption purposes of the weaker sections and to make arrangements for the distribution of fertilisers and essential consumer articles. It is further stated that it is the policy of the State to channelise credit facilities in the rural areas for the aforesaid purposes primarily through co-operative societies. It is thereafter that it is stated that it is considered essential in public interest and in order to secure proper management of co-operative societies and also to carry out the aforesaid purposes in an effective manner, to reorganise such co-operative societies into broad Agricultural Service Co-operative Societies or Farmer Service Co-operative Societies, as the case may be, by suitably amalgamating them and wherever necessary including new areas within their area of operation having regard to the broad norms specified therein. I have pointed out, after analysing Section 14-A of the Act, that the power of amalgamation can be exercised by the Registrar or the Dy. Registrar only when he forms an opinion that it is essential to do so in the public interest or in the interest of co-operative movement or for the purpose of securing proper management of any co-operative societies. I have also pointed out that such measure which causes least interference should be adopted under Section 14-A having regard to the use of the expression "essential" in sub-sec. (1) of S. 14-A. The formation of the necessary opinion by the Registrar or the Deputy Registrar contemplated by sub-sec. (1) can only be made after examining the working and structure of the concerned co-operative societies. It is necessary to bear in mind that Section 14-A does not give blanket power to amalgamate the co-operative societies in such a manner as to make them viable units of a prescribed capital and area of operation. The power under sub-sec. (1) of Section 14-A cannot be exercised bearing in mind only the policy of the State and the abstract norms that the authority has formulated in this behalf. The Registrar or the Deputy Registrar can make an order under sub-sec. (1) of S. 14-A only if he forms the necessary opinion after examining the working and structure and all relevant aspects of each co-operative society sought to be dealt with. But, what the Deputy Registrar says he has done is to form an opinion on examination of the working of several agricultural co-operative societies in the district that many of them cannot effectively function to subserve the interest of the rural people, viz., to meet their credit requirements. That merely because many of the societies are not functioning effectively, the Deputy Registrar cannot make that as the basis for amalgamating other societies. The working of which he has not examined or the working of which is otherwise satisfactory. The preamble to the order makes it clear that the Deputy Registrar has not examined the working and structure of the societies sought to be amalgamated. As the Deputy Registrar has not formed the necessary opinion after examining the working and structure of the societies sought to be amalgamated, he could not have exercised the power of amalgamation under sub-sec. (1) of S. 14-A of the Act. The norms specified in the order pertain to the area of operation, the capital etc. These are norms having a bearing on the question of the size and capital of the co-operative society to be formed by amalgamation. There are no norms to take into account the manner in which the existing co-operative societies are functioning. As all the impugned orders are stereotyped orders, this is another circumstance indicating that there is no application of the mind of the Registrar to the requirements of sub-sec. (1) of Section 14-A before he passed the impugned orders. When a power is conferred on an authority to make an order on his being satisfied about the existence of certain conditions, he has to make an order after applying his mind and forming an opinion that the conditions for exercising the powers have been satisfied. If such authority passes an order in a mechanical way without the application of his mind, the same cannot be regarded as a valid order. As I am satisfied that the impugned orders have been passed

mechanically and without the application of the mind of the Deputy Registrar, the same are liable to be quashed.

63. For the reasons stated above, I hereby strike down S. 14-A of the Karnataka Co-operative Societies Act, 1959 as offending Art. 19 (1) (c) of the Constitution and I also quash the impugned orders made under S. 14-A of the Act.

M. K. SRINIVASA IYENGAR, J.:— I agree.

ORDER OF THE COURT

V. S. MALIMATH, J.:— (On behalf of the Full Bench).

64. I. The following emerge from the separate judgments promounced in these cases:

(i) It is unanimously held that Section 14A of the Karnataka Co-operative Societies Act, 1959 is within the competence of the State Legislature under Entry 32 of List II of VII Schdule to the Constitution.

(ii) It is unanimously held that Section 14-A of the Act is not void as offending Art. 14 of the Constitution.

(iii) It is held in accordance with the majority opinion (Jagannatha Shetty, Bopanna & Venkatachala JJ.) that S. 14-A is not void as offending Art. 19 (1) (c) of the Constitution.

65. It is held in the minority judgment (Malimath & Srinivasa Iyengar JJ.) that S. 14-A is void as offending Art. 19 (1) (c) of the Constitution.

(iv) It is held by Malimath & Srinivasa Iyengar JJ. that S. 14-A is not void as offending Art. 31 (1) or Article 31 (2) of the Constitution.

(v) It is held in accordance with the majority opinion (Jagannatha Shetty, Bopanna & Venkatachala JJ.) that the principle of audi alteram partem has to be followed while exercising power under S. 14-A of the Act and that the impugned orders made under the said provision are void, they having been made in contravention of the said principle.

66. Malimath and Srinivasa Iyengar JJ. have, in their minority judgment, held that the Legislature has, by necessary implication, excluded the principle of audi alteram partem.

(vi) It is held by Malimath and Srinivasa Iyengar JJ. that the impugned orders have to be quashed on the ground that the same have been made by the Deputy Registrar in a mechanical manner and without applying his mind.

II. In the result, the impugned orders made under S. 14-A of the Karnataka Co-operative Societies Act, 1959 are hereby quashed.

III. The petitioners are entitled to costs from the State. Advocate's fee is fixed at Rs. 250/- in each case.

Rule made absolute.

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FULL BENCH

V. S. MALIMATH, S. R. RANGE GOWDA AND M. N. VENKATACHALIAH JJ.

The State of Karnataka, Petitioner v. C. P. Chandrasekhar, Respondent.

Civil Revn. Petn. No. 1942 of 1974 D/- 2-2-1978.*

Karnataka Agricultural Income-tax Act (22 of 1957), Ss. 10 (1) (a), 10 (2) (a) and 3 (3) — Assessment of agricultural income — Lands held by assessee as trustee — Income received partly for his own benefit and partly for the benefit of others — Assessment can be made under S. 10 (1) (a) and not under Section 10 (2) (a) or Section 3 (3).

Where a person holds an agricultural land as a trustee and receives the agricultural income partly for his own benefit and partly for the benefit of others, assessment can be made in accordance with Section 10 (1) (a) of the Act and not under S. 10 (2) (a) or under S. 3 (3) of the Act. (Para 7)

Section 3 (3) will have no application to such a case. It applies only if the persons hold property as tenants-in-common and derive agricultural income. If a person holds agricultural lands as a trustee and receives agricultural income partly for his own benefit and partly for the benefit of others, it is impossible to say that the property is held as tenants-in-common. (Para 1)

It is clear from the language of Section 10 (2) (a) of the Act that the question of application of the said provision arises only if the case does not fall un-

*(Against Order of Sales Tax Appellate Tribunal, Bangalore, D/- 29-4-1974).

der S. 10 (1) (a) of the Act. If the case falls under S. 10 (1) (a), it will not be necessary to examine as to whether Section 10 (2) (a) applies. (Para 2)

Section 10 (1) (a) of the Act refers to receipt of income by the trustee on behalf of any person. But, under the law of trust, the trustee cannot be regarded as receiving income of the trust property on behalf of any person. The legal title vests in the trustee and he is entitled to receive the income of the trust property for the benefit of the beneficiaries. But, it appears that having regard to the context in which the expression "is entitled to receive on behalf of any person" is used, it has to be understood as meaning "entitled to receive for the benefit of any person." If the expression is not so understood. S. 10 (1) (a) of the Act, so far as trustees are concerned, cannot be given effect to and the provision to that extent becomes otiose. AIR 1966 SC 1191, Followed; (1966) 2 Mys LJ 275, Explained and held that it was not inconsistent with AIR 1966 SC 1191.

(Para 3)

Cases Referred: Chronological Paras

AIR 1971 SC 2463 : 81 ITR 763 : 1971 Tax LR 1756 3
AIR 1966 SC 1191 : 60 ITR 216 2, 6
(1966) 2 Mys LJ 275 2, 6
(1964) 51 ITR 339 (Mys) 3

K. Shivashankar Bhat, Govt. Advocate, for Petitioner; U. L. Narayana Rao, for Respondent.

MALIMATH, J.:— The Division Bench consisting of Venkataramiah, J; and Venkatachala, J. has referred the following question of law for the opinion of the Full Bench:

"Where a person holds the agricultural land in question as a trustee and receives the agricultural income partly for his own benefit and partly for the benefit of others, can assessment be made in accordance with S. 10 (1) (a) read with S. 3 (3) of the Karnataka Agricultural Income-tax Act, 1957 ignoring S. 10 (2) (a) of that Act."

Section 3 (3) of the Karnataka Agricultural Income-tax Act, 1957 (hereinafter referred to as 'the Act'), will have no application to a case where a person holds agricultural lands as a trustee and receives the agricultural income partly for his own benefit and partly for the benefit of others. Section 3 (3) of the Act applies only if the persons hold property as tenants-in-common and derive agricultural income. If a person holds agricultural lands as a trustee and receives agricultural income partly for his own benefit and partly for the benefit of others, it is impossible to say that the property is held as tenants-in common.

2. The only other question that requires examination is as to whether Section 10 (1) (a) of the Act applies or Section 10 (2) (a) of the Act applies to the case of a trustee holding agricultural lands and receiving the agricultural income partly for his own benefit and partly for the benefit of others. For the sake if convenience, we extract the provisions of S. 10 (1) (a) and S. 10 (2) (a) of the Act:

"10 (1) (a)—In the case of agricultural income taxable under this Act, which the Court of Wards, Administrator General or Official Trustee or any receiver, administrator, executor, trustee, guardian or manager appointed by or under any law or by an order of Court or by written agreement, is entitled to receive — on behalf of any person, the tax shall be levied upon and recoverable from the Court of Wards, Administrator-General, official trustee, or from such receiver, administrator, executor, trustee, guardian or manager, as the case may be, in the like manner and to the same amount as it would be leviable upon and recoverable from the person on whose behalf such agricultural income is receivable and all the provisions of this Act shall apply accordingly.

xxx xxx xxx

10 (2) (a)— Save as provided in subsection (1) if a person holds land from which agricultural income is derived partly for his own benefit and partly for the benefit of others or wholly for the benefit of others, agricultural income-tax shall be assessed on the total agricultural income derived from such land at the rate which would be applicable if such person had held the land exclusively for his own benefit."

It is clear from the language of S. 10 (2) (a) of the Act that the question of application of the said provision arises only if the case does not fall under S. 10 (1) (a) of the Act. If the case falls under S. 10 (1) (a), it will not be necessary to examine as to whether S. 10 (2) (a) applies. The essential question for consideration is as to whether S. 10 (1) (a) applies to the case of a person holding agricultural lands as a trustee and receiving agricultural income partly for

his own benefit and partly for the benefit of others. The Division Bench which made the reference has proceeded on the assumption that the rule laid down by this Court in R. T. N. Punja v. Commr. of Income-tax ((1966) 2 Mys LJ 275) is inconsistent with the view expressed by the Supreme Court in K. K. Handique v. Member, Board of Agricultural Income-tax ((1966) 60 ITR 216) : (AIR 1966 SC 1191). It has been pointed out in the order of reference that Ss. 10 (1) (a) and 10 (2) (a) of the Act, with which we are concerned, are similar to Ss. 13 and 12 respectively of the Assam Agricultural Income-tax Act, 1939, construed by the Supreme Court in the aforesaid case. It is further pointed out that in the case of R. T. M. Punja, this Court did not take into account the provisions of Section 10 (2) (a) of the Act.

3. The language of Sec. 10 (1) (a) of the Act makes it clear that in the case of agricultural income taxable under the Act which the trustee appointed by written agreement, is entitled to receive on behalf of any person, the tax shall be levied upon and recoverable from the trustee, in the like manner and to the same amount as it would be leviable upon and recoverable from the person on whose behalf such agricultural income is receivable and all provisions of the Act shall apply accordingly. Section 10 (1) (a) of the Act refers to receipt of income by the trustee on behalf of any person. But, under the law of trust, the trustee cannot be regarded as receiving income of the trust property on behalf of any person. The legal title vests in the trustee and he is entitled to receive the income of the trust property for the benefit of the beneficiaries. But, it appears to us that having regard to the context in which the expression "is entitled to receive on behalf of any person" is used, it has to be understood as meaning "entitled to receive for the benefit of any person." If the expression is not so understood, S. 10 (1) (a) of the Act, so far as trustees are concerned, cannot be given effect to and the provision to that extent becomes otiose. This Court had the occasion to construe S. 41 of the Indian Income-tax Act, 1922, in Rajamannar v. Commr. of Income-tax ((1964) 51 ITR 339) (Mys). Though in S. 41 (1) of the Indian I.-T. Act, 1922, similar expression has been used, viz., "on behalf of:: as is used in Sec. 10 (1) (a) of the Act, their Lordships construed those words as meaning "for the benefit of", as otherwise, S. 41 (1) of the Indian Income-tax Act which relates to trust would be rendered otiose. The decision of this Court in Rajamannar's case has been affirmed, with approval, by the Supreme Court in Commr. of Wealth Tax v. Kripashankar Daya Shankar Worah (1971) 81 ITR 763 : (AIR 1971 SC 2463). If the words "on behalf of any person" used in S. 10 (1) (a) of the Act are understood as meaning "for the benefit of any person" as laid down by this Court and the Supreme Court in the cases referred to above, it follows that S. 10 (1) (a) will apply to the case of a person who holds agricultural lands as a trustee and receives agricultural income for the benefit of others.

4. It was maintained by Sri Shivashankar Bhat, learned High Court Government Advocate appearing for the Department, that though the expression "is entitled to receive on behalf of any person" may be construed as meaning "entitled to receive for the benefit of any person", the trustee who receives the income not only for the benefit of other beneficiaries but also for the benefit of himself, cannot be regarded as receiving income for the benefit of any person or persons. In other words, he maintained that if the trustee receives part of the income for the benefit of himself, he cannot be regarded as a person receiving the entire income from agricultural lands for the benefit of any other persons.

5. It is not possible to accede to the above contention of Sri Shivashankar Bhat, because when the trustee receives income partly for his benefit and partly for the benefit of other beneficiaries, he receives the said income in his capacity as a trustee. Besides, under the definition of the word "person" occurring in S. 2 (1) (p) of the Act, "person" means a person among others who holds property partly for his own benefit and partly for another. Therefore, a person who holds agricultural lands as trustee and receives agricultural income partly for his own benefit and partly for the benefit of others, can be assessed under S. 10 (1) (a) of the Act and the question of invoking S. 10 (2) (a) does not arise.

6. The case dealt with by this Court in Punja's case ((1966) 2 Mys LJ 275) was governed by S. 3 (3) of the Act.

But, their Lordships also proceeded to examine as to whether the case also falls under S. 10 (1) (a) of the Act, and came to the conclusion that on the facts of the case it can be brought under Section 10 (1) (a) of the Act as well. That was a case in which the manager received the income from the agricultural lands on behalf of others. As the conditions of S. 10 (1) (a) of the Act were satisfied in that case, their Lordships came to the conclusion that the provisions of S. 10 (1) (a) of the Act applied to the facts of that case. Therefore, the provisions of Section 10 (2) (a) of the Act did not arise for consideration in that case. Therefore, the decision in Punja's case cannot be regarded as being inconsistent with the decision of the Supreme Court in K. K. Handique's case (AIR 1966 SC 1191). It is, no doubt, true that S. 12 of the Assam Agricultural Income-tax Act is similar, to some extent, to S. 10 (2) (a) of the Act. But, so far as S. 13 of the Assam Agricultural Income-tax Act is concerned, it is not similar to S. 10 (1) (a) of the Act. Section 13 of the Assam Agricultural Income-tax Act as construed by the Supreme Court deals only with two categories of persons, viz. (1) common Manager appointed under any law for the time being in force or under an agreement: managers who do not fall under the above category are outside the section, and (2) receivers, administrators or the like. But, S. 10 (1) (a) of the Act, with which we are concerned, also deals with other categories of persons such as 'trustees' etc. The Supreme Court construed the document in question as creating a trust and vesting the properties in the trustees for the benefit of the trustees as well as others. As their Lordships came to the conclusion that the document created a trust and as Section 13 of the Assam Agricultural Income-tax Act did not deal with the trustees, that Section was held not applicable. As S. 13 of the Assam Agricultural Income-tax Act did not apply to the facts of that case, their Lordships proceeded to hold that Sec. 12 (1) of the Assam Agricultural Income-tax Act was attracted. But, S. 10 (1) (a) of the Act, with which we are concerned covers the case of trustees. Therefore. it is not possible to hold that the decision of this Court rendered in Punja's case is inconsistant with the rule laid down by the Supreme Court in Handique's case.

7. For the reasons stated above, we answer the reference as follows:

"Where a person holds an agricultural land as a trustee and receives the agricultural income partly for his own benefit and partly for the benefit of others, assessment can be made in accordance with S. 10 (1) (a) of the Karnataka Agricultural Income-tax Act, 1957 and not under S. 10 (2) (a) or under S. 3 (3) of the said Act."

Answer accordingly.

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FULL BENCH

E. S. VENKATARAMAIAH, M. K. SRINIVASA IYENGAR AND M. N. VENKATACHALIAH, JJ.

M/s. Mysore Kirloskar Ltd., Harihar, Applicant v. The Commissioner of Income-tax, Bangalore, Respondent.

I.T.R.C. Nos. 82 to 85 of 1974, D/- 17-4-1978.

Income-tax Act (43 of 1961), S. 37 — Capital expenditure or revenue expenditure — Manufacture of Machines — Amounts paid to foreign Companies for acquiring technical know-how — Held, it was revenue expenditure deductible under S. 37. (1968) 67 ITR 23 (Kant), Overruled.

The assessee company entered into agreements with foreign companies for acquiring technical know-how for manufacture of certain machines. It made regular payments for that purpose. From the terms of the agreement it was clear that (1) No secret process or technical knowledge was sold by the foreign company to the assessee; (2) the period of user was for 15 years, (3) the object of the agreement was to obtain the benefit of the technical assistance for running the business; (4) the permission was granted to the assessee subject to rights actually granted or which may be granted after the date of the agreement to other persons though outside India; (5) the assessee was expressly prohibited from divulging the confidential information to third parties, (6) there was no transfer of fruits of research once for all; and (7) the foreign company which was continuously carrying on research had agreed to make it available to the assessee.

IV/IV/D818/78/MVJ

Held, that the payments made to these companies in the relevant years under consideration were of a revenue nature and allowable under Sec. 37. (1968) 67 ITR 23 (Kant), Overruled; AIR 1968 SC 1131, Foll. (Case law discussed). (Para 21)

In the instant case, under the agreement the assessee acquired merely the right to draw for the purpose of carrying on its business as a manufacturer of certain articles upon the technical knowledge of the foreign company for a limited period. The foreign company did not part with any of its assets absolutely for ever or for any limited period of time. It continued to have a right of user of its knowledge, even after the agreement had run its course: its right in this behalf was not lost. The assessee did not acquire any right to the user of any name in regard to the products even if the agreement had run its course. (Para 17)

Anno, AIR Manual (3rd Edn.) I.-T. Act (1961), S. 37 N. 2 (i). 3. 11.

Cases Referred: Chronological Paras

(1976) 103 ITR 321 (Bom) 6, 18
1976 Tax LR 203: 101 ITR 844 (Cal) 6
(1971) 81 ITR 243 (Cal) 6, 18
AIR 1968 SC 1131: 69 ITR 692 5, 6, 17, 18, 20
(1968) 67 ITR 23 (Kant). 3, 5, 6, 18, 20
(1965) 56 ITR 580 (HL), Jeffrey v. Rolls Royce Ltd. 18
(1965) 57 ITR 428 (Bom) 2
(1964) 41 Tax Cas 556, Musker v. English Electric Co. 18
(1959) 35 ITR 707 (HL), Evans Medical Supplies Ltd. v. Moriarty 18

G. Sarangan, for Petitioner in all cases; S. R. Rajashekara Murthy, for Respondent in all cases.

M. K. SRINIVASA IYENGAR, J.:— These references are made by the Income-tax Appellate Tribunal, Bangalore Bench in relation to the assessment for the assessment years 1962-63, 1964-65, 1965-66, 1968-69. The assessee is common to all these cases. The questions relate to the payment of certain sums of money to foreign companies by the assessee under certain agreements entered into with them. One question that is being common for all these years is in regard to the payments made under an agreement with M/s. Alfred Herberts Ltd., U. K. (hereinafter referred to as Herberts). The agreement with that company was on 1-8-1958. The payments made in the several assessment years were £ 1,000, £ 2,000, £ 1,000 and £ 3,250. In relation to the assessment year 1965-66, questions relate to payments made to a Company M/s. Landis Tool Company, U.S.A. (hereinafter referred to as Landis) of 12,000 dollars and to M/s. Monarch Machine Tools Company of U.S.A. of 10,000 dollars, also. The Tribunal held that the payments made to Herberts and Landis were capital in nature while the payment made to Monarch Machine Tools Co., was revenue in nature. The Appellate Assistant Commissioner had held that the payment made to Monarch Machine Tools Co., was revenue in nature and the Tribunal dismissed the appeal that had been filed by the Department against that order. The reference in regard to Monarch Machine Tools Co., is at the instance of the Commissioner while others are at the instance of the assessee.

2. In regard to an earlier assessment year namely 1960-61, a similar payment that had been made to Herberts Ltd., and been held to be capital in nature by the Tribunal and there was a reference to this Court at the instance of the assessee. This court held that the view taken by the Tribunal was correct. On behalf of the assessee the principles enunciated by the High Court of Bombay in Commr. of I.-T., Bombay v. CIBA Pharma Pvt. Ltd., ((1965) 57 ITR 428) (Bom) had been relied upon. This Court, however, distinguished that case and was of the opinion that the payment was made in regard to a new product and the principle enunciated by the High Court of Bombay in Ciba Pharma Private Ltd., was not applicable, as the agreement in relation to that case was only for a period of 5 years and further it was concerned with a pharmaceutical industry and technical knowledge in that field would become outmoded within the course of months and years and therefore the ratio of that decision was not applicable to the facts of this case.

3. When the assessment for the years under consideration was taken up it was contended for the assessee that the full facts had not been placed in regard to the earlier assessment year and actually the assessee was manufacturing lathes and grinders almost from its inception in 1941 and the agreements were not in regard to any new business as such. Further certain material facts had not been properly appreciated. However, the

Income-tax Officer did not accept the contention of the assessee and disallowed the expenditure claimed in this behalf as not permissible under S. 37 of the Income-tax Act, 1961. On appeal, however, the Appellate Assistant Commissioner reversed the finding of the Income-tax Officer so far as Monarch Machine Tools Company was concerned for the assessment year 1965-66, and the Tribunal upheld his view in this behalf on a further appeal by the Department. But, the Appellate Assistant Commissioner apparently following the observations made by this Court in Mysore Kirloskar Ltd. v. Commr. of I.-T., Mysore ((1968) 67 ITR 23) (Kant) disallowed the claim for allowing these expenditures in relations to both Alfred Herberts Ltd. and Landis Tool Company. In the further appeals by the assessee, it was strenuously contended that this Court had proceeded on a wrong premise that new products were being manufactured and the agreements were in relation thereto and certain other aspects were also put forward as distinguishing the earlier case for the assessment year 1960-61. The Tribunal appears to have felt that these aspects which had not been considered in the earlier year should be enquired into and accordingly remanded the matter to the Appellate Assistant Commissioner to make a report in regard to these aspects raised on behalf of the assessee. The Appellate Assistant Commissioner examined witnesses and on the basis of the material placed before him sent a remand report dated 30-10-1971 in relation to the assessment years 1962-63, 1964-65 and 1965-66 which substantially supported the contentions on behalf of the assessee. So far as the assessment year 1968-69 was concerned, the appeal was kept pending before it awaiting remand report of the Appellate Assistant Commissioner as it was agreed between the parties that the report will hold good even for that assessment year.

4. However, as already stated, the Tribunal held that the payments to Alfred Herbert Limited and Landis Machine Tools Co., were capital in nature and the assessee was not entitled to allowance of those expenditures under Sec. 37 of the Income-tax Act.

5. The question that is common to all the years which relates to the payment to Alfred Herbert Limited is as follows:

"Whether, on the facts and in the circumstances of the case, and on the true interpretation of the agreement dated 1-8-1958 between Mysore Kirloskar Ltd., and Alfred Herberts Ltd., U. K. the Tribunal was right in law in holding that the payment of Rs. 13,400 (£ 1,000) made under clause 12 (i) of the agreement is of capital nature?"

The amounts for the other three years are £ 2,000, £ 1,000 and £ 3,250. The other two questions relating to the assessment year 1965-66 are as follows:—

"Whether, on the facts and in the circumstances of the case, and on the true interpretation of the agreement dated 31-12-1963 between Mysore Kirloskar Ltd., and Landis Tool Co., U. S. A. the Tribunal was right in holding that the payment of Rs. 57,450 (S. 12,000) made under clause 3 of the agreement is of a capital nature?

xx xx

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the payment of Rs. 47,825 (£ 10,000) as per clause 8 of the agreement dated 9-1-1964 between the assessee and the Monarch Machine Tools Co. of U.S.A. was allowable as revenue expenditure?"

It has been contended by Sri G. Sarangan, the learned counsel for the assessee, that the facts and circumstances in the instant cases are indistinguishable from those in Ciba Pharma Private Ltd., decided by the Supreme Court on appeal by the Department from the judgment of the High Court of Bombay in Commr. of Income-tax, Bombay City I v. Ciba of India Ltd., (1968) 69 ITR 692: (AIR 1968 SC 1131). It is argued by him that the decision of this Court in (1968) 67 ITR 23 (Kant) is based upon a wrong assumption, in that it proceeded on the basis that the agreement with Alfred Herbert Ltd., was in regard to a new product, whereas it is clear that the assessee was manufacturing lathes and grinders even earlier to 1958 and further that the two grounds on which Ciba's case was distinguished are irrelevant and so untenable.

6. The main plank for the Department has been the judgment of this Court reported in (1968) 67 ITR 23 (Kant). We have been taken through the judgment of the High Court of Bombay as well as

the judgment of the Supreme Court reported in 69 ITR 692: (AIR 1968 SC 1131) and also two decisions of the High Court of Calcutta reported in Commr. of Income-tax (Central), Calcutta v. Hindustan General Electrical Corporation Ltd. ((1971) 81 ITR 243) and in Commr. of Income-tax, West Bengal v. Associated Electrical Industries (India) Pvt. Ltd.. (1975) 101 ITR 844: (1976 Tax LR 203) and another decision of the High Court of Bombay in Acc-vickers Babcock Ltd. v. Commr. of Income-tax, Bombay ((1976) 103 ITR 321). The Appellate Assistant Commissioner in his exhaustive report on remand noticed the several clauses in the three agreements in regard to the several provisions and conditions under which the technical knowledge or know-how was supplied to the assessee and the purpose of such supply and that they were similar. The Tribunal does not find anything contrary thereto. The only difference if at all it can be said to be so, is that in the preamble to the agreement with Monarch Machine Tools Company, the expression 'licence' is used which is not to be found in the other two agreements. Apart from this difference, the main purpose of the supply of know-how and the conditions subject to which it was to be used are identical. Therefore, it would be sufficient if we notice a few of the clauses in the agreement with Alfred Herbert. The preamble to the agreement specifies that Herbert who are manufacturers of machine tools, small tools and workshop equipment have agreed to grant to MK (Mysore Kirloskar) permission to manufacture certain machine tools and workshop equipment for sale in India.

7. Clause 1 states that Herbert hereby grant to MK permission to manufacture in India in accordance with Herbert's designs — Capstan and Turret Lathes having spindle bores of one and one-half inches to four and one-quarter inches inclusive and spare and component parts for such lathes referred to collectively as products and the assessee had agreed to manufacture the products during continuance of the agreement and not to manufacture or sell machine tools or equipment of substantially similar designs or parts therefor covered by the products either for their own use or for supply to any one else. The assessee was permitted to complete the manufacture of not more than six Capstan Lathes at present in course of construction for use in the works of their companies only. The assessee agreed to undertake manufacture of these products only for their factory or factories situated in India and would not directly or indirectly manufacture in any other State of Territory. The agreement also provided that any further type of products might be agreed to be manufactured on such permission.

8. Clause 2 provided that notwithstanding anything herein contained Herbert shall be entitled to determine the agreement by notice in writing in the event of the assessee selling the products direct to customers in India or through any Distributors or Agents of whom Herbert did not approve.

9. Clause 3 (i) provided that in consideration of the payments mentioned in clause 12 (i) Herbert would provide the assessee with manufacturing technique of the products from time to time and also furnish two complete sets of detailed and general arrangements drawings, material specifications and parts lists relating to the appropriate machines. Sub-clause (ii) made provision for supply of patterns, jigs fixtures and special tools as may be agreed upon at prices to be fixed.

10. Clause 5 provided that in the event of the agreement being terminated before the end of 15 years (fixed in the agreement) the assessee shall deliver to Herbert or otherwise as Herbert should direct without charge all drawing patterns, jigs fixtures and special tools which were supplied to the assessee by Herbert or produced or obtained by the assessee for manufacturing the products. The assessee agreed not to use any of the drawings, patterns, jigs fixtures and special tools for any other purpose except for work to Herbert designs.

11. Clause 7 inter alia made provision for termination of the agreement if the quality of the products manufactured did not come up to the standards of Herbert.

12. Under clause 8 it was provided that all machines manufactured pursuant to the agreement had to be sold under the Trade Mark "Herbert-Kirloskar" which name had to be cast on all machines in a conspicuous space and had to be used in all quotations, specifications, orders, advertisements and description of the products. Under that

clause it was specifically agreed that the assessee shall cease to use all the said Trade Marks or any of them in relation to any machine on the termination of the agreement.

13. Clause 11 made provision for communication of information on improvements in the manufacture design or use of the products which may come to the knowledge of the parties and licence for the user thereof free of any royalty.

14. Clause 15 provided that Herbert would not authorise or assist any other concern in India to manufacture the products and spares and component parts therefor so long as the manufacturing capacity of the assessee will ensure a reasonable supply to satisfy the demand for the same in India and it further provided that if the assessee was unable to meet such demands nothing would prevent Herbert from exporting into India any of the products manufactured by or to the order of Herbert outside India to the extent that from time to time may be permitted by the Government of India or which it could lawfully export without any such specific permission and whether or not the assessee was able to meet the demand.

15. Clause 18 provided that the assessee should observe strict secrecy as to all confidential and secret documents, information and 'know-how' supplied to it by Herbert and would not directly or indirectly use the know-how, experience and information acquired by it pursuant to the agreement so far as to assist any other person, firm or company to manufacture products similar to the products of any of them or otherwise to the detriment of Herbert.

16. Clause 21 of the agreement provided that, in the event of the agreement being terminated by efflux of the period fixed therein or by notice thereafter as provided is clause 17, or in the event of its being terminated by efflux of time as to any other machine or machines (other than the Herbert No. 4 Capstan Lathe and Herbert No. 7B Combination Turret Lathe) nothing contained in the agreement shall thereafter in any manner whatsoever prevent the assessee from manufacturing and/or selling the products and it shall have full power, liberty and authority to manufacture and/or sell the same but without limiting the like rights of HERBERT or any other person authorised by it. It also provided that the assessee would be free to make such arrangements for the sale of the products as they may in their absolute discretion think fit, but in the event of the agreement being terminated before the expiration of the period of 15 years, the assessee would be entitled to complete and deliver the products in course of manufacture at the date of such termination and would be bound to make the payments to Herbert in respect thereof in accordance with clause 12 (ii). It further provided that save as aforesaid the assessee should not during the remainder of the fixed term of fifteen years specified under clause 17 directly be engaged concerned or interested in the manufacture or sale of the products.

17. Read as a whole, it is seen that under the agreement the assessee acquired merely the right to draw for the purpose of carrying on its business as a manufacturer of certain articles upon the technical knowledge of the foreign company for a limited period. The foreign company did not part with any of its assets absolutely for ever or for any limited period of time. It continued to have a right of user of its knowledge, even after the agreement had run its course: its right in this behalf was not lost. The assessee did not acquire any right to the user of the name 'HERBERT' in regard to the products even if the agreement had run its course. Actually it could not use that name and had to discontinue such user or associating that name with the products to be manufactured thereafter. In the words of the Supreme Court in Ciba's case, 69 ITR 692 : (AIR 1968 SC 1131) 'by making that technical knowledge available the foreign company did not part with any asset of its business, nor did the assessee acquire any asset or advantage of an enduring nature for the benefit of its business.'

18. From the terms of the agreement it is clear that (1) No secret process or technical knowledge was sold by the foreign company to the assessee, (2) the period of user was for 15 years; (3) the object of the agreement was to obtain the benefit of the technical assistance for running the business; (4) the permission was granted to the assessee subject to rights actually granted or which may be granted after the date of the agreement to other persons though outside

India; (5) the assessee was expressly prohibited from divulging the confidential information to third parties; (6) there was no transfer of fruits of research once for all; and (7) the foreign company which was continuously carrying on research had agreed to make it available to the assessee. These are the very factors which were taken into consideration by the Supreme Court in coming to the conclusion that the expenditure was of revenue nature and allowable under Section 10 (1) (xv) of the Indian Income-tax Act 1922, which is pari materia with Sec. 37 of the Income-tax Act 1961, Therefore, it is clear that the facts and circumstances in the instant case are indistinguishable from those in Ciba's case (AIR 1968 SC 1131). The Supreme Court in the course of its judgment referred to the decision of the House of Lords in Jeffrey v. Rolls Royce Ltd. ((1965) 56 ITR 580) (HL) and Musker v. English Electric Co. ((1964) 41 Tax Cas 556) and distinguished the decision in Evans Medical Supplies Ltd. v. Moriarty ((1959) 35 ITR 707) (HL). The principles enunciated by the Supreme Court in Ciba's case were applied by the High Court of Calcutta in Commr. of Income-tax (Central) Calcutta v. Hindustan General Electrical Corporation Ltd. ((1971) 81 ITR 243) (Cal). The learned Judges referred to the speech of Viscount Radcliffe in Musker v. English Electric Co. Ltd. and extracted the following observations:

"In my opinion, there are two considerations which govern cases of this kind and which go a long way towards destroying the force of the analogies by which the appellant's argument seeks to prove that the transactions under review were sales of fixed assets, and that receipts arising from them ought to be treated as receipts on capital account. One is that in reality no sale takes place. The appellant had after the transaction what it had before it. There is no property right in "know-how" that can be transferred, even in the limited sense that there is a legally protected property interest in a secret process. Special knowledge or skill can indeed ripen into a form of property in the fields of commerce and industry, as in copyright, trademarks and designs and patents, and where such property is parted with for money what is received can be, but will not necessarily be. a receipt on capital account. But imparting "know-how" for reward is not like this, any more than a teacher sells his knowledge or skill to his pupil."

This Court in its judgment in Mysore Kirloskar Ltd. v. Commr. of I.-T. Mysore ((1968) 67 ITR 23) (Kant) referred to certain observations in Rolls Royce case (1965) 56 ITR 580 (HL) in the speech of Lord Radcliffe and in particular to the following:

"These considerations lead me to say that, although 'know-how' is properly described as fixed capital by way of analogy, it is the kind of intangible entity that can very easily change its category according to the use to which its owner himself decides to put it. I am not sure that it is too much to say that it is his use of it that determines the category. It is not like a single physical entity which must be employed for production or else broken up; it is more like a fluid in store which can be pumped down several channels."

After referring to these observations, this Court proceeded to state:

"The above decision clearly establishes that "know-how" primarily is a capital asset and the price received on its sale a capital receipt .... Applying the ratio of the above decision to the facts of the present case, it becomes evident that "know-how" supplied by Herbert in the hands of the assessee is a capital asset, but the price realised for the sale of that 'know-how' by Herbert is a revenue income. From that conclusion, it follows that the "know-how" acquired by the assessee during the assessment year is an acquisition of a capital asset and, consequently, the price paid for that acquisition is a capital expenditure."

With great respect, in our opinion, the conclusion does not follow the observations of Lord Radcliffe's judgment referred to in the judgment earlier. The High Court of Calcutta in (1971) 81 ITR 243 referred to the decision in (1968) 67 ITR 23 (Mys) but distinguished it. The High Court of Bombay in the case reported in (1976) 103 ITR 321 (Acc-Vickers Babcock Ltd. v. Commr. of Income-tax, Bombay City) also referred to the decision of this Court in (1968) 67 ITR 23 and distinguished it, preferring to follow the principles laid down by the Supreme Court in Ciba's case (AIR 1968 SC 1131).

19. Clause 12 provides for the payments and is as follows:—

"12 (i) On the execution of this agreement to pay "HERBERT" in respect of the "know-how" to be supplied hereunder the sum of £ 1,000/- (One thousand pounds sterling) in respect of the Herbert No. 4 Capstan Lathes and £ 1,000 (One thousand pounds sterling) in respect of the Herbert No. 7B Combination Turret Lathes and upon agreeing to manufacture any further machine a further £ 1,000 (One thousand pounds sterling) in respect of each and every other type of machine manufactured hereunder.

(ii) On MK's invoice price of all products manufactured and sold hereunder (including any goods completed after the date of termination as provided in Cl. 17 hereof) MK will make a payment to HERBERT of 7½% (seven and one half per cent) subject to any deduction for tax payable under Indian Law.

(iii) x x x x"

The Department has recognised the payments under sub-clause (ii) as allowable revenue expenditure. It is plain that the nature and purpose of the payments under both the sub-clauses are the same; only the payments are in two stages. Merely on this account the character of the payments is not changed. They cannot be treated differently.

20. It is pertinent to point out that the relevant agreement considered by the High Court of Bombay provided for a lump sum payment though payable in instalments and the agreement itself was renewable for a period of five years at a time, if no notice terminating the agreement six months before the expiry of the period was given. Therefore, the period of the agreement by itself is not conclusive or determinative of the nature of payment whether it is of revenue or capital nature. This Court in (1968) 67 ITR 23 (Kant) distinguished Ciba's case (AIR 1968 SC 1131) on the two grounds viz., that the period of agreement in Ciba's case was only for a period of five years, and that the knowledge acquired by research would be outmoded in months or years in pharmaceutical industry and could not therefore be said to be an asset of capital nature. Both these criteria, in our opinion, are not determinative. One of the assumptions implicit in and underlying the reasoning on which Ciba's case was distinguished is, that the pace of research in and development of the pharmaceutical industry is far more accentuated than what can be said to obtain in the machine tools industry. This assumption is not supportable. The pace of all round technology advancement being what it is, there is no warrant for an assumption that research in machine tool industry in which metallurgical science has a significant part to play is slower than in other fields of technology and science. There is no material to hold that the postulate that developments in pharmaceutical industries are susceptible to obsolescence does not hold good in other fields of technology including the field of modern machine tools design which is no less sophisticated. We are clearly of the opinion that the judgment of this Court reported in (1968) 67 ITR 23 (Kant) proceeded on wrong assumptions and is not in accordance with the principles enunciated by the Supreme Court in Ciba's case (69 ITR 692): (AIR 1968 SC 1131) and must be considered as not laying down the correct law. We accordingly overrule it.

21. In the result, we hold that in so far as the payment to M/s. Monarch Machine Tools Co. Ltd. is concerned, the Tribunal was right in holding that it was allowable revenue expenditure. In regard to the payments made to M/s. Alfred Herbert Co. Ltd. and M/s. Landis Tool Co., the Tribunal was in error in holding that they were of a capital nature. We hold that the payments made to these companies in the relevant years under consideration were of a revenue nature and allowable under S. 37 of the Income-tax Act, 1961. The questions are answered accordingly. Parties shall, however, bear their own costs.

Answer accordingly.

AIR 1978 KARNATAKA 199

M. RAMA JOIS, J.

Tammanna Parisa Gundale, Petitioner v. The State of Karnataka and others, Respondents.

Writ Petn. No. 4475 of 1977, D/- 19-1-1978.*

Karnataka Land Reforms Act (10 of 1962), S. 48A — Bombay Tenancy and Agricultural Lands Act (67 of 1948), Sections 27, 29 and 84 — Eviction proceed-

*(To quash the order of Land Tribunal, Athani, D/- 28-5-1977.)

ing against tenant for sub-letting in contravention of S. 27 — Dismissal — Landlord not taking recourse to S. 84 — Landlord also accepting rent from sub-tenant — Sub-tenant held was a tenant and entitled to occupancy rights under S. 48A of Karnataka Act.

The landlord instituted eviction proceedings against the original tenant on the ground that he had sub-let the lands in favour of the petitioner which was in contravention of S. 27 of the Bombay Act. He was also made a party to the proceedings. The landlord was not successful and even his petition was dismissed by High Court. Thereafter the name of the petitioner was entered in the revenue register as tenant. The rent was also accepted from the tenant. Application for resumption filed under S. 14 was also dismissed. On the basis of the facts the petitioner filed application claiming occupancy right in respect of the lands under S. 48A of the Karnataka Act.

Held, that the petitioner's initial entry into the land in question, as sub-tenant, though contravened S. 27 of the Bombay Act, the act of recognition of the petitioner as tenant since 1962 after the landlord failed to get an order of eviction against the tenant for contravention of S. 27 of the Bombay Act in view of the bar created by S. 29 (2) of the Bombay Act, was not in contravention of any of the provisions of the Bombay Act. Therefore, the petitioner should be deemed to be a person lawfully cultivating the land belonging to the landlord on the date of the commencement of the Karnataka Act and, therefore, a 'tenant' as defined under the provisions of that Act, AIR 1959 SC 689, Distinguished.

(Para 16)

Sub-letting of agricultural lands is prohibited by S. 27 and S. 14 of the Bombay Act confers right on the landlord to terminate the tenancy of a tenant who sub-lets the lands in violation of Sec. 27, but S. 29 of the Bombay Act prescribes the period of limitation. After the expiry of the period of limitation, there is no remedy that could be resorted to against the tenant. In such a situation, there is nothing in S. 27 of Bombay Act or any other provisions of the Act debarring a landlord to recognise the sub-tenant introduced by the tenant as his tenant. Similarly, it was open for the landlord to have refused to recognise or treat the petitioner as his tenant even after the dismissal of the civil petition by the High Court, by refusing to receive rent, and objecting to the entry in the revenue records showing the petitioner as tenant and also by not filing application under S. 14 of the Act for resumption in which event, on the date of commencement of the Karnataka Act the petitioner could not have been considered as a person cultivating the lands in question lawfully as a tenant, and he could have successfully resisted the claim of the petitioner for occupancy rights in respect of the land in question. Therefore in the act of recognition of a sub-tenant, introduced by a tenant, against whom there is no remedy provided under the Bombay Act after the expiry of the period of limitation prescribed under S. 29 (2) of the Bombay Act, as his tenant, by the landlord, there is no contravention of the provisions of S. 27 of the Bombay Act as it is not an act of sub-letting which alone is prohibited under S. 27. Such an act falls outside S. 27 and there is no provision in the Bombay Act prohibiting the landlord to treat the erstwhile sub-tenant as his own tenant.

(Para 14)

S. 84 provides for the summary eviction of any person unauthorisedly occupying or wrongfully in possession of any land. The landlord therefore, could have taken action u/s. 84 of the Bombay Act against the petitioner on the ground that his possession of the land was unauthorised as he entered the land by way of sub-lease which is contrary to the provisions of S. 27 of the Bombay Act. Therefore it becomes clear that as the land-owner had lost his right, on the ground of the expiry of the period of limitation prescribed under S. 29 of the Bombay Act, to apply for taking possession of the land from the tenant and as the original tenant had completely lost interest after the sub-lease in favour of the petitioner. the land-owner could resort to make an application to the concerned authority under S. 84 of the Bombay Act for summary eviction of the petitioner. But after the disposal of the civil petition by the High Court, the landlord instead of resorting to S. 84, proceeded to recognise the petitioner as lawful tenant by accepting the rents.

(Para 10)

Cases Referred: Chronological Paras

AIR 1959 SC 689 4, 5-6
AIR 1941 Bom 144 : 43 Bom LR 232 15
AIR 1925 PC 83 7

V. S. Gunjal, for Petitioner; M. S. Gopal and W. V. Arbatti, for Respondent No. 2.

ORDER:— The petitioner who originally entered as a sub-tenant of agricultural lands, and who claimed occupancy rights under S. 48-A of the Karnataka Land Reforms Act (briefly 'the Act') on the ground that he had become a lawful tenant of the land-owner, but whose claim has been rejected by the Land Tribunal, has presented this writ petition praying for quashing the order of the Land Tribunal.

2. The undisputed facts of the case are these: One Smt. Subhadrabai, mother of respondent 2 was the owner of 29 acres and 5 guntas of land in Sy. No. 474 of Ainapur village in Athani Taluk in Belgaum District. The said lands were leased in favour of Govardhan Dairy Farm Ltd., Poona in the year 1948-49. Govardhan Dairy Farm in turn sub-let the lands in favour of the petitioner. S. 27 of the Bombay Tenancy and Agricultural Lands Act, 1948 (hereinafter referred to as 'the Bombay Act') provides that sub-letting of lands by a tenant is invalid and S. 14 of that Act provides the various grounds on which tenancy can be terminated and one of them is on the ground of sub-letting, but S. 29 (2) of the Bombay Act fixes the period of limitation of two years to make an application for possession, from the date on which the right to obtain possession accrued. Under these provisions Smt. Subhadrabai instituted eviction proceedings before the Tenancy Aval Karkun, Athani, against the original tenant on the ground that they had sub-let the lands in favour of the petitioner. He was also made a party to the proceedings. The claim was rejected and the order was confirmed in appeal by the Assistant Commissioner. The revision petition to the Appellate Tribunal was also dismissed. Against these orders C. P. No. 198/69 was filed in this Court under Article 227 of the Constitution. The said petition was also dismissed on 29-11-1961. Thereafter the name of the petitioner was entered in the revenue records as tenant vide M. C. No. 5955 on 5-1-1962. Thereafter the petitioner paid rents to the mother of the 2nd respondent and after her death he paid the rents every year to her husband i.e. father of the 2nd respondent, who was a Civil Judge and who has received it. A resumption application was filed by the 2nd respondent represented by his elder brother Prahlad against the petitioner in the year 1966 under S. 14 of the Act. The said application came to be dismissed as per order dated 7-10-1972 by the II Additional Munsiff.

3. On the basis of the above facts, the petitioner filed an application in Form No. 7 claiming occupancy rights in respect of 29 acres and 5 guntas of land in Sy. No. 474 of Ainapur village before the Land Tribunal, Athani Taluk under Section 48-A of the Act.

4. The petitioner produced before the Land Tribunal receipts for having paid the land revenue dated 27-4-1960, 11-5-1961, 28-5-1962, 19-6-1963, 23-4-1964, 24-6-1965, 25-4-1966, 4-6-1967, 17-5-1968, 27-5-1969, 21-6-1970, 25-5-1971, 25-6-1972, 20-6-1973, 14-4-1974, 23-5-1975 and 24-4-1976. The petitioner also produced the receipts for having remitted the rents to the land-owner dated 19-4-1960, 27-4-1960, 12-3-1962, 13-3-1964, 8-4-1965, 4-5-1966, 19-7-1967, 7-4-1968, 25-4-1969, 23-5-1971 and 11-3-1972. He also produced the extract from the Mutation Register, according to which, as per Entry No. MC 5955 on 5-1-1962, the name of the petitioner came to be registered as tenant subsequent to the order of this Court. The Land Tribunal by an order of the majority of the members dated 28-5-1977 rejected the claim of the petitioner. The Chairman of the Land Tribunal, however, gave a dissenting judgment upholding the claim of the petitioner. In the order of the majority of the members, it is noticed that none of the facts which are set out earlier which have also been set out in the order of the Land Tribunal are undisputed. But they proceeded on the basis that as the petitioner entered the land as a sub-lessee and as sub-letting was invalid in view of S. 27 of the Bombay Act, the petitioner cannot be considered as a tenant or a person lawfully cultivating the land, on the date of the commencement of the Act, which alone entitles a person to claim occupancy rights. They relied on the decision of the Supreme Court in Waman Shrinivas Kini v. Ratilal Bhagwandas and Co., (AIR 1959 SC 689). In the said decision, it has been held that a sub-lease created though in terms of the agreement cannot be valid when the law prohibited sub-letting and a tenant against whom proceedings for eviction were brought under the provi-

sions of the Bombay Rents, Hotel and Lodging House Rates Control Act on the ground of sub-letting cannot rely on the terms in the lease deed authorising him to sub-lease when the Act itself prohibited sub-letting. The Chairman of the Land Tribunal held that as in the present case, the land-owner has collected the rents from the petitioner and had also filed resumption application under S. 14 (1) of the Act which could have been filed only against a tenant and not against a trespasser, there were strong grounds to hold that there existed a relationship of tenant and land-owner between the petitioner and the 2nd respondent.

5-6. Sri V. S. Gunjal, learned counsel for the petitioner, contended that the order of the Land Tribunal suffers from patent error of law in that, the decision of the Supreme Court in Waman Shrinivas's case (AIR 1959 SC 689) has been wrongly applied. He urged that having regard to the facts and circumstances of the case which are different from that case and the provisions of the Bombay Act, which are not similar in all respects to the provisions of the Act considered in the Supreme Court case there was absolutely no justification for holding that the landlord and tenant relationship had not come into existence and the petitioner was not cultivating the land lawfully on the date of the commencement of the Act.

7. Sri M. S. Gopal, learned counsel appearing for respondent-2, on the contrary, contended that S. 27 of the Bombay Act prohibited the sub-leasing of agricultural lands and no amount of acquiescence on the part of respondent-2 could make the possession of the petitioner lawful. He submitted that the Tribunal was right in applying the ratio of the decision of the Supreme Court referred to earlier. Apart from the Supreme Court case he also relied on the decision of the Privy Council reported in AIR 1925 PC 83 (Surajmull v. Triton Insurance Co.), in which it was held that no Court can enforce as valid which the law declares invalid and obedience to law cannot be dispensed with by consent of parties.

8. The principle laid down in both the decisions are undoubtedly well settled. Therefore I proceed to examine as to whether the act of recognition of sub-tenant as tenant, in the facts and circumstances of this case amounts disobedience of law as the decision in this case entirely depends upon the answer to the said question.

9. S. 27 of the Bombay Act which prohibits sub-letting is as follows:

"27 (1) No sub-division or sub-letting of the land held by a tenant or assignment of any interest therein shall be valid:

Provided that nothing in this sub-section shall prejudicially affect the rights of a permanent tenant.

** **"

S. 14 of the Bombay Act provides for grounds of termination of tenancy. It reads thus:

"14 (1) Notwithstanding any law, agreement or usage, or the decree or order of a Court, the tenancy of any land shall not be terminated—

(a) unless the tenant

(i) ** **

(ii) ** **

(iii) has sub-divided, sub-let or assigned the land in contravention of S. 27.

** **"

S. 29 (2) and (3) of the Bombay Act provides for the procedure for taking possession by a land-owner. It reads as follows:

"29 (1) ** **

(2) No landlord shall obtain possession of any land or dwelling house held by a tenant except under an order of the Mamlatdar. For obtaining such order he shall make an application in the prescribed form and within a period of two years from the date on which the right to obtain possession of the land or dwelling house, as the case may be, is deemed to have accrued to him.

(3) On receipt of application under sub-sec. (1) or (2) the Mamlatdar shall, after holding an enquiry, pass such order thereon as he deems fit."

From the above provisions, it may be seen that S. 27 of the Bombay Act provides that sub-letting by a tenant is not valid and S. 14 authorises a landlord to terminate the tenancy on the ground of sub-letting and S. 29 of the said Act prescribes a period of limitation of two years for obtaining possession of the lands from the date on which the right to obtain possession of the land accrues to the landlord.

10. In the present case, it is not in dispute that the mother of the 2nd res-

pondent, the original land-owner, did institute proceedings against the original tenant for termination of tenancy and eviction on the ground of violation of S. 27 of the Bombay Act by sub-letting the lands to the petitioner from the land in question and that the petitioner was also made a party to the said proceedings. It is also not in dispute that respondent-2 failed before the original authority and also before the appellate and revisional authorities to secure an order of eviction against the tenant M/s. Govardhan Dairy Farm and further that the matter was taken up before this Court in C. P. 198 of 1959 under Art. 227 of the Constitution and that by an order of this Court dated 28-11-1961, the said petition was also dismissed. As is clear from the said decision, which has been produced by the 2nd respondent as Exhibit I along with the statement of objections, that the claim of the 2nd respondent for eviction was dismissed on the ground that it was time-barred. There is no provision in the Bombay Act as to the steps that could be taken up by a landlord for terminating the tenancy or securing possession from a tenant who had sub-let the lands in violation of S. 27 after the expiry of the period of two years prescribed in S. 29 of the Bombay Act. In this situation, the only provision of the Bombay Act under which the 2nd respondent could have sought eviction of the petitioner from the land in question was Sec. 84. The said section reads as follows:

"84. Any person unauthorisedly occupying or wrongfully in possession of any land

(a) the transfer or acquisition of which either by the act of parties or by the operation of law is invalid under the provisions of this Act,

(b) the management of which has been assumed under the said provisions, or

(c) to the use and occupation of which he is not entitled under the said provisions and the said provisions do not provide for the eviction of such persons, may be summarily evicted by the Collector."

The above section provides for the summary eviction of any person unauthorisedly occupying or wrongfully in possession of any land. The 2nd respondent, therefore, could have taken action under S. 84 of the Bombay Act against the petitioner on the ground that his possession of the land was unauthorised as he entered the land by way of sub-lease which is contrary to the provisions of S. 27 of the Bombay Act. Therefore it becomes clear that as the land-owner had lost his right, on the ground of the expiry of the period of limitation prescribed under S. 29 of the Bombay Act, to apply for taking possession of the land from the tenant and as it is not disputed that the original tenant had completely lost interest after the sub-lease in favour of the petitioner, the land-owner could resort to make an application to the concerned authority under S. 84 of the Bombay Act for summary eviction of the petitioner. But after the disposal of the civil petition before this Court, the mother of the 2nd respondent instead of resorting to S. 84, proceeded to recognise the petitioner as lawful tenant by accepting the rents. After her death it is not in dispute that the father of the 2nd respondent has received the rents from the petitioner. Further, it is also not in dispute that the name of the petitioner came to be entered as tenant as per mutation entry (M. C. No. 5955) dated 5-1-1962, a copy of which is produced as Exhibit B along with the writ petition, and no action has been taken for getting the said entry set aside. This circumstance also goes to show that after the dismissal of the civil petition before this Court, respondent-2 instead of applying for summary eviction under Section 84 of the Bombay Act chose to treat the petitioner as tenant. Does this act of the 2nd respondent amount to contravention of any of the provisions of the Bombay Act? There is no provision in the Bombay Act prohibiting a landlord placed in such a situation from recognising the sub-tenant introduced by a tenant as his own tenant.

11. The next question for consideration is whether the ratio of the decision of the Supreme Court referred to above applies to this case. The said case arose under the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. Section 15 of the said Act provided that notwithstanding anything contained in any law, it shall not be lawful after the coming into operation of the Act for any tenant to sub-let the whole or any part of the premises or to assign or transfer in any other manner his interest therein. The said case arose when the landlord brought a suit for ejectment of the ten-

ant inter alia on the ground of sub-lease of the premises by the tenant. The tenant, who was the appellant before the Supreme Court, contended that in the lease deed itself there was a term which clearly authorised the tenant to sub-let the premises. Having regard to the wordings of S. 15 of the said Act, the Supreme Court held that there can be no contract contrary to the provisions of the statute. They further held that S. 15 of the said Act is based on public policy and the said policy cannot be defeated by consent of parties.

12. The present case is clearly distinguishable from the said case. As stated earlier, this is not a case where the landlord is asking for eviction of a tenant of land on the ground that he had sub-let the same in violation of law as in the Supreme Court case. In such a case undoubtedly the tenant, who has contravened the provisions of the Act by sub-letting cannot resist eviction even on the ground of written or oral consent on the part of the landlord for the act of sub-letting. In fact, as narrated earlier, the mother of the 2nd respondent, instituted eviction proceedings against the tenant on the ground of sub-letting. If the ratio of the Supreme Court case referred to earlier were to apply to the facts of the present case, the civil petition of the mother of the 2nd respondent ought to have succeeded and an order for eviction of the tenant including the sub-tenant would have been granted in the said case. But the said civil petition was dismissed, because there is another mandatory provision of law in the Bombay Act itself, namely, the prescribed period of limitation of two years within which alone the landlord could terminate the tenancy and seek possession of the lands on the ground of violation of S. 27 of the Bombay Act by sub-letting and this constitutes a clear distinguishing feature between the present case and the Supreme Court case relied on by the 2nd respondent.

13. Another distinguishing feature of this case as pointed out earlier is that there is no provision in the Bombay Act covering a case of this type where the original tenant after sub-leasing the land completely loses the interest in it and the land-owner begins to receive rents directly from the sub-tenant and also treats him as a tenant in all respects. The undisputed facts of this case are:—

(i) that the landlord had received the rents from the petitioner;

(ii) that no action has been taken by the 2nd respondent against the mutation entry to the effect that the petitioner was a tenant, and

(iii) that an application was made before the Land Tribunal for resumption under Section 14 of the Act.

As stated earlier the only section on which the landlord could have taken action for summary eviction of the petitioner from the land in question was under S. 84 of the Act. But there is no compulsion in any of the provisions of the Bombay Act that the landlord must take action under S. 84 of the Act for eviction. If he had the right to take action for the eviction of the petitioner from the land in question under S. 84 of the Act, he could as well have declined to take action and to treat the petitioner as his lawful tenant.

14. As noticed earlier sub-letting of agricultural lands is prohibited by S. 27 and S. 14 of the Bombay Act confers right on the landlord to terminate the tenancy of a tenant who sub-lets the lands in violation of S. 27, but S. 29 of the Bombay Act prescribes the period of limitation. After the expiry of the period of limitation, there is no remedy that could be resorted to against the tenant and that is what happened to the 2nd respondent in C. P. 198 of 1959 before this Court. In such a situation, there is nothing in S. 27 of the Bombay Act or any other provisions of the Act debarring a landlord to recognise the sub-tenant introduced by the tenant as his tenant. Similarly, it was open for the landlord to have refused to recognise or treat the petitioner as his tenant even after the dismissal of the civil petition by this Court, by refusing to receive rent, and objecting to the entry in the revenue records showing the petitioner as tenant and also by not filing application under S. 14 of the Act for resumption in which event, on the date of commencement of the Act the petitioner could not have been considered as a person cultivating the lands in question lawfully as a tenant, and he could have successfully resisted the claim of the petitioner for occupancy rights in respect of the land in question. Therefore in the act of recognition of a sub-tenant, introduced by a tenant, against whom

there is no remedy provided under the Bombay Act after the expiry of the period of limitation prescribed under S. 29 (2) of the Bombay Act, as his tenant, by the landlord, there is no contravention of the provisions of S. 27 of the Bombay Act as it is not an act of sub-letting which alone is prohibited under S. 27. Such an act falls outside S. 27 and there is no provision in the Bombay Act prohibiting the landlord to treat the erstwhile sub-tenant as his own tenant. Therefore the principle laid down in the Supreme Court case as also in the decision of the Privy Council is clearly inapplicable to the present case.

15. As regards the resumption application filed by respondent, Sri M. S. Gopal, learned counsel for respondent-2, has contended that the petitioner was a minor and he was not represented by his natural guardian i.e. his father, in the said case and, therefore no importance can be attached to the said proceedings. In the said case an elder brother of the petitioner acted as the next friend and not as a guardian. The Court exercising power under the Karnataka Land Reforms Act held as follows on this point:—

"The learned counsel for the opponent further contended that P.W. 1 could not have filed the present application on behalf of the minor applicant, and he is not the next friend of the applicant. But the present application is admittedly filed by P. W. 1 describing himself to be the next friend of the applicant. For that the father of the applicant as his natural guardian or any of the other brothers of the applicant have not at all objected saying P.W. 1 is acting detrimental to the interest and benefit of the applicant. So, P.W. 1 can very well act as the next friend of the applicant and ask for resumption of the land."

Alternatively he also submitted that the filing of resumption application even if it amounts to an admission by the 2nd respondent that the petitioner is a tenant should be confined to that case. In support of this submission, he relied on the decision reported in 43 Bom LR 232 : (AIR 1941 Bom 144) (Government of Bombay v. Narayan Govind Nadgir). Even assuming that the 2nd respondent is right in contending that his elder brother not being a natural guardian could not have filed the application for resumption and the said admission cannot be considered as binding for this case, the fact remains that the rents have been received by the natural guardian of the 2nd respondent and that circumstance is sufficient to hold that the petitioner has been treated as tenant. There is also an additional circumstance that the name of the petitioner came to be entered as tenant as per mutation entry referred to earlier and the said entry has not been challenged by the 2nd respondent. This is consistent with the receipt of rents by the natural guardian from the petitioner right from 1962 i.e., 12 years before the Karnataka Land Reforms Act came into force.

16. In the circumstances, I reverse the finding of the Land Tribunal on the question of tenancy and hold that the petitioner's initial entry into the land in question, as sub-tenant, though contravened S. 27 of the Bombay Act, the act of recogntiion of the petitioner as tenant since 1962 after the 2nd respondent failed to get an order of eviction against the tenant for contravention of S. 27 of the Bombay Act in view of the bar created by S. 29 (2) of the Bombay Act, is not in contravention of any of the provisions of the Bombay Act. Therefore, the petitioner should be deemed to be a person lawfully cultivating the land belonging to the 2nd respondent on the date of the commencement of the Act and, therefore, a 'tenant' as defined under the provisions of the Act.

17. For the reasons stated above, the impugned order of the Land Tribunal, Athani Taluk dated 28-5-1977 produced along with the writ petition as Annexure 'A' is hereby quashed. The case is remanded to the Land Tribunal for considering the application of the petitioner filed in Form No. 7 read with S. 48-A of the Act claiming occupancy rights in respect of 29 acres and 5 guntas of land in S. No. 474 of Ainapur village, Athani Taluk, in the light of the aforesaid finding. No costs.

Petition allowed.

AIR 1978 KARNATAKA 206

M. RAMA JOIS, J.

Ganga Birappa, Petitioner v. State of Karnataka and another, Respondents.

Writ Petn. No. 6456 of 1977, D/- 3-1-1978.*

Karnataka Acquisition of Land for Grant of House Sites Act (18 of 1973), Ss. 3 (3) and 3 (4) — Rules framed under the Act Rr. 8 and 9 — No order under S. 3 (3) before issuing notification under S. 3 (4) — Notification is liable to be quashed.

The clear effect of sub-sec. (3) of S. 3 of the Act read with Rules 8 and 9 of the Rules is that after the receipt of the report by the Assistant Commissioner along with his recommendation, the Deputy Commissioner has to apply his mind to the record so sent to him and to pass orders under sub-sec. (3) of S. 3 of the Act. It is only after passing an order under that sub-section deciding in favour of the acquisition of the lands proposed to be acquired, the Deputy Commissioner gets power to direct the issue of notification under sub-sec. (4) of S. 3 of the Act, as is made clear by the opening words in sub-sec. (4) of S. 3. (Paras 4, 8, 8A)

C. J. B. Rao, for Petitioner; V. C. Brahmarayappa, Govt. Pleader, for Respondents Nos. 1 and 2.

ORDER:— The petitioner is the owner of 1 acre and 20 guntas of land in Sy. No. 150/1 of Ayyanahalli Kasaghatta village, Doddaballapur Taluk. By notification dated 27-3-1976 issued under sub-sec. (1) of S. 3 of the Karnataka Acquisition of Land for Grant of House Sites Act, 1972 (hereinafter referred to as 'the Act'), the Deputy Commissioner, Bangalore District, proposed to acquire the aforesaid land belonging to the petitioner for the purpose of granting house sites to the weaker section of the people. The petitioner was notified about the proposed acquisition and was called upon to file his objection, if any, to the acquisition. The petitioner submitted his objections within the prescribed time. Thereafter the Assistant Commissioner, Doddaballapur Sub-Division to whom the power to enquire and report under sub-sec. (3) of S. 3 of the Act has been delegated, conducted the enquiry, heard the petitioner and the Block Development Officer, and submitted his report to the Deputy Commissioner. Thereafter, by Notification dated 7-6-1977 issued in exercise of power under sub-sec. (4) of S. 3 of the Act, the Deputy Commissioner, Bangalore District, issued the final notification notifying the acquisition of the aforesaid land belonging to the petitioner. Aggrieved by the said notification, the petitioner has presented this writ petition.

2. Sri C. J. B. Rao, learned counsel for the petitioner, raised the following contention in support of the petition.

3. The final notification issued under sub-sec. (4) of S. 3 of the Act is invalid as it is not preceded by an order of the Deputy Commissioner under sub-sec. (3) of S. 4 of the Act.

4. In order to appreciate the contention of the petitioner, it is necessary to set out the relevant provisions of the Act and the Rules framed under the Act:

S. 3 of the Act reads thus:

"3. Acquisition of land:

1. If at any time, in the opinion of the State Government any land is required for the purpose of providing house sites to the weaker sections of people who are houseless, the State Government may, by notification, give notice of its intention to acquire such land.

2. On the publication of a notification under sub-sec. (1), the State Government shall serve notice upon the owner or where the owner is not the occupier, on the occupier of the land and on all such persons known or believed to be interested therein to show cause, within thirty days from the date of service of the notice, why the land should not be acquired.

3. After considering the cause, if any, shown by the owner of the land and by any other person interested therein, and after giving such owner and person an opportunity of being heard, the State Government may pass such orders as it deems fit.

4. After orders are passed under sub-sec. (3), where the State Government is satisfied that any land should be acquired for the purpose specified in the notification issued under sub-sec. (1) a declaration shall, by notification be made to that effect. ** **"

*(To quash the order of Deputy Commissioner, Bangalore Dist., Bangalore. D/- 7-6-1977.)

Rules 6, 8 and 9 of the Rules framed under the Act read thus:

"6. Hearing of Objections:

1. If a statement of objections is filed after the dates specified in the notice under sub-sec. (2) of S. 3 or by a person who is not interested in the land, it shall be summarily rejected.

2. If any objection is received from a person interested in the land on or before the date specified in the notice under sub-sec. (2) of S. 3, the Assistant Commissioner shall fix a date for hearing the objections and give notice thereof to the objectors. Copies of the objections shall also be sent to the Block Development Officer or the Chief Officer, as the case may be, who may submit a statement by way of answer to the objections.

3. On the date fixed for enquiry or on any other date to which the enquiry may be adjourned by him, the Assistant Commissioner shall hear the objector or his Advocate and the Block Development Officer or the Chief Officer or their representative, as the case may be and record any evidence that may be produced in support of the objections.

8. Assistant Commissioner to report to Government:

On completion of the enquiry, the Assistant Commissioner shall as expeditiously as possible submit his report and recommendations as to each objection, whether admissible or inadmissible, for the orders of the State Government under sub-sec. (3) of S. 3:

"9. Consideration of Objections and Issue of Final Notification:

On consideration of the objections and the report of the Assistant Commissioner, if the State Government decides,—

(a) that the land should be acquired for the purpose specified in the Notification issued under sub-sec. (1) of S. 3, it shall, by notification, make a declaration in Form 'C' under sub-sec. (4) of S. 3,

(b) that the land should not be acquired, it shall publish a notification cancelling the notification issued under sub-sec. (1) of S. 3."

As can be seen from sub-sec. (1) of S. 3 of the Act, it provides for the issue of a preliminary notification giving notice of the intention to acquire any particular land required for the purpose of the Act. Sub-sec. (2) of S. 3 provides for service of notice upon the owner and such other person who is interested in the land calling upon them to show cause within 30 days from the date of service of notice on them as to why the land should not be acquired. The power given to the State Government under sub-secs. (1) and (2) of S. 3 has been delegated to the Deputy Commissioner and Assistant Commissioner, respectively, by notification issued by the Government in exercise of the power conferred under S. 6 of the Act. Sub-sec. (3) of S. 3 prescribes the most important procedure to be followed in the acquisition proceedings initiated under sub-sec. (1). The functions of the authority under sub-sec. (3) of S. 3 consist of two parts:

(1) to conduct enquiry by considering the cause, if any, shown by the owner of the land or by any other person interested therein by giving them an opportunity of hearing; and

(2) to pass orders on the basis of the enquiry so held.

By notification dated 13-4-1976 issued in exercise of power under S. 6 of the Act, the State Government has delegated the first part of the power viz., of holding enquiry under sub-sec. (3) of S. 3 of the Act to the Assistant Commissioner and the second part of the power to pass orders under sub-sec. (3) of S. 3 of the Act to the Deputy Commissioner. Consequently the Assistant Commissioner, after holding the enquiry under sub-sec. (3) of S. 3 of the Act in accordance with R. 6 aforesaid, has to submit his report to the Deputy Commissioner and the Deputy Commissioner is required to pass orders under sub-sec. (3) of S. 3 of the Act. Sub-sec. (4) of S. 3 of the Act provides that after the orders are passed under sub-sec. (3) of S. 3 and in cases where the State Government is satisfied that the land proposed should be acquired for the purpose specified in the preliminary notification issued under sub-sec. (1) of S. 3, a declaration shall be made by the issue of a notification to that effect as provided under sub-sec. (4) of S. 3 of the Act. The power of the Government under sub-sec. (4) of S. 3 is also delegated to the Deputy Commissioner in the aforesaid notification.

4. Now coming to the Rules, R. 6 of the Rules prescribes the procedure regarding hearing of objections. According to sub-rule (1) of R. 6, objections filed after the period prescribed in the notice issued under sub-sec. (2) of S. 3 of the Act are liable to be rejected summarily. Sub-rule (2) of R. 6 provides that

if objections are received from any person, within the stipulated time the Assistant Commissioner should fix a date for hearing and give notice to that effect to the concerned objectors. The said sub-rule further provides that copies of the objections filed by the parties should also be sent to the Block Development Officer or Chief Officer, as the case may be, for submitting his statement by way of answer to the objections. Sub-rule (3) of R. 6 provides that on the date fixed for enquiry or on any other date to which the enquiry may be adjourned by him, the Assistant Commissioner should hear the objector or his advocate and the Block Development Officer or the Chief Officer as the case may be, or their representative and record any evidence that may be produced in support of the objections. Rule 8 provides that after holding enquiry in accordance with R. 6, the Assistant Commissioner should submit his report and recommendation to the Deputy Commissioner as expeditiously as possible for the orders of the State Government under sub-sec. (3) of S. 3 of the Act. Rule 9 of the Rules provides that if on consideration of the objections and the report of the Assistant Commissioner, the State Government (Deputy Commissioner) decides that the land proposed to be acquired should be acquired for the purpose of sub-sec. (1) S. 3 of the Act, a notification shall issue in Form No. C making a declaration to that effect under sub-sec. (4) of Sec. 3 of the Act. The clear effect of sub-sec. (3) of S. 3 of the Act read with Rr. 8 and 9 of the Rules is that after the receipt of the report by the Assistant Commissioner along with his recommendation, the Deputy Commissioner has to apply his mind to the record so sent to him and to pass order under sub-section (3) of Section 3 of the Act. The opening words of sub-sec. (4) of S. 3 of the Act provide that after orders are passed under sub-sec. (3) of S. 3 of the Act, where the State Government (Deputy Commissioner) is satisfied that any land should be acquired for the purpose specified in the notification issued under sub-sec. (1) of S. 3 of the Act, a declaration shall be made to that effect by notification.

5. As stated earlier, the contention of the petitioner is that after the receipt of of the report under sub-sec. (3) of S. 3 of the Act from the Assistant Commissioner, the Deputy Commissioner straightway proceeded to issue notification under sub-sec. (4) of S. 3 without passing any order as required under sub-sec. (3) of S. 3 of the Act.

6. The contention, however, advanced on behalf of the respondents is that the Deputy Commissioner has passed an order under sub-s. (3) of S. 3 before the issue of the impugned notification. In order to verify as to the correctness of the above submission, I looked into the original records which were produced at the time of hearing. The records disclosed that after the Assistant Commissioner submitted his report, the office of the Deputy Commissioner prepared a note and placed the same before the Deputy Commissioner for orders. The relevant portion is contained in paras. 11 and 12 of the proceedings. They read as follows:—

"11. The letter No. RHS 233/75-76 dated 18-5-77 of the A.C.. is put up for kind perusal. The 3 (1) notification has been published in the Gazette D/- 14-4-76. 'B' Notice has been served on the land owner. The Anubhavadar of the land has filed objection stating that S. No. 107 is more convenient for the formation of sites than the S. No. 150/1. The A. C. has heard the objector in presence of the B.D.O. The B.D.O. has stated that S. No. 107 is in a low level and it is full of rocks. The A.C. has requested to overrule the objections and to issue notification under S. 3 (4) to acquire A 1-20 gs. of land in S. No. 150/1 of Iyyanahalli H/o Kasaghatta village, D. B. Pur Taluk.

12. Hence for orders on para. 11."

After setting out the events in para. 11, in para. 12 orders of the Deputy Commissioner was sought for on para. 11. The next immediate para is para. 13 which is in the handwriting of the Deputy Commissioner and the same reads as follows:

"13. P1 put up 3 (4) draft notification also in all such cases the A.C. has recommended for issue of 3 (4) notification, it should be done."

This order was made on 1-6-1977. By this order the Deputy Commissioner straightway directed the issue of final notification without applying his mind and passing an order on the report of the enquiry sent by the Assistant Commissioner on the objection to the acquisition filed by the petitioner which is a mandatory requirement under sub-s. (3)

of S. 3 of the Act which requirement is further made clear by the opening words of sub-sec. (4) of S. 3 of the Act. Immediately after the said order was passed, in para. 14 a draft order was put up on 7-6-1977 and was signed by the Deputy Commissioner. The said order dated 7-6-1977 is also found in the records. It is a cyclostyled pro forma in which the final decision of the Deputy Commissioner directing the issue of a notification under sub-sec. (4) of S. 3 of the Act was incorporated. The said order also being relevant is extracted below:

"PROCEEDING OF THE DEPUTY COMMISSIONER, BANGALORE DISTRICT, BANGALORE.

ORDER No. RHS (2) 554/75-76 Dated 7-6-77.

SUBJECT: Acquisition of A-1-20 guntas of land in S. No. 150/1 of Iyyanahalli H/o Kasaghatta village, Doddaballapur Taluk.

"Reference; Letter No. RHS-233/75-76 D/- 18-5-1977 from the Assistant Commissioner, Doddaballapur Sub-Division, sending records for issue of Final Notification under Sec. 3 (4) of the Act:

ORDER

In the circumstances reported by the Assistant Commissioner, Doddaballapur Sub-Division, Bangalore, I am satisfied that the Lands specified in the annexed notification should be acquired for the public purpose of granting house sites to weaker sections of the people and therefore sanction is accorded under S. 3 (4) of the Karnataka Acquisition of Land for Grant of House Sites Act 1972 (18 of 1973) to take further action by the Assistant Commissioner for the acquisition of the said land.

The annexed notification in Form 'C' in English is forwarded to the Compiler, Karnataka Gazette for publication in the Karnataka Gazette Extraordinary Dated 23-6-77.

The cost of acquisition will be met out of the allotment provided to the Assistant Commissioner, Doddaballapur Sub-Division, Bangalore.

Sd/- S. S. Meenakshi Sundaram,
Deputy Commissioner,
Bangalore District."

8. The records disclose that no order was passed by the Deputy Commissioner, which he was required to pass under sub-sec. (3) of Sec. 3 of the Act before issuing the notification under sub-s. (4) of S. 3 of the Act. As already pointed out, under sub-sec. (3) of S. 3 of the Act the power to enquire has been delegated to the Assistant Commissioner, but the power to pass final orders on the report of the Assistant Commissioner has been delegated to the Deputy Commissioner. It is only after passing an order under that sub-section deciding in favour of the acquisition of the lands proposed to be acquired, the Deputy Commissioner gets power to direct the issue of notification under sub-sec. (4) of S. 3 of the Act, as is made clear by the opening words in sub-sec. (4) of S. 3.

8A. The whole object of sub-sec. (3) of S. 3 read with R. 8 of the Rules is that after the report of the Assistant Commissioner is received along with the objections of the persons aggrieved, the Deputy Commissioner has to apply his mind to the objections of the parties concerned, the views expressed by the Block Development Officer or the Chief Officer, as the case may be, and also the report of the Assistant Commissioner. It is open for the Deputy Commissioner to either accept the objection to the acquisition raised by the parties and drop the acquisition or to reject the same and to proceed to acquire the lands as proposed. It is only after passing an order under sub-sec. (3) of S. 3 of the Act rejecting the objection to the proposed acquisition and holding that the acquisition should be made that the Deputy Commissioner gets jurisdiction to direct issue of notification under sub-sec. (4) of S. 3 of the Act. In the present case, as pointed out earlier there is failure on the part of the Deputy Commissioner to comply with the mandatory requirements of sub-sec. (3) of S. 3 of the Act. Therefore the contention urged for the petitioner has to be accepted.

9. For the reasons aforesaid, the rule is made absolute. The final notification No. RHS (2) 554/75-76 issued by the Deputy Commissioner, Bangalore District, under sub-sec. (4) of S. 3 of the Karnataka Acquisition of Land for Grant of House Sites Act, 1972 (Karnataka Act No. 18 of 1973) acquiring the land measuring 1 acre and 20 guntas belonging to the petitioner in Sy. No. 150/1 situate in Iyyanahalli H/o Kasaghatta village, Doddaballapur Taluk, is quashed. The authorities will be at liberty to proceed with the acquisition from the stage at which the illegality was committed as pointed out in this order.

10. The petitioner is entitled to the costs. Advocate's fee Rs. 100/-.

Rule made absolute.

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D. M. CHANDRASHEKHAR, C. J. AND N. D. VENKATESH, J.

Kallaiah Nagaiah Koradhanyamath, Petitioner v. Basappa Tirakappa Buradikatti and others, Respondents.

Writ Petn. No. 6423 of 1977, D/- 22-6-1978.*

(A) Karnataka Agricultural Produce Marketing (Regulation) Act (27 of 1966), S. 41 (4) — Rules under Act, R. 45 (2) — Absence of statutory provision laying down grounds for setting aside election — Power of Tribunal to set aside election on well accepted grounds.

Even in the absence of any express statutory provision in the Act or the Rules laying down the ground on which an election can be set aside, an Election Tribunal can set aside an election on any of the well accepted grounds and one of such grounds is that the disobedience of, or non-compliance with, any statutory provision governing such election, has materially affected the result of such election. 1975 (2) Kant LJ 235 Foll., Observations in AIR 1972 Mys 226 held obiter. (Para 10)

In the present case, since there was equality of votes between the petitioner and respondent No. 1, the vote cast by respondent No. 11 is very likely to have materially affected the result of the election though on account of secrecy of ballot it could not be ascertained whether respondent No. 11 voted for petitioner or respondent No. 1. Hence, the District Judge was right in holding that voting by respondent No. 11 who was not entitled to vote, had materially affected the result of the election and rendered the election invalid. (Para 11)

(B) Constitution of India, Art. 226 — Jurisdiction of High Court is discretionary and is to be exercised in aid of justice — Allowing an illegal election to stand is not a proper exercise of jurisdiction.

It is well settled that the jurisdiction of the High Court under Art. 22(of the Constitution is discretionary and has to be exercised only in aic of justice. Even assuming that th(District Judge functioning as Election Tribunal could not set aside that election in the absence of express statutory provision laying down the grounds on which such election could be set aside, the High Court need not interfere with the decision of the District Judge setting aside the election when the result of election, as declared by the Returning Officer, was obviously illegal. In such circumstances, interfering with the order of the District Judge would only result in allowing an illegal election to stand and it would not be proper exercise of discretion to interfere with the judgment of the District Judge. (Para 12)

Anno: AIR Comm. Const. of India, (2nd Edn.), Art. 226, N. 18.

Cases Referred: Chronological Paras

1975 (2) Kant LJ 235 1, 8, 10

AIR 1972 Mys 226 : (1972) 1 Mys LJ 121 1, 6

K. A. Swami, for Petitioner; B. G. Sridharan, for Respondent No. 1. V. T. Raya Reddy, for Respondents 3, 9, 10, 12 and 13; Jayakumar Patil, for Respondent No. 15.

CHANDRASHEKHAR, C. J.:— This petition under Art. 226 of the Constitution has been referred to a Division Bench by Rama Jois, J., as in his opinion there appeared to be conflict between the decision of a Bench of this Court in Hayat Beig v. Muniyenkate Gowda (1972 (1) Mys LJ 121): (AIR 1972 Mys 226) and the decision of a single Judge in Channegowda v. State of Karnataka, 1975 (2) Kant LJ P. 235).

2. This petition is directed against the judgment of the District Judge, Dharwar, in an election petition under S. 41 (4) of the Karnataka Agricultural Produce Marketing (Regulation) Act, 1966 (hereinafter to be referred to as 'the Act'), and R. 45 (2) of the Rules thereunder (hereinafter referred to as 'the Rules').

3. Petitioner and respodent 1 were candidates for an election to the office of the Chairman of the Agricultural Produce Market Committee, Ranibennur. The Returning Officer declared that each of them had secured

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*(To quash order passed by Dist J. Dharwar, D/- 25-7-1977).

seven votes. On drawing lots, the petitioner was declared as having been elected. Respondent 1 challenged that election in an election petition before the learned District Judge, who, by the impugned judgment, set aside the result of the election.

4. Though the learned counsel for the petitioner assailed both the grounds on which the learned District Judge set aside the election of the petitioner, it is sufficient for purposes of this petition to deal with only one of them, namely, that respondent No. 11, the Assistant Secretary of Agricultural Produce Market Committee, was not competent to vote.

5. Section 11 of the Act which provides for the constitution of the market Committee other than the first one, states, inter alia, that one of the members of the Committee shall be an officer subordinate to the Chief Marketing Officer, nominated by the Chief Marketing Officer. For the Agricultural Market Committee, Ranibennur, the Chief Marketing Officer had nominated the District Marketing Officer, Dharwar District, as such member. It is common ground that at the time of the election, that District Marketing Officer had been transferred and respondent No. 11, the Assistant Secretary, Agricultural Produce Market Committee, Hubli, was placed in charge of the current duties of the Office of the District Marketing Officer and voted in that election. The learned Disrict Judge has held that since respondent No. 11 was only placed in such charge, he could not have exercised the statutory power of voting which the District Marketing Officer only could exercise and that his vote had materially affected the result of the election and hence rendered the election invalid. The view taken by the learned District Judge is supported by several decisions of this Court and of the Supreme Court. Sri K. A. Swamy, learned counsel for the petitioner, was not able to show that this view of the learned District Judge was incorrect.

6. However, Sri K. A. Swamy contended that since neither the Act nor the Rules provide on what grounds an election to the office of the Chairman of a Market Committee, can be set aside, the learned District Judge could not have set aside the election in spite of his having been empowered under S. 41 of the Act to decide any dispute relating to the validity of such election. In support of his contention Sri K. A. Swamy strongly relied upon the decision of a Division Bench of this Court in Hayat Beig v. Munivenkate Gowda (AIR 1972 Mys 226) (supra). There, an election of the Chairman of a Village Panchayat had been challenged in an election petition before the Munsiff who is constituted as Election Tribunal under R. 17 of the Karnataka Village Panchayat (Election of Chairman and Vice-Chairman) Rules, 1959. The learned Munsiff set aside that election and his decision was assailed in a writ petition. While quashing his decision, the Division Bench observed thus:

"It appears to us that the Rule making authority has by oversight omitted to frame a Rule stating the grounds on which the election of a returned candidate shall be declared to be void. In the absence of any such Rule, we fail to see how the Munsiff exercising his powers under Sec. 30 (2) read with Rr. 17 and 18 of the Rules can try an Election Petition. The Munsiff under the Act exercises his powers not as a Court but as a Tribunal. He has no inherent powers of a Court. Therefore the Munsiff could not have set aside the election of the petitioner."

7. Sri K. A. Swamy, submitted that sub-sec. (2) of S. 30 of the Karnataka Village Panchayats and Local Boards Act and R. 17 of the Rules thereunder, are in pari materia with S. 41 (4) of the Act and R. 45 (2) of the Rules and that hence, the ratio of that decision would apply with equal force to this case also and that the learned District Judge could not set aside the election petition.

8. As pointed out by Venkataramiah, J. in Channegowda v. State of Karnataka, 1975 (2) Kant LJ 235 (supra) the two grounds which persuaded the Division Bench in Hayat Beig's case to quash the decision of the learned Munsiff were:

(i) that an election of a returned candidate could not be set aside in the absence of proof that on account of non-compliance with any law, the result of the election in so far as it

concerned the returned candidate, had been materially affected;

(ii) the Munsiff who was functioning as a Tribunal and not as a Court had no inherent powers of a Court and therefore, he could not have set aside the election in the absence of any specific statutory provision which laid down the grounds on which the election could be set aside.

9. When once the Division Bench held in Hayat Beig's case that the result of the election had not been shown to have been materially affected by any non-compliance with any law, there was no need for the Division Bench to go into the question whether the Munsiff, functioning as the Election Tribunal, could set aside an election in the absence of any specific statutory provision laying down the grounds on which an election could be set aside. So, in our opinion, what the Division Bench in Hayat Beig's case has said on this point, is obiter dictum and hence is not binding on us.

10. We are in respectful agreement with the view taken by Venkataramiah, J. in Channe Gowda's case 1975 (2) Kant LJ 235 that even in the absence of any express statutory provision laying down the ground on which an election can be set aside, an Election Tribunal can set aside an election on any of well accepted grounds and one of such grounds is that the disobedience of, or non-compliance with, any statutory provision governing such election, has materially affected the result of such election.

11. In the present case, since there was equality of votes between the petitioner and respondent No. 1, the vote cast by respondent No. 11 is very likely to have materially affected the result of the election though on account of secrecy of ballot it could not be ascertained whether respondent No. 11 voted for petitioner or respondent No. 1. Hence, the learned District Judge was right in holding that voting by respondent No. 11 who was not entitled to vote, had materially affected the result of the election and rendered the election invalid.

12. Moreover, it is well settled that the jurisdiction of this Court under Art. 226 of the Constitution, is discretionary and has to be exercised only in aid of justice. Even assuming for the sake of argument that the learned District Judge functioning as Election Tribunal could not set aside that election in the absence of express statutory provision laying down the grounds on which such election could be set aside, this court need not interfere with the decision of the District Judge setting aside the election when result of election, as declared by the Returning Officer, was obviously illegal. In such circumstances, interfering with the order of the District Judge would only result in allowing an illegal election to stand and it would not be proper exercise of discretion of this Court to interfere with the judgment of the learned District Judge.

13. In the result, the petition fails and the rule issued in this petition is discharged.

In the circumstances of the case, parties will bear their own costs.

Order on the oral application for grant of certificate of fitness to appeal to the Supreme Court.

After we dictated the above order in open Court, the learned counsel for the petitioner made an oral application praying for grant of a certificate of fitness to appeal to the Supreme Court. In our opinion, no substantial question of law of general importance which needs to be decided in Supreme Court, can be said to arise out of our order.

Hence, we decline to grant the certificate prayed for.

Rule discharged and certificate of fitness refused.

AIR 1978 KARNATAKA 212

M. RAMA JOIS, J.

Sanna Basappa Shankarappa Ballagodu, Petitioner v. Basappa Sathyappa and others, Respondents.

Writ Petns. Nos. 3432 and 3433 of 1976, D/- 13-1-1978.*

Karnataka Land Reforms Act (10 of 1962), S. 48-A — Karnataka Land Reforms Rules (1974), R. 17 — Conferment of occupancy rights — Procedure — Tri-

*(To quash the order of Land Tribunal, Badami etc. D/- 23-11-1975.)

FV/FV/C260/78/AS/SNV.

bunal must hold an enquiry and give its finding after considering evidence adduced by parties in support of their claims.

Where the Tribunal got printed "Ready-made Orders" for its use and passed orders conferring occupancy rights by filling up certain particulars in those forms mechanically, without enquiry, without applying its mind.

Held that the orders were passed in gross violation of mandatory provisions of S. 48-A of the Act and Rule 17 of the Karnataka Land Reforms Rules. It was obligatory for the Tribunal to hold enquiry and give its finding after considering the evidence adduced by the parties in support of their respective claims.

(Paras 3, 4, 5)

U. L. Narayana Rao, for Petitioner in both the petitions; J. M. Riazuddin (for No. 1) in W. P. No. 3432 of 1976 and K. S. Desai (for No. 1) in W. P. 3433 of 1976, for Respondents.

ORDER:— These two writ petitions are presented by the same person against two orders of the Land Tribunal, Badami Taluk dated 23-11-1975 produced as Exs. 'A' and 'B' along with the writ petition. By the said orders the Land Tribunal conferred occupancy rights in favour of the first respondent in each of these writ petitions in respect of 6 acres of land in S. No. 36 and 5 acres in S. No. 81 of Pattadakal village.

2. Sri U. L. Narayana Rao, learned counsel for the petitioner contended that the Tribunal had held no enquiry as contemplated under S. 48A of the Karnataka Land Reforms Act read with Rule 17 of the Karnataka Land Reforms Rules. He pointed out that the Land Tribunal has filled up the particulars furnished by the applicant in his Form No. 7 on printed forms and that constitutes the order of the Land Tribunal.

3. I have gone through the certified copies of Exs. 'A' and 'B'. The submission made by Sri U. L. Narayana Rao is fully justified. Except the filling up of the Survey numbers, their extent, village in which the lands are situated and the name of the parties, in the printed form the rest of the order is stereotyped and printed. It is surprising that the Tribunal has got printed "Ready-made orders" for its use and has passed the impugned orders by filling up those forms mechanically, without enquiry, without applying its mind in gross violation of the mandatory provisions of the Land Reforms Act.

4. It is unfortunate that the Land Tribunal which is invested with statutory power to decide the valuable rights of the parties should have passed orders in a callous manner without applying its mind and without holding an enquiry which cannot inspire confidence in the parties seeking justice from the Tribunal. In the circumstances, it is necessary to observe that the Tribunal should bear in mind the provisions of S. 48A of the Act and R. 17 of the Karnataka Land Reforms Rules, which make it obligatory for the Tribunal to hold enquiry and give its finding after consideinrg the evidence adduced by the parties in support of their respective claims.

5. For the reasons stated above, the rule is made absolute. The impugned orders of the Land Tribunal, Badami Taluk dated 23-11-1975 (Exs. 'A' and 'B') are quashed. The cases are remanded to the Land Tribunal for fresh disposal in accordance with law. No costs.

Rule made absolute.

AIR 1978 KARNATAKA 213

K. JAGANNATHA SHETTY, J.

Mahalingeshwara Devaru and another, Appellants v. Seetharama Bhatta and another, Respondents.

Regular Second Appeal No. 712 of 1972, D/- 9-6-1978.

(A) Civil P. C. (5 of 1908), S. 11 — Res judicata — Test — Identity of property — Relevancy.

The primary test of res judicata depends upon the identity of title in the two litigations and not the identity of the actual property involved in the two cases. Therefore, even if the property involved in the previous suit was different, that cannot be an impediment to invoke the principles of res judicata. The plea of res judicata could also be established on the record of the judgment and decree in the previous suit, and not necessarily on the production of the pleadings.

(Paras 3, 4)

Anno: AIR Comm. C. P. C. (9th Edn.), S. 11, Notes 70, 72, 39.

(B) Civil P. C. (5 of 1908), S. 11 — Res judicata — Earlier decision rendered wrongly — Whether operates as res judicata.

The principle of res judicata is not affected by a subsequent contrary view taken by a superior Court in any other case. A wrong decision by a Court having jurisdiction is as much binding between the parties as a right one and may be superseded only by appeals to higher tribunals or other procedure like review which the law provides. Therefore, even if a decision happens to be wrong in view of the later judgment of the High Court, it is binding between the parties and its legal effect remains the same whether the reason for the decision was sound or not. AIR 1966 SC 1061, Rel. on. (Para 4)

Anno: AIR Comm. C. P. C. (9th Edn.), S. 11 N. 2.

Cases Referred: Chronological Paras

AIR 1966 SC 1061 : 1966 Cri LJ 805 4

AIR 1953 SC 33 3

Padubidri Raghavendra Rao, for Appellants; B. P. Holla, for Respondent 1 Respondent 2 Served and unrepresented.

JUDGMENT:— This Second Appeal by the plaintiff is directed against the judgment and decree of the Additional District Judge, South Kanara, in R. A. No. 13 of 1969 affirming the decree in O. S. No. 13 of 1967 on the file of the Principal Civil Judge, Udupi, South Kanara District. The suit was brought by the temple called "Sree Mahalingeshwara Devaru" of Havanje village, Udupi Taluk for declaration of title in respect of the suit A and B schedule properties and for recovery of possession on the ground that the defendant who was an Archak of the temple failed to perform "Archaka service" and has no right to remain in possession. The defendant has not been doing any "Archaka service" since 1949-50 despite the demand from the temple authorities. The patta of the A Sch. properties stands exclusively in his name and patta of the B Sch. properties stands jointly in the name of the temple and the defendant. The said properties are comprised in Warg Nos. 31 and 36. The case of the plaintiff was that the suit properties are 'Uttara properties' of the temple and the defendant could remain in possession and take the income thereof so long as he performed Poojas in the temple and since he had not performed Poojas since 1949-50, he has no right to remain in possession of the temple properties.

Both the Courts dismissed the suit firstly on the ground that the temple has no right to recover possession from the defendant for his failure to perform "Archaka service" in the temple and secondly on the ground that the decision in a previous litigation O. S. No. 12 of 1942 operated as res judicata as between the parties. There are also other grounds held against the plaintiff. It may not be necessary to refer to them. It seems to me that the plaintiff must fail if the decision of the trial Court on the question of res judicata is found to be correct. But, if that finding is not correct, then it may be necessary to go to the legality of the other findings recorded by the Courts below. I will, therefore, examine the correctness of the conclusion of the Courts below on the question of res judicata having regard to the decision in O. S. No. 12 of 1942.

2. The facts leading to the institution of O. S. No. 12 of 1942 are these: Survey No. 87/13 which also belonged to Warg Nos. 31 and 36 was the subject matter of litigation. The present defendant's father Shama Bhatta filed the suit against the said temple contending that that property was his ancestral property and that he was unreasonably dispossessed by the defendants therein. For the temple, it was contended that the property was its "Uttara property" covered by the Durmuki Chitta 1803; that the defendant was only an Archaka of the temple and he had no title over the property. The trial Court held that it was not the "Uttara property" of the temple. That decision was affirmed in the appeal by the Subordinate Judge. Ext. D-2 is a certified copy of the judgment of the trial Court and Ext. D-4 is a certified copy of the appellate judgment. The question is whether the finding recorded in the previous suit operates as res judicata in the present suit.

3. The primary test of res judicata depends upon the identity of title in the two litigations and not the identity of the actual property involved in the two cases. That is the principle engrafted on the general rule of res judicata by Section 11 of the Code of

Civil Procedure. (Smt. Raj Lakshmi Dasi v. Banamali Sen, AIR 1953 SC 33). Therefore, even if the property involved in the previous suit was different, that cannot be an impediment to invoke the principles of res judicata. It is not in dispute that the properties involved in both the cases having a comomn title comprised in the same Warg Nos. 31 and 36. Therefore, the finding that the said property was not "Uttara property' of the temple arrived at in the previous suit must be held to be binding on the parties to the present suit.

4. It was, however, urged by Sri Padubidri Raghavendra Rao, learned counsel for the appellant that the pleadings of the previous suit were not produced in the present suit and therefore the plea of res judicata cannot be examined. It is true that those pleadings were not produced by the defendant. But the omission to produce the pleadings is not so material in the present case. The judgments in the previous case contain a summary of those pleadings. The plea of res judicata could also be established on the record of the judgment and decree in the previous suit. and not necessarily on the production of the pleadings. It was, however, urged by Sri Raghavendra Rao that the decision in O. S. No. 12 of the 1942 should not be relied upon in view of the later decision of the Madras High Court in S. A. Nos. 117 to 123 of 1950 which has been produced in the present case as Ext. P. 12, wherein it was held that the properties in the hands of the Archakas were not their absolute properties and the deity had the right to the properties in Warg Nos. 31 and 36.

It is true that the decision of the Madras High Court in the aforesaid case, left by itself would have been of great assistance to the case of the plaintiff in the present case. In that case, it was held that the properties in the hands of the Archakas of the temple were not their absolute properties. That decision was based on the agreement termed as "Taha Karar" entered into between Raghuramacharya representing the branch of Dasa Adiga and others. The predecessors-in-title of the defendant was the 4th party to that document. That document was marked as Ext. D-4 in that suit. The said document has been marked as Ext. P-15 in the present case. The decision of the Madras High Court on the nature of the document may be relevant as a binding precedent. But the decision cannot have the effect of overruling the earlier view taken in O. S. No. 12 of 1942 by the Subordinate Judge. The appeal S. A. Nos. 117 to 123 of 1950 in which the Madras High Court gave its verdict, was not an appeal arising out of O. S. No. 12 of 1942. The principle of res judicata is not affected by a subsequent view taken by a superior Court in any other case. As the Supreme Court observed in State of West Bengal v. Hemant Kumar, AIR 1966 SC 1061, a wrong decision by a Court having jurisdiction is as much binding between the parties as a right one and may be superseded only by appeals to higher tribunals or other procedure like review which the law provides, Therefore, even if I assume that the decision in O. S. No. 12 of 1942 was a wrong judgment in view of the later judgment of the High Court of Madras in S. A. Nos. 117 to 123 of 1950, the earlier judgment does not render it anytheless final and binding between the parties and its legal effect remains the same whether the reason for the decision was sound or not. Therefore, the said decision of the Madras High Court cannot be pressed into service to nullify the principles of res judicata operating in the present case. In view of the decision in O. S. No. 12 of 1942, it must be stated that the properties in question in the present suit are not "Uttara properties" of the temple. That is sufficient to dismiss the plaintiff's suit. I, therefore, affirm the judgments of the lower courts on this ground alone without considering the merits of the other questions urged in the appeal.

5. In the result, the appeal fails and is dismissed. But in the circumstances, I make no order as to costs.

Appeal dismissed.

AIR 1978 KARNATAKA 216

D. M. CHANDRASHEKHAR, C. J. AND N. D. VENKATESH, J.

Anjaneyappa and others, Appellants v. The Deputy Commissioner, Kolar District, Kolar & others, Respondents.

Writ Appeals Nos. 384 to 386 of 1976, D/- 29-5-1978.*

(A) Karnataka Acquisition of Land for Grant of House Sites Act (18 of 1973), Section 2 (3) — Whether Government can acquire land without issuing notification under Section 2 (3).

The clause "as the State Government may, having regard to their economic backwardness, by notification specify" in the definition governs the words "such other class or classes of persons" and not the words "Scheduled Castes or Scheduled Tribes and landless labourers." So far as the Scheduled Castes, Scheduled Tribes and landless labourers are concerned, they have been recognised by the Act itself as constituting weaker sections of people. The sub-section empowers the State Government to specify any other class or classes of persons besides the above three classes of persons as constituting weaker sections of people having regard to their economic backwardness. Hence, even in the absence of any notification under S. 2 (3), it was competent for the authorities to acquire under the Act lands for granting house sites to Scheduled Castes and Scheduled Tribes and landless labourers. (Para 6)

(B) Karnataka Acquisition of Land for Grant of House Sites Act (18 of 1973), S. 3 (3) — Power to hear objections.

What had been superseded by the Notification dated 23-6-1975 was only the Notification dated 10-1-1975 and not the earlier Notification dated 10-10-1973 under which the power to hear objections under S. 3 (3) had been delegated to the Assistant Commissioners and such delegation of power to Assistant Commissioners had not been superseded by any subsequent Notification. Though under the Notification dated 23-6-1975 the powers of the Government under S. 3 (3) of the Act had been delegated to the Deputy Commissioner, such delegation was not inconsistent with the earlier delegation to the Assistant Commissioners of the power to hear objections under S. 3 (3). After 23-6-1975 both the Assistant Commissioners and the Deputy Commissioners had been empowered to hear objections. (Para 16)

(C) Karnataka Acquisition of Land for Grant of House Sites Act (18 of 1973), Ss. 3 (3), (4), 6 — Assistant Commissioner can hear objections and Deputy Commissioner can decide on report of Assistant Commissioner.

In this Act the function of hearing objections to the proposed acquisition is separated from the functions of deciding (after considering such objections) whether or not to acquire the land. Sub-sec. (3) of S. 3 deals with the former function while sub-sec. (4) of that Section deals with the latter function. S. 6 permits delegating different functions and powers of the Government to different authorities. Hence, it is permissible for the Government to delegate to one person or authority its functions and powers under sub-sec. (3) of S. 3 and to another person or authority its functions and powers under sub-sec. (4) of that Section. The rules of natural justice operate only in areas not covered by any law validly made and do not supplant the law of the land but supplement it. Hence it was not correct to say that the Deputy Commissioner who passed the orders under S. 3 (4) to acquire the lands, should have himself heard the objections and that it was not permissible for the Assistant Commissioner to hear the objections and the Deputy Commissioner to decide on the basis of the report of the Assistant Commissioner whether the land should be acquired. AIR 1970 SC 150 Rel. on. (Para 18, 19)

(D) Constitution of India, Art. 226 — Appeal — New point — Contention raising mixed question of law and fact not permitted — Contention however raising pure question of law allowed. (Paras 5, 21)

Anno: AIR Comm. Const. of India, (2nd Edn.) Art. 226, N. 42.

Cases Referred: Chronological Paras

AIR 1970 SC 150 18

AIR 1968 Mys 296: 1968 (1) Kant LJ 113 18

AIR 1959 SC 308 17, 18

*(To quash order passed by Jagannatha Shetty, J. D/- 27-8-1976.)

AIR 1956 SC 285 17

G. Gangi Reddy, for Appellants; Annadanayya Puranik III Addl. Govt. Advocate, for Respondents 1 and 2; K. Subba Rao, for Respondents 3 to 22.

D. M. CHANDRASHEKHAR, C. J.:— These appeals are from the common order of Jagannatha Shetty, J., in W. Ps. Nos. 4428 to 4430 of 1976. The appellants herein were the petitioners therein and will hereinafter be referred to as the petitioners. The respondents herein were respondents therein.

2. In these petitions under Article 226 of the Constitution, the petitioners had impugned the acquisition of their lands for the purpose of providing house sites to the weaker sections of the people under the provisions of the Karnataka Acquisition of Land for Grant of House Sites Act 1972, (hereinafter referred to as the Act). They had contended inter alia, that:

(i) They had no opportunity of being heard as required under R. 6 (3) of the Karnataka Acquisition of Land for Grant of House-sites Rules, 1973, (hereinafter referred to as the Rules) framed under the Act.

(ii) The Assistant Commissioner had no jurisdiction to hear the petitioners' objections to the proposed acquisition of their lands and

(iii) the Deputy Commissioner did not hear the petitioners.

3. The learned single Judge dismissed the petitions holding against the petitioners on all the above three points.

4. In these appeals, Sri Veerabhadrappa, Advocate, who is appearing in certain pending writ petitions in which similar questions are raised, was permitted to intervene and to address arguments.

5. In these appeals, we permitted Sri M. Gangi Reddy, learned Counsel for the appellants, to urge a new contention which had not been urged before the learned single Judge since that contention is purely one of law. That contention is that unless the Government had issued a notification under sub-sec. (3) of S. 2 of the Act specifying who are weaker sections of people, no acquisition could be made under the provisions of the Act. To appreciate this contention, it is necessary to refer to the definition of the expression "weaker sections of people" in sub-sec. (3) of S. 2 of the Act as "persons belonging to the Scheduled Castes or Scheduled Tribes, landless labourers and such other class or classes of persons as the State Government may, having regard to their economic backwardness, by notification specify."

6. The clause "as the State Government may, having regard to their economic backwardness, by notification specify" in the above definition, governs the words "such other class or classes of persons" and not the words "Scheduled Castes or Scheduled Tribes and landless labourers". So far as the Scheduled Castes, Scheduled Tribes and landless labourers are concerned, they have been recognised by the Act itself as constituting weaker sections of people. The sub-section empowers the State Government to specify any other class or classes of persons besides the above three classes of persons as constituting weaker sections of people having regard to their economic backwardness. The Scheduled Castes, Scheduled Tribes and landless labourers are statutorily recognised as constituting weaker sections of people and there is no need for the Government to specify them by a notification under S. 2 (3). Hence, even in the absence of any notification under S. 2 (3), it was competent for the authorities to acquire under the Act lands for granting house sites to Scheduled Castes and Scheduled Tribes and landless labourers. Thus, we are unable to accept the contention of Sri Gangi Reddy and Sri Veerabhadrappa that unless the Government had issued a notification under Sec. 2 (3) specifying the weaker sections of people, the Government could not acquire lands under the Act.

7. It is common ground that the objections of the petitioners to the proposed acquisition of their lands, were heard under Section 3 (3) of the Act by the Assistant Commissioner of the Revenue Sub-Division. It was contended by Sri Gangi Reddy and Sri Veerabhadrappa that the Assistant Commissioner had no jurisdiction to hear under sub-sec. (3) of S. 3 the objections of the petitioners to the proposed acquisition of their lands and that the only authority competent to hear their objections was the Deputy Commissioner.

8. Sub-sec. (3) of S. 3 reads:

"After considering the cause, if any, shown by the owner of the land and by any other person interested therein, and after giving such owner and person an opportunity of being heard, the State Government may pass such orders as it deems fit."

9. S. 6 provides that the State Government may, by notification, delegate to any of its officers, subject to such conditions and restrictions as may be specified in such notification, any of its powers under this Act except the power to make rules under S. 7.

10. By Notification No. DPC 221 DRH 73 (1) dated 10-10-1973 the State Government delegated some of its powers under the Act to Assistant Commissioners in charge of Revenue Sub-Divisions. The relevant portion of that Notification reads:

"Sub-sec. (3) of S. 3 (Only the power of giving an opportunity to the owner and other persons of being heard)."

11. The relevant portions of sub-rules (2) and (3) of R. 6 of the Rules read:

"(2) If any objection is received from a person interested in the land on or before the date specified in the notice under sub-sec. (2) of S. 3, the Assistant Commissioner shall fix a date for hearing the objections and give notice thereof to the objectors.

.....

(3) On the date fixed for enquiry or on any other date to which the enquiry may be adjourned by him, the Assistant Commissioner shall hear the objector or his Advocate and the Block Development Officer or the Chief Officer or their representative, as the case may be, and record any evidence that may be produced in support of the objections.'

12. Rule 8 reads:

"8. Assistant Commissioner to Report to Government. —

On completion of the enquiry, the Assistant Commissioner shall as expeditiously as possible submit his report and recommendations as to each objection, whether admissible or inadmissible for the orders of the State Government under sub-sec. (3) of Section 3."

13. Rule 9 reads:

"9. Consideration of Objections and issue of Final Notification.—

On consideration of the objections and the report of the Assistant Commissioner, if the State Government decides, —

(a) that the land should be acquired for the purpose specified in the Notification issued under sub-sec. (1) of S. 3, it shall, by Notification, make a declaration in Form 'C' under sub-sec. (4) of S. 3;

(b) that the land should not be acquired, it shall publish a notification cancelling the notification issued under sub-sec. (1) of S. 3."

14. Subsequently, the Government, by its Notification dated 10-1-1975 issued under S. 6, delegated to Deputy Commissioners of the Districts its powers under sub-sec. (1) of S. 3 and also its powers under sub-secs. (3) and (4) of that Section in cases where no cause had been shown by the owners of lands or other persons to notices issued under sub-sec. (2) of that Section and where such cause had been shown, the powers under sub-secs. (3) and (4) of S. 3 had been delegated to Divisional Commissioners. By its Notification-I No. FD 2406 HLA 74 dated 23-6-1975, issued in supersession of the Notification dated 10-1-1975, the Government delegated to the Deputy Commissioner its powers under sub-secs. (1), (3) and (4) of S. 3 of the Act.

15. Sri Gangi Reddy and Sri Veerabhadrappa contended that as the Notification of the Government dated 23-6-1975 superseded the earlier Notification dated 10-1-1975, after the issue of the later Notification (dated 23-6-1975) it was the Deputy Commissioner and not the Sub-Division Officer who was competent to hear objections under sub-sec. (3) and that in the present cases the hearing of objections by the Assistant Commissioner was without jurisdiction.

16. The above contention overlooks that what had been superseded by the Notification dated 23-6-1975 was only the Notification dated 10-1-1975 and not the earlier Notification dated 10-10-1973 under which the power to hear objections under S. 3 (3) had been delegated to the Assistant Commissioners and that such delegation of power to Assistant Commissioners had

not been superseded by any subsequent Notification. It is true that under the Notification dated 23-6-1975 the powers of the Government under S. 3 (3) of the Act had been delegated to the Deputy Commissioners, but such delegation is not inconsistent with the earlier delegation to the Assistant Commissioners of the power to hear objections under S. 3 (3). After 23-6-1975 both the Assistant Commissioners and the Deputy Commissioners had been empowered to hear objections. Thus, we are unable to accept the contention of learned counsel that the Assistant Commissioner had no jurisdiction to hear objections.

17. It was next contended by Sri Veerabhadrappa, that the Deputy Commissioner who passed the orders under S. 3 (3) to acquire the lands, should have himself heard the objections and that it was not permissible for the Assistant Commissioner to hear the objections and the Deputy Commissioner to decide on the basis of the report of the Assistant Commissioner whether the land should be acquired. He maintained that the authority who decides, should itself hear objections. In support of his contention, he strongly relied on the following observations of Subba Rao, J. (as he then was), who spoke for the majority of the Bench in G. Nageshwara Rao v. Andhra Pradesh State Road Transport Corporation (AIR 1959 SC 308 at page 327):

"Personal hearing enables the authority concerned to watch the demeanour of the witnesses and clear up his doubts during the course of the arguments, and the party appearing to persuade the authority by reasoned argument to accept his point of view. If one person hears and another decides, then personal hearing becomes an empty formality."

His Lordship did not express his dissent from the following earlier enunciation by the Supreme Court in Pradyat Kumar v. Chief Justice of Calcutta (AIR 1956 SC 285 at page 291):

"It is well recognised that a statutory functionary exercising such a power cannot be said to have delegated his functions merely by deputing a responsible and competent official to enquire and report. That is the ordinary mode of exercise of any administrative power. What cannot be delegated except where the law specifically so provides — is the ultimate responsibility for the exercise of such power."

18. As pointed out by a Division Bench of this Court in V. C. Thimmarayappa v. State of Mysore (1968 (1) Kant LJ 113 at p. 118: (AIR 1968 Mys 296) in G. Nageswara Rao's case (AIR 1959 SC 308) (supra) the question raised was regarding the validity of rules providing for hearing by one decision by another, in the absence of specific statutory provision enabling such a procedure being followed. The Andhra Pradesh Government had framed rules for which there was no specific sanction of the statute for departing from the basic concept of judicial procedure. But, in this Act the function of hearing objections to the proposed acquisition, is separated from the function of deciding (after considering such objections) whether or not to acquire the land. Sub-sec. (3) of S. 3 deals with the former function while sub-sec. (4) of that Section deals with the latter function. Section 6 permits delegating different functions and powers of the Government to different authorities. Hence, it is permissible for the Government to delegate to one person or authority its functions and powers under sub-sec. (3) of S. 3 and to another person or authority its functions and powers under sub-sec. (4) of that Section. As pointed out by the Supreme Court in A. K. Kraipak v. Union of India (AIR 1970 SC 150 at 156), the rules of natural justice operate only in areas not covered by any law validly made and do not supplant the law of the land but supplement it.

19. Thus, we are unable to accept the contention of learned Counsel that there was any infirmity in the impugned acquisition on account of the petitioners' objections having been heard not by the Deputy Commissioner who decided to acquire the lands, but by the Assistant Commissioner.

20. Lastly, it was contended that there was no material to show that the Deputy Commissioner who made the declaration under sub-sec. (4) of S. 3, had satisfied himself that the petitioners' lands should be acquired for the purpose of providing house sites. All that was stated in the writ petitions was that the Deputy Com-

missioner had mechanically passed the order under S. 3 (4) and that he had not considered properly the report submitted by the Assistant Commissioner.

21. From the order of the learned single Judge it does not appear that the above contention was urged before the learned single Judge. This contention raises a mixed question of law and fact and hence we cannot permit the petitioners to urge this contention for the first time in these appeals.

22. All the contentions urged in these appeals fail and we dismiss these appeals.

23. In the circumstances of the cases, we direct the parties to bear their own costs in these appeals.

Appeals dismissed.

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K. BHIMIAH AND
G. N. SABHAHIT, JJ.

A. V. Venkatakrishnaiah and another, Appellants v. S. A. Sathyakumar, Respondent.

Misc. First Appeal No. 5 of 1977, D/- 21-8-1978.*

Hindu Minority and Guardianship Act (37 of 1956), S. 13 — Guardians and Wards Act (8 of 1890), S. 19 — Hindu father's right to custody of his child — Welfare of child is paramount consideration — Evidence and proof of welfare — S. 13 of H. M. and G. Act overrides S. 19 of G. and W. Act.

Where the minor is subject to the Hindu law, S. 13 of the Hindu Minority and Guardianship Act prevails over Section 19 (b) of the G. and W. Act. The two sections together with S. 17 of the latter Act should be read harmoniously and if there be any conflict, it is Section 13 of the Hindu Minority and Guardianship Act that prevails. This overriding effect is clearly provided in Sections 2 and 5 of that Act. The dominant consideration, therefore, in appointing the guardian should be the welfare of the child, and not merely the right of the father. The father's right to the custody of his minor child is no longer absolute; it is circumscribed by the consideration of welfare of the minor. (Case-law ref.) (Para 6)

A Hindu woman died soon after delivering a son. The minor was brought up by his maternal grandparents who promised to return him to his father when he was two years old but refused to hand over his custody to the father after the said period. The father thereon applied under S. 10 of the Guardians and Wards Act for the custody of the child.

It was found that the father had remarried and had a son from his second wife. It was quite probable that more issues may be appearing in due course. The step-motherly attitude is proverbial in this country. The Court had asked the father to befriend the minor by visiting him often but the father had paid only one visit. In the Court also the minor refused to go to his father. The father was likely to have not much time left to look after his son who would be left with his step-mother. Taking all the facts into consideration, it was held that the welfare of the child was not secure in his father's house and its custody was refused to him though being an officer in a Bank he was in a position to look after the child well and had made several deposits in the bank in the name of the child. AIR 1971 Mys 211, Dist. (Paras 12, 13)

Anno: AIR Manual (3rd Edn.) Hindu Minority and Guardianship Act, S. 13, N. 1, 2; AIR Manual (3rd Edn.), Guardians and Wards Act, S. 19, N. 3.

Cases Referred: Chronological Paras

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AIR 1971 Mys 211: (1971) 1 Kant LJ 307 13
AIR 1969 Cal 573 7
AIR 1966 Mad 173 7
AIR 1961 Punj 51 7

Padubidri Raghavendra Rao, for Appellants; S. V. Narasimhan, for Respondent.

SABHAHIT, J.:— This appeal is instituted by the original respondents 1 and 2 against the order dated 30-7-1976 by the District Judge, Chickmagalur in Guardian and Wards Case No. 16 of 1975 on his file allowing the petition of the father for custody of the child.

2. Sri S. A. Satyakumar, presented an application to the District Court

*(Aganist order of Dist J. Chikmagalur, D/- 30-7-1976.)

under Section 10 of the Guardians and Wards Act (hereinafter called the 'Act') praying for custody of his minor son Ravishankar. He has averred in the petition that Ravishankar was born on 7-8-1972 and that his wife, the mother of the child, died after delivery and ever since the time the child was born, the child was being brought up in the house of the maternal grand parents. He has further averred that he allowed the child to remain in the house of the maternal grand parents of the child as they were shocked by the death of their daughter, his wife. Of late, differences arose between him and his father-in-law and mother-in-law and they had taken hostile attitude towards him and they were not allowing him to see his son. A panchayathi was held in June, 1974 in connection with the handing over of the child as also the movables belonging to the petitioner in the custody of the respondents. His parents-in-law agreed for the handing over the child in August, 1974, as soon as the child completed two years. Before instituting the petition, the petitioner demanded for the custody of the child but, his parents-in-law did not handover the child to him. According to him, the child had to be put in a good school as the child would be completing three years. He instituted the petition on 5-9-1975 before the learned District Judge praying for the custody of the child from the respondents in the petition who are his father-in-law and mother-in-law.

3. The petition was resisted by respondents in the petition. While admitting that the child was born on 7-8-1972 and the mother died after delivery, they contended that the welfare of the child would be better served if the child is left with them, and that was also the last wish of Vimala, their daughter, before her death. They denied that they prevented the petitioner from seeing the child or visiting their house. According to them, the petitioner nursed ill-will against them and instituted the petition with an ulterior motive to spoil the future of the boy. They denied all other allegations made by him against them. They further asserted that the words of the father were a mere make believe story and he was not really interested in the welfare of the child. When the petition came up for hearing, the petitioner examined himself as P. W. 1 and spoke to the averments made in the petition. In addition, it was elicited from him that he had married again. He examined P. W. 2, B. Srinivasa Rao, on the point that the child was not sent to the petitioner's house on the occasion of the annual death ceremony of the mother. As against that, Venkatakrishnaiah, the first respondent, gave his evidence in support of the objections statement. He got marked the letter written to his wife, mother of the deceased Vimala, by her daughter, as also the letters written by the petitioner to him in connection with the bringing up of the child. He has sworn that the welfare of the child would be better served if the child were left with him. The learned District Judge, on appreciating the evidence on record, held that the father of the child was in law entitled to the custody of the child unless he was shown to be unfit for the custody of the child and in that view he ordered the custody of the child in favour of the petitioner, the father of the child, by his order dated 30-7-1976 as stated above. Aggrieved by the said order, the respondents have come up in appeal before this Court.

4. The learned Advocate appearing for the appellants-respondents vehemently argued that the learned District Judge did not take into consideration the facts that in such cases the court should consider the welfare of the child and also the last wishes of the deceased mother. According to him, the father had taken the second wife and a boy was born as a result of the wedlock and it was not congenial for the welfare of the child to hand him over to the custody of the father. As against that, the learned counsel for the respondent-petitioner, strenuously urged that while deciding the question of guardianship, the father could not be disallowed the custody, unless the Court found that he was unfit for the custody of the child as laid down in S. 19 of the Act. According to him, the father was getting a salary of more than Rs. 500/- per month and he had all the affection for the child and the

mere fact that he had taken a second wife should not be made a ground to hold him unfit to be the guardian of the child. The sole point, therefore, that arises for our consideration in this appeal is: whether it is in the welfare of the child to allow the custody of the child to the father as is done by the learned District Judge.

5. Section 17 of the Act reads as follows:

(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what consistently with the law to which the minor is subject appears in the circumstances to be for the welfare of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property."

Section 19 of the Act reads as follows:

"Nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person—

(a) .....

(b) of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor, or

(c) ....."

These provisions will have to be read along with Section 13 of the Hindu Minority and Guardianship Act 1956, which reads as follows:

"(1) In the appointment or declaration of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus if the court is of opinion that his or her guardinship will not be for the welfare of the minor."

(Emphasis added).

Thus, reading these provisions together it becomes obvious that the rigour of the prohibition contained in S. 19 (b) of the Act is considerably whittled down by the positive provision made in S. 13 of the Hindu Minority and Guardianship Act which unequivocally declares that the Court shall be guided by the paramount consideration of the welfare of the child, while appointing his guardian.

6. In the instant case, the learned counsel appearing for the respondent-petitioner relying on clause (b) of S. 19 of the Act, quoted above, submitted that when the father was living, unless he was declared to be unfit to be the guardian of the person of the minor by the Court, any other person could not be appointed as the guardian of the minor. It is needless for us to point out that the said provision has to yield place to Section 13 of the Hindu Minority and Guardianship Act which states that in spite of any provision made in any other Act, the sole criterion for appointing the guardian should be the welfare of the child. In fact, S. 17 of the Act states inter alia, that the court shall, subject to the provisions of the section, be guided by what consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor. The minor is subject in this case to Hindu Law. Therefore, S. 13 of the Hindu Minority and Guardianship Act prevails over S. 19 (b) of the G. and W. Act. The three sections should be read harmoniously and if there be any conflict, it is S. 13 of the Hindu Minority and Guardianship Act that prevails. This over-riding effect is clearly provided in Ss. 2 and 5 of that Act. The dominant consideration, therefore, in appointing the guardian should be the welfare of the child, and not merely the right of the father. The father's right to the custody of his minor child is no longer absolute; it is circumscribed by the consideration of welfare of the minor.

7. The view that we have taken finds full support in the following decisions:

(i) Captain Rattan Amol Singh v. Smt. Kamaljit Kaur (AIR 1961 Punj. 51);

(ii) Raichand v. Smt. Sayar Bai (AIR 1966 Mad 173);

(iii) Sunil Kumar Chowdhary v. Smt. Satirani Chowdhari (AIR 1969 Cal 573); and

(iv) Lalta Prasad v. Ganga Sahai (AIR 1973 Raj 93).

8. It is in evidence that ever since his birth the child has been brought up by the maternal grand parents. When this case came up for hearing in the month of March 1978 and when the child was present before this Court, the child was unable even to recognise the father and when the father went near the child, the child got startled which only shows that the father has not been affectionate enough towards the child all these years as he ought to have been and that he has not even befriended the child. It is not the case of the father that ever since the death of his wife he was prevented from seeing the child, though he has stated in his evidence that a few months prior to the presentation of the petition there was misunderstanding between him and his parents-in-law. If really the father was affectionate and considerate to the child he should have befriended the child by visiting the child often and making presents to the child on occasions like his birthday. Even though this Court directed on 10-3-1978 that the father should befriend the child by going to his father-in-law's house, when the case came up for hearing to-day, it was verified that the father went to the house of his father-in-law only once but, since it was already late in the evening he returned without even seeing the child. It is not his case that his parents-in-law prevented him from seeing the child. In the course of these five months, if he could not find time to visit the child even once and befriend the child, in spite of a direction from this court, it would be doubtful what affection and consideration he is capable of rendering to this child.

9. It is not disputed that he has taken a second wife and a male child is born out of the wedlock and the child is 1½ years old now. Consideration being had to the normal state of affairs, it would not be congenial for the welfare of the present child to stay with his step-mother. Step-motherly attitude has become proverbial in our society. It is not suited for the healthy and normal growth of emotional and moral personality of the child.

10. Moreover, while considering the question of appointment of a guardian, we have to take into consideration the last wish of the mother as provided in S. 17 of the Act as also the welfare of the child which is of paramount consideration. Our attention was drawn to Ex. R. 1 a lengthy letter written by Vimala, the deceased mother of the child, when she was with the child. It makes a pathetic reading. She has poured out her heart to her mother and has in detail described the woes suffered by her at the hands of her brother-in-law and mother-in-law in the house of her husband. Her husband was always keeping mum, supporting the cruel attitude of mother-in-law and brother-in-law. As a culmination to this letter comes the last wish of the deceased lady which reads:

"In the event of delivery and my dying, and the child surviving, you alone bring up the child and attend on him till he grows. For certain do not deliver the child. This is my last wish." It appears that even then she had a premonition about her death after delivery, the child surviving and in view of the miseries and suffering undergone by her at the hands of her brother-in-law and mother-in-law, she made her last wish very clear to her mother. That, certainly is one of the factors to be taken into consideration while appointing the guardian of the child under the provisions of S. 17 of the Act which are not inconsistent with the provisions made in S. 13 of the Hindu Minority and Guardianship Act.

11. The grand-father of the child has sworn that all attention is bestowed on the child and we are told that the child is attending a Kindergarten school. We are told that the brother of D. W. 1 is issueless and he is very fond of the child. He is an Officer in the Vijaya Bank and even several fixed deposit receipts were shown to us with regard to deposits kept in the name of the child. That makes it clear that the child is looked after well, brought up very well and interests of

his education are looked after well in the house of his grand parents.

12. The question is whether he should be dislodged from this surrounding to land him in the house of his step-mother. It is in evidence that the father goes to the office and spends most of the time there. Then, the child would be under the care of his step-mother. The step-mother has her own child and she was married just two years back. Other children also in all probability would make their appearance in due course. That being so, it becomes obvious that the welfare of the child cannot be secure in the house of the petitioner though no doubt, he is the father of the child. It is in that sense that we hold that the father is not a fit and proper person on the facts of this case to be the guardian of his minor child.

13. The learned counsel for the father next invited our attention to a decision of this Court in Kamalamma v. Lakshminarayana Rao (1971) 1 Kant LJ 307: (AIR 1971 Mys 211). In that decision, His Lordship Justice Venkataramiah who delivered the judgment for the Bench has observed that the question whether the father is fit or unfit to be the guardian of the person of a minor is a question of fact. There cannot be any dispute about this proposition. Whether the father is fit or unfit to be the guardian of his minor child has to be decided on the facts of each case and we have already discussed the facts of this case and we have held that the interests of the child would be better served by leaving the child in the custody of his grand parents. It is decided in that case that the fact that the father is unfit should be pleaded and proved. We have already pointed out that the rigour of the provisions of S. 19 (b) of the Act has been considerably relaxed in view of S. 13 of the Hindu Minority and Guardianship Act. In this case it is no doubt pleaded by the grandfather that it was the last wish of his daughter that the child should be brought up by them. He has also stated that the interests of the child would be better served by leaving the child with them. He has averred that the father's version in the petition is a make-believe story. In addition, it is elicited in the evidence of the petitioner himself that he married again and the second marriage took place during the pendency of this proceeding. These facts as we have discussed above, are proved in the case. Hence, the decision cited by the learned counsel for the petitioner cannot help him in any way.

14. In the result, the appeal is allowed and the impugned order of the District Judge ordering delivery of the child to the father is hereby set aside. Accordingly, the petition of the father for the custody of the child is dismissed.

On the peculiar circumstances of this case, we make no order as to costs throughout.

Appeal allowed.

END

THE

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KERALA SECTION

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" " P. Subramanian Poti, B.SC., B.L.
" " N. D. P. Namboodiripad, B.A., (HONS) B.L.
" " G. Viswanatha Iyer, B.A., B.L.
" " V. Khalid, B.SC., B.L.
" " K. Bhaskaran, B.A., B.L.
" " George Abraham Vadakkel, B.A., B.L.

Hon'ble Mr. Justice T. Chandrasekhar Menon, B.SC., B.L.
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THE

All India Reporter

1978

Kerala High Court

AIR 1978 KERALA 1

KU. P. JANAKI AMMA J.

Narayana Iyer Kulathu Iyer, Petitioner v. Manakkadu Devaswom, and others, Counter Petitioners.

C.M.P. No. 10320 of 1977 in C.M.P. No. 10319 of 1977 in E.S.A. No. 4 of 1976 and C.M.P. No. 10376 of 1977 in C.M.P. No. 10375 of 1977 in E.S.A. No. 5 of 1976, D/- 23-9-1977.

Limitation Act (36 of 1963), Section 5 — Delay — Condonation of — Bona fide mistake of counsel. (Kerala High Court Act (5 of 1959), S. 5).

On being advised by his counsel that by virtue of introduction of S. 100-A, Civil, P.C. the petitioner's right to prefer appeal was lost, the petitioner did not file an application under S. 5 of the Kerala High Court Act for obtaining leave to appeal. After publication of the ruling in Raghavan Pillai v. Sainaba Beevi (1977 Ker. L.T. 417), the petitioner sought to file application for leave to appeal with application to condone delay on ground of bona fide mistake on the part of his counsel in giving advice.

Held, the delay could not be condoned. AIR 1970 SC 898, Foll. (Para 3)

In the absence of any application for leave to appeal before introduction of S. 100A, C.P.C., the question whether the petitioner could be said to have had a substantive right to file appeals and whether the right of the petitioner to move applications for granting leave to file appeal was a vested right were not questions which were decided in Raghavan Pillai v. Sainaba Beevi, 1977 Ker LT 417. Therefore, it could not be concluded on the basis of the above decision alone that there was any bona fide mistake on the part of the counsel in interpreting the scope and application of Sec. 100A. (Case law discussed). (Paras 3, 4)

Anno: Comm., Lim. Act (1963), S. 13 Notes 13, 13B.

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P. N. Sankaranarayana Pillai, for Petitioner in both the cases; P. K. Kesavan Nair and K. N. Narayana Pillai for Counter-Petitioner No. 3 in both the cases.

ORDER:— The petitioner in both the cases is the same. He is the appellant in E.S.A. Nos. 4 and 5 of 1976 on the file of this Court. The said appeals were dismissed by a common judgment on 29-11-1976. Aggrieved by the decision, the petitioner decided to file an appeal to a Division Bench after obtaining leave under S. 5 of the High Court Act. He obtained copies of the judgments and decrees on 18-2-1977. In the meanwhile, the Civil Procedure Code Amendment Act, 1976 came into force on 1-2-1977 and S. 100A was introduced into the Code. He was instructed by his counsel that

by virtue of the above provision read with S. 100A of the Amendment Act, no further appeal was maintainable against the decision in second appeal. The petitioner, therefore, did not move for obtaining leave to file appeals against the decision. But subsequently, this Court held in Raghavan Pillai v. Sainaba Beevi (1977 Ker. L.T. 417) that the ban under S. 100A of the Act has no retrospective operation. When a report of the above ruling appeared in the part of the 1977 Ker. L. T. reports dated 20th June, the counsel realised his mistake and informed the petitioner of the correct position. Accordingly the petitioner filed applications for certificates under S. 5 of the Kerala High Court Act along with the present petitions for condoning delay. The petitioner prays that since the delay was due to a bona fide mistake regarding the scope and application of S. 100A, the same may be condoned.

2. The petitions are opposed. The learned counsel for the respondents would argue that the decision in Raghavan Pillai v. Sainaba Beevi (1977 Ker. L.T. 417) has no application to the present case. There was no mistake on the part of the counsel in advising the petitioner that no further appeal would lie against the decision of this Court. That on a later date the High Court took a view regarding the operation of S. 100A which is different from that adopted by the counsel is, according to the respondents, no ground for condoning delay. To support his contention, reference has been made by the learned counsel for the respondents to the decision reported in V. V. Kudva v. E. S. I. Corporation (AIR 1972 Mys 204). In that case, the litigant concerned acquiesced in a decision of the Employees State Insurance Court and did not file an appeal in time. Subsequently, his counsel noticed the decision of the Supreme Court in Provident Fund Inspector, Guntur v. T. S. Hariharan (AIR 1971 SC 1519) and expressed the opinion that he had a fair chance of success in case an appeal had been filed against the decision of the Employees' State Insurance Court. An appeal was accordingly filed with an application for condoning delay. Basing on the decision of the Supreme Court in Tilokchand Motichand v. H. B. Munshi (AIR 1970 SC 898) the Mysore High Court held as follows: (at p. 206)

"None of the decisions relied on by Mr. Hande supports his contention that a litigant who has acquiesced in the judgment of a Court by not preferring an appeal within the period of limitation, can wake up and prefer an appeal after a subsequent ruling of the Supreme Court or the High Court which he considers as being favourable to him. Nor can the advice of his counsel that his case is not a fit one for appeal, which advise may turn out to be a mistaken one in the light of a subsequent ruling of the Supreme Court or the High Court, be regarded as a sufficient ground for condoning such delay."

3. It will be apposite if I quote here the following observations of Hidayatullah C. J. in Tilokchand Motichand v. H. B. Munshi (AIR 1970 SC 898) (at p. 902):

"Everybody is presumed to know the law. It was his duty to have brought the matter before his Court for consideration. In any event, having set the machinery of law in motion he cannot abandon it to resume it after a number of years, because another person more adventurous than him in his turn got the statute declared unconstitutional, and got a favourable decision. If I were to hold otherwise, then the decision of the High Court in any case once adjudicated upon and acquiesced in may be questioned in a fresh litigation revived only with the argument that the correct position was not known to the petitioner at the time when he abandoned his own litigation."

The observations apply with equal force to the present case. It follows that even assuming that the judgment reported in Raghavan Pillai v. Sainaba Beevi (1977 Ker. L. T. 417) can be interpreted to mean that the petitioner retained his right to file an appeal in spite of the introduction of S. 100A to the Civil Procedure Code, that by itself is not a ground for condoning delay in respect of an application for obtaining leave.

4. It is also noted that the facts in Raghavan Pillai v. Sainaba Beevi (1977 Ker. L. T. 417) are different

from those of the present case. The appellant in that case had obtained leave to file appeal on 31-1-1977 before the coming into force of the Civil Procedure Code Amendment Act of 1976 and had, therefore, a vested right to file an appeal on 1-2-1977, the date of commencement of that Act. In the instant case, on the other hand, no petition for issue of certificate had been filed before the coming into force of the amended Act. S. 5 of the Kerala High Court Act did not confer on the petitioner an absolute right of appeal. His right was conditional on the Judge who disposed of the second appeals certifying that the case was a fit one for a further appeal. Whether under such circumstances the petitioner could be said to have had a substantive right to file appeals and whether the right of the petitioner to move applications for granting leave to file appeal was a vested right are not questions which are decided in Raghavan Pillai v. Sainaba Beevi (1977 Ker. L. T. 417). Therefore, it cannot be concluded on the basis of the above decision alone that there was any bona fide mistake on the part of the counsel in interpreting the scope and application of S. 100A. In other words, the petitioner is not entitled to avail of the above decision and seek condonation of delay on that footing.

5. The petitioner has not stated in his affidavit when his counsel communicated to him about the mistake. Neither has he explained the delay from the date of such communication till 16th July, 1977, the date of filing of the application.

Sufficient grounds are not made out for condoning delay. Dismissed.

Petitions dismissed.

AIR 1978 KERALA 3

G. VISWANATHA IYER, J.

Nanikutty Amma Devaki Amma and others, Petitioners v. Krishnan Kochunarayanan Nair and others, Respondents.

C. R. P. No. 92 of 1975-H, D/-3-8-1977

JU/KU/D996/77/KHA/WNG

(A) Civil P. C. (5 of 1908), O. 7 R. 10 (2) — Absence of endorsement — Effect of.

The absence of an endorsement is a mere irregularity and it cannot be said that the court is in seisin of the plaint, after the order for return, to enable it to make any amendment in the plaint. Even if the suit is to be deemed pending until such an endorsement, that is only for the purpose of calculating the period of exclusion under S. 14 of the Limitation Act. AIR 1971 Madh. Pra. 243, Dist. (Para 2)

An order directing the return of the plaint and fixing the time for its re-presentation effectively makes the court passing it functus officio in all matters except for the limited purpose of making an endorsement. (Para 2)

(B) Civil P. C. (5 of 1908), O. 6 R. 17 — Amendment of plaint after passing of order returning plaint for presentation to court having jurisdiction — Application for amendment to court passing such order — Held not maintainable. (1910) ILR 33 Mad 262 and AIR 1926 Mad 133 (2) and AIR 1939 Mad 397, Diss.

After the order for return of the plaint if any amendment is made by the plaintiff in the plaint and re-presents it, it is really a fresh plaint which the court has always power to receive. This is different from saying that a court which has held that it has no jurisdiction over the suit can thereafter amend it so as to make it a suit within its jurisdiction. (1910) ILR 33 Mad. 262 and AIR 1926 Mad. 133 (2) and AIR 1939 Mad 397, Diss.; AIR 1969 Bom 370, Rel. on; AIR 1919 Mad 1071 (2), Ref. (Para 3)

Cases Referred: Chronological Paras

AIR 1971 Madh. Pra. 243	2
AIR 1969 Bom. 370	3
AIR 1939 Mad. 397	3
AIR 1926 Mad. 133 (2)	3
AIR 1919 Mad. 1071 (2)	3
(1910) ILR 33 Mad. 262	3

T. S. Venkiteswara Iyer and P. K. Balasubramanyan, for Petitioners; K. N. Narayan Pillai, for Respondents.

ORDER:— The plaintiffs in a suit for partition are the revision petitioners. The suit was filed in 1969. Pending suit some of the plaint sche-

dule properties were acquired under the Land Acquisition Act for some public purpose. Thereafter the plaint was amended so as to include a prayer for declaration of the plaintiffs' right to a share in the compensation amount. Some of the defendants had filed a written statement to the original plaint in which one of the contentions was that proper court-fee has not been paid for the plaint. But this contention was not pressed for consideration either before or after the amendment of the plaint. Both parties let in evidence on the issues raised on the pleadings and the case was posted for final hearing. One of the issues raised in the case was whether the court-fee paid is not sufficient. After the final hearing the learned Munsiff entered a finding on this issue alone by holding that the valuation for the purpose of court-fee and for the purpose of jurisdiction is not correct and that the plaint if properly valued for purpose of jurisdiction will exceed the pecuniary jurisdiction of the Munsiff's Court. Consequently the lower court held that the plaint should be returned for presentation to the proper court having jurisdiction over the subject-matter. He did not enter a finding as regards the exact court-fee payable on the valuation. Time to re-present the plaint in the proper court was fixed as one month. Before the expiry of this period of one month the plaintiffs filed an application to amend the plaint by withdrawing the declared relief in respect of the compensation amount awarded for some of the plaint properties acquired pending suit. This was rejected by the learned Munsiff stating that after the earlier order directing return of the plaint for presentation to the proper court having jurisdiction over the subject-matter no plaint is there to amend. This is objected to in this revision petition.

2. According to the learned counsel for the revision petitioner the view of the lower court that there is no plaint before that Court to amend after the order for return of the plaint to the proper court having jurisdiction, is not correct. In support of his contention he referred to Order VII Rule 10 (2), C. P. C. which is in the following terms:—

"10. Return of plaint.

(1) x x x x

(2) On returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it."

and contended that since such an endorsement has not been made in the plaint by the Munsiff at the time when or before the amendment application was filed the learned Munsiff is still in seisin of the plaint. He also referred to Explanation I to Section 14 of the Limitation Act and the decision in Brij Mohandas v. Narsinghdas (AIR 1971 Madh Pra 243) where it has been held that the civil proceeding can be deemed to have ended only by the endorsement made as per Order VII Rule 10 (2), C. P. C. No doubt Rule 10 (2) of Order VII provides that the Judge must endorse on the plaint the date of its presentation and return and the brief statement of the reasons for the return of it and this is a judicial act to be performed by the Court. But the absence of such an endorsement is a mere irregularity and it cannot be said that the court is in seisin of the plaint, after the order for return, to enable it to make any amendment in the plaint. Even if the suit is to be deemed pending until such an endorsement, that is only for the purpose of calculating the period of exclusion under Section 14 of the Limitation Act. Once the plaint has been ordered to be returned, there is nothing remaining to be done by the court except to make an endorsement and the omission in making such an endorsement is only irregular and does not make the order for return ineffective or incomplete. An order for return is final so far as that court is concerned and such an order is also appealable as an appealable order. In this case the learned Munsiff has passed an order directing the return of the plaint and the time for re-presentation is also fixed. That effectively makes the court functus officio in all matters except for the limited purpose of making an endorsement. Again the reasons for the re-

turn as provided for in Rule 10 (2) of Order VII need not be on the back of the plaint itself. The order for return containing the reasons serves the purpose of an endorsement as required under Sec. 10 (2).

3. The learned counsel next submitted that even after the order for return is passed, the court can consider an application for amendment and in support of this position he relied on the decisions of the Madras High Court in Ponnapundan v. Authimoola Ponnapundan ((1910) ILR 33 Mad 262), Ramachandrayya v. Venkatratnam (AIR 1926 Mad 133 (2)) and Chendrayya v. Seethanna (AIR 1939 Mad 397). In Ponnapundan v. Authimoola Ponnapundan ((1910) ILR 33 Mad 262) there was an enquiry as to the value of the subject-matter and the suit was found undervalued and so the plaint was returned for presentation to the proper court. The plaintiff amended his plaint by correcting the valuation and striking off some of the properties so as to leave the case in the jurisdiction of the District Munsiff. The District Munsiff thereupon re-admitted the plaint and the question for decision was whether this was right. In the Letters Patent appeal the court held that he has the power. This is followed in the other cases referred to. But there is a line of cases which takes the view that once the Court finds that it has no jurisdiction over a suit it cannot pass any valid order in such a suit except the orders which the statute expressly empowers to pass such as the order to return the plaint to be presented to the proper court and orders as to costs — See Kannuswami Pillai v. Jagathambal (AIR 1919 Mad 1071 (2)). After the order for return of the plaint if any amendment is made by the plaintiff in the plaint and re-presents it, it is really a fresh plaint which the court has always power to receive. This is different from saying that a court which has held that it has no jurisdiction over the the suit can thereafter amend it so as to make it a suit within its jurisdiction. This is also the view taken in the Single Bench decision of the Bombay High Court in Shobha v. Mahale (AIR 1969 Bom 370). The principle is stated thus at page 372, para. 7:—

"As long as the Court has not given a finding that it had no jurisdiction and the plaint should be returned for presentation to the proper court it is seized of the matter because the Court has the right to decide the question of its own jurisdiction even if the decision ultimately be that it has no jurisdiction. As long as the Court is seized of the matter, it is open to a party at any time to abandon a part of the claim by a unilateral act by making a statement to that effect which the Court must record, if thereafter the suit is within its jurisdiction, the Court should proceed to hear it."

I respectfully agree with this principle and I hold that the court has no power to order an amendment of the plaint after it has passed an order directing return of the plaint for presentation to the proper court having jurisdiction.

In the result I do not find any reason to interfere with the order passed by the learned Munsiff. The Civil Revision Petition is dismissed, but in the circumstances I make no order as to costs.

Petition dismissed.

AIR 1978 KERALA 5

V. P. GOPALAN NAMBIYAR, C. J. AND K. K. NARENDRAN, J.

Narayanan Vasu, Appellant v. Ayyappan Sreedharan and another, Respondents.

Writ Appeal No. 268 of 1974, D/- 7-7-1977.

Easements Act (5 of 1882), Sec. 60 — Revocation of license — Shifting of Kudikidappukaran to different premises where same right of enjoyment and same conditions are guaranteed to him — Does not amount to revocation of license.

Where a Kudikidappukaran is asked to shift from the premises which he was permitted to occupy to different premises where the same right of enjoyment in practically the same conditions is guaranteed to him, there is no revocation of the licence or the

permission to occupy the Kudikidappu. Particularly it is so, when the shifting of the premises is occasioned in pursuance of a statutory right conceded by the Land Reforms Act to the landlord to shift the Kudikidappu and a statutory obligation cast on the Kudikidappukaran to shift, if the conditions for shiftir stand established. (Para 2)

N. Raghava Kurup, M. S. Narayana Pillai and B. B. Radhakrishnan, for Appellant; Govt. Pleader, for Respondents.

GOPALAN NAMBIYAR, C. J.:— This writ appeal is against the judgment of a learned Judge who dismissed the writ petition filed to quash the order (Ext. P1) of the Land Tribunal, Vaikom directing the shifting of the kudikidappu on deposit of the price of the homestead and the shifting charges, and on satisfying the other conditions provided for by the Act. An ingenious point was raised by way of defence to the application. As that is the only point now argued before us, we need not concern ourselves with the rest of the proceedings, or the contentions raised. The point was that the appellant-kudikidappukaran had put up a building on the property which he was occupying, that this was "a work of a permanent character" within the meaning of Section 60 Cl. (b) of the Indian Easements Act, and that therefore the licence or the permission granted to the kudikidappukaran was not liable to be revoked. In consequence, it was contended that the proceedings which commenced by way of a suit to shift the kudikidappukaran had to be dismissed, as shifting would amount to revocation of the licence. The learned Judge dismissed the writ petition holding that the provisions of the Easements Act cannot prevail over the provisions of the Land Reforms Act and that the relationship between a kudikidappukaran and his landlord and their respective rights and liabilities are now completely governed by the provisions contained in the Land Reforms Act. The learned Judge was of the view that Sec. 60 of the Easements Act cannot, therefore, be availed of by the kudikidappukaran.

2. We doubt whether the ground stated by the learned Judge would really justify the conclusion, or be taken advantage of, for the purpose of defeating the plea raised by the kudikidappukaran. Even granting that in proceedings for shifting the kudikidappu it is open to the kudikidappukaran to raise a plea based on Section 60 of the Indian Easements Act, we do not think that the said contention can be accepted on the facts disclosed in the present case. Section 60 reads as follows:

"60. A license may be revoked by the grantor, unless:—

(a) it is coupled with a transfer of property and such transfer is in force;

(b) the licensee, acting upon the licence has executed a work of a permanent character and incurred expenses in the execution."

Before the provisions of Cl. (b) can be availed of, it must be shown that the execution of the work of a permanent character had been done by the licensee "acting upon the license". That apart, Cl. (b) can be pleaded by the licensee only against a revocation of the license by the grantor. On both these aspects, we think the kudikidappukaran's contention that he is entitled to rely on the section must fail. We do not think that on the pleadings to which our attention was drawn, the execution of the work of a permanent character by the kudikidappukaran was done "acting upon the license" within the meaning of the section. The contention of the landlord who instituted the proceedings to shift the kudikidappukaran was that the work was executed against his wishes and for the purpose of putting him to difficulty. Whatever be the position in regard to this aspect of the matter, we are clearly of the view that where what is sought to be done is to shift the kudikidappukaran from the premises which he was permitted to occupy, to different premises where the same right of enjoyment in practically the same conditions, is guaranteed to him, there is no revocation of the license or of the permission to occupy the kudikidappu. Particularly is this so, when the shifting of the premises is occasioned in pursuance of a

statutory right conceded by the Land Reforms Act to the landlord to shift the kudikidappu and a statutory obligation cast on the kudikidappukaran to shift, if the conditions for shifting stand established. We are, therefore, of the view that on the position disclosed in this case, it cannot be said that there has been any revocation of the license within the meaning of Section 60 of the Indian Easements Act. The question of pleading irrevocability under Cl. (b) of the said section, therefore, would not, and cannot, arise.

For these reasons, we dismiss this writ appeal with no order as to costs.

Appeal dismissed.

AIR 1978 KERALA 7

V. P. GOPALAN NAMBIYAR, C. J., AND K. K. NARENDRAN, J.

Assistant Collector of Central Excise, Trivandrum and others, Appellants v. P. I. Kuriakose Ranny and another, Respondents.

Writ Appeal No. 267 of 1974, D/- 6-7-1977.*

Gold Control Licensing Dealers Rules (1969), R. 2 (f) — Application for grant of licence — Relevant criterion to be applied for a grant of licence stated — Application allowed — (O. P. No. 1965 of 1973 (Ker), Reversed).

According to Rule 2 (f), the relevant criterion to be applied in the case of application from dealers in a village is whether there is need to increase the number of dealers in the district within which the village is situated. This requirement is to be adjudged on a comparative assessment of the turnover of the licenced dealers for a period of three years preceding that in which the application for the issue of licence was made.

In the instant case, the application for the grant of licence was made from the village R. The application was rejected by the licencing authority on the ground that there was no need to increase the number of dealers in the district in which the village R was situated, as the neighbouring area was well served. As to the turnover of the existing dealers in the district in which the village R was situated, for the three years preceding the application, it was found that no case for the grant of an additional licence was made out. Held that the application was correctly rejected by the observance of the statutory provisions as laid down by Rule 2 (f). (O. P. No. 1965 of 1973 (Ker), Reversed). (Para 4)

M. Ratna Singh and K. Prabhakaran, for Appellants; Varghese Kalliath and A. I. Kakkappan, for Respondents.

GOPALAN NAMBIYAR, C. J.:— The learned Judge against whose judgment this appeal has been preferred, allowed O. P. No. 1965 of 1973 quashed Exts. P2, P4 & P8 orders and directed a grant of the licence under the Gold Control Order to the writ petitioner, the 1st respondent in this appeal. We regret our inability to concur with the learned Judge either in his reasoning or the conclusion arrived at. The 1st respondent applied for a licence under the Gold Control Order for the year 1969. By Ext. P2 order, the Licensing Authority rejected the application on the ground that having regard to the number of licenced dealers in Pathanamthitta, their transactions and the demand for gold ornaments likely to arise from that area, it was not considered necessary to issue a licence as a gold dealer to the petitioner at Ranni, a place close to Pathanamthitta. On appeal, the appellate authority confirmed the order saying that it saw no reason to interfere with the order of the Licensing Authority. There was a further revision to the Government of India which rejected the same by Ext. P8 order. It recorded that from the records of the case as to the turnover of the existing dealers in the District of Quilon in which the village of Ranni is situated, for the three years preceding the application it was found that no case for the grant of an additional licence in favour of the writ petitioner was made out.

*(Against Judgment of this Court in O. P. No. 1965 of 1973).

2. The learned Judge was of the view that there has been a misconception by the licensing authority and the appellate authority in regard to the statutory provision for the grant of the licence, that there was a violation of the principles of natural justice on the part of the revisional authority in dealing with the revision petition, and a non-advertence to the relevant materials in the light of which the eligibility of the petitioner for a licence had to be considered and decided. In the light of these, the learned Judge set aside the impugned orders and directed the grant of the licence to the petitioner. We would immediately note that the eligibility of the petitioner for the grant of the licence for the year 1969, was being decided on the 8th Feb. 1974; and it was on this date that the learned Judge issued a writ of mandamus directing the 1st respondent to the writ petition to grant forthwith the gold dealers licence on the writ petitioner's application. Giving careful thought to the matter, we have no hesitation to come to the conclusion that this part of the judgment of the learned Judge directing the grant of the licence to the writ petitioner for the year 1969 in the year 1974 was unjustified and cannot be supported. That part of the judgment of the learned Judge has, in any event. to be vacated.

3. Even on the merits, we are unable to endorse the reasoning or the conclusion of the learned Judge in regard the rest of the judgment. Rule 2 (f) of the Gold Control Licensing Dealers Rules 1969 is the relevant rule which deals with the consideration of an application for a licence. The same in so far as it is material provides:

"2. Matters to which regard shall be had before issuing a licence.— On receipt of an application for the issue of a licence to commence or carry on business as a dealer, the Administrator shall have regard to the following matters, namely:—

(a) to (e): x x x x

(f) the need to increase the number of licensed dealers in the city or town in which the dealer intends to carry on business or where the applicant intends to carry on business in a village, the need to increase the number of licensed dealers in the district within such village is situated, having regard to—

(i) the number of licensed dealers existing in such city, town or district, as the case may be, and

(ii) the demand for ornaments which is likely to arise in such city, town or district. such demand being estimated on the basis of the turnover of the licensed dealers, existing therein. for a period of three years preceding the year in which such application for the issue of licence has been made and such turnover shall be determined on the basis of the accounts and returns submitted under the law for the time in force in relation to gold:

(rest of the rule omitted as unnecessary.)

4. From the above rule it is seen that the relevant criterion to be applied is, in the case of applications of dealers in a city or town, whether there was need to increase the number of licenced dealers in the said city or town, and where the application is from dealers in a village, whether there was similar need to increase the number of dealers in the district within which the village is situated. This requirement was to be adjudged on a comparative assessment of the turnover of the licenced dealers for a period of three years preceding that in which the application for the issue of licence was made. Ext. P2 will show that the licensing authority addressed itself to the question as to whether the local area of Ranni required to be served by an additional dealer in the gold trade and came to the conclusion that there was no such need, as the neighbouring area of Pathanamthitta was well served. The Appellate Authority merely endorsed this reasoning of the licensing authority. On revision, (Ext. P5 shows the grounds of revision), the writ petitioner filed Ext. P6 a resolution from the Panchayat to show that Ranni was a fast developing area, and stood in need of further additions to the existing quota of the licensed gold dealers. The writ petitioner also produced Ext. P7 statement before the revisional autho-

rity to show that a number of cases of contravention of the regulations under the Gold Control Act, had been detected by the Excise party, and one on re-thinking, the Assistant Collector had given a licence to a native of Chengannur, a place nearly twentyfive miles away from Ranni, during the pendency of the revision application. It will be noticed that both Exts. P6 and P7 were emphasising the regional or the local aspect involved in the grant of the licence and not concentrating attention on the requirements of the district, so that the confusion of thought in the mind of the licensing and the appellate authority, was as much present in the mind of the writ petitioner as well; and indeed, he had made his contribution to the development of the confusion. But the revisional authority set the train of thought on correct rails and dealt with the matter properly in the light of the requirements postulated by the statutory rule; namely, whether the requirements of the district as a whole required or warranted an addition to the existing quota of licensed gold dealers. It found that there was no ground, having regard to the turnover disclosed for the past three years preceding the application and on this ground it rejected the petitioner's application for a licence.

5. Despite the technical mistake or non-advertence to the relevant aspect of the rule committed by the licensing authority and the appellate authority, we should have thought that there was little scope for interference under Art. 226 of the Constitution with the impugned orders; especially, when the revisional authority had assessed the position from the correct standpoint. We are of the opinion that the interests of justice did not warrant interference, and the learned Judge exceeded the limits of his jurisdiction in interfering with the orders impugned. The learned Judge noticed that it had been brought to the notice of the revisional authority that two persons had been granted a licence as gold dealers while the writ petitioner's application had been rejected. One of them, the 4th respondent was granted a licence as a gold dealer in Ranni by order dated 17-2-1972. We may observe that the case of this respondent affords no comparable basis with that of the petitioner. His application was in 1972 and the three years for which the turnover and the requirement as to the volume of the trade had to be assessed, were different from the relevant period in respect of the petitioner's application. It was submitted that it had been brought to the notice of the revisional authority that one Sankaran Achari from Punalur had been granted a gold dealers' licence in 1969 and one Prabhakaran from the Quilon district had been granted the licence in 1970. Both these are within the Quilon district to which the writ petitioner also belongs. But it will be noticed that both Sankaran Achari and Prabhakaran were applicants from a town and not from a village; and the criteria specified for disposal of their applications are different from those in regard to the applications from a village. For that reason, these cases again do not afford any comparable basis with that of the petitioner.

6. The learned Judge took the view that there was violation of the principles of natural justice as the revisional authority had not put the figures of turnover of the existing dealers in which Quilon District for three years preceding 1969 before the writ petitioner. With respect, we are unable to agree with the learned Judge. The requirement of turnover in the area had been referred to by the licensing authority and the appellate authority. The revisional authority concentrated attention on this aspect from the correct point of view as laid down by the statutory rule. The petitioner himself should have known that the volume of the trade and the extent of the turnover for the three years immediately preceding the application was the relevant criterion in the light of which the application for licence should have to be decided. As ruled by the Supreme Court, and by this Court in regard to Rice Milling Dealers Licence, we think the petitioner was entitled to the observance of the statutory regulations and no more. And we are not prepared, on the facts and

circumstances to hold that there was such non-observance of the statutory rules as to warrant interference under Art. 226 of the Constitution.

7. Giving the matter our careful attention we are of the opinion that the learned Judge was wrong in interfering under Art. 226 with the impugned orders Exts. P2, P4 and P8, and in directing by a mandamus the grant of licence to the writ petitioner for the year 1969. We allow this appeal, set aside the order of the learned Judge and direct that O. P. No. 1965 of 1973 will stand dismissed. There will be no order as to costs.

Appeal allowed.

AIR 1978 KERALA 10

V. P. GOPALAN NAMBIYAR, AG. C. J. AND GEORGE VADAKKEL, J.

Southern Fisheries Corpn, Appellant v. The Corpn. of the City of Cochin and others, Respondents.

Writ Appeal No. 76 of 1973, D/- 5-4-1977.*

Precedents — Water rate found to be unconstitutional as discriminatory — Relief by refund on the theory of doctrine of prospective overruling not justified. O. P. No. 337 of 1970 (Ker), Reversed.

Where a single Judge in a writ petition, after holding the levy of water rate charged in certain area of the Corporation of Cochin to be unconstitutional as discriminatory, confined the relief granted to the petitioner from the date of judgment, on the theory of prospective overruling.

Held (in appeal) that the doctrine of prospective overruling was in the melting pot and there was no justification for applying the theory. The Court should ordinarily grant to the petitioner a full and complete refund of all the water charges collected at the discriminatory rate of levy. (As the petitioner claimed refund from the date of filing the writ petition, refund was granted from that date), O. P. No. 337 of 1970 (Ker), Reversed. (Para 2)

Cases Referred: Chronological Paras

AIR 1973 SC 1461 2
AIR 1967 SC 1643 2

*(Against Judgment of this Court in O. P. No. 337 of 1970.)

HU/IU/D10/77/AS/KSB

V. Rama Shenoi and R. Raya Shenoi, for Appellant; S. Narayanan Poti, N. K. Varkey and Govt. Pleader, for Respondents.

GOPALAN NAMBIYAR AG. C. J.:— The appeal is directed against the judgment in O.P. No. 337 of 1970. The question in the writ petition was regarding the constitutionality of differential rates of levy of water-tax in the Mattancherry and the Ernakulam areas both of which are comprised in the limits of the Corporation of Cochin, which was formed on and from 1-11-1967. In the Mattancherry area of the Corporation, water-charges are levied at the rate of Rs. 8/- per 1000 gallons for non-domestic use; and in the Ernakulam area, at the rate of Rs. 3/- per 1000 gallons for non-domestic use. We need not enter into the further details of the levy as the learned Single Judge has held the levy to be unconstitutional as discriminatory and no appeal against the said judgment has been filed by the Corporation.

2. The only grievance of the petitioner is against the learned Judge having confined the relief granted to the petitioner from the date of pronouncing judgment on the theory of what the learned Judge described as "prospective overruling". This is what the learned Judge stated:

"9. I think that this is an eminently proper case for applying the doctrine of prospective over-ruling recognised and applied by the Supreme Court in Golak Nath v. State of Punjab (AIR 1967 SC 1643). Different rates of water charges were in force in Ernakulam and Mattancherry Municipalities. After the Corporation of Cochin was formed on 1-11-1967, these different rates were continued to be levied in the Ernakulam area and the Mattancherry area of the Corporation without any objection from any person. The petitioners before me are persons, who being well aware of the said fact, applied for supply of water for industrial purpose at the prevailing rates, and made use of the same on that basis. There is no equity on their part in questioning the past. Striking down the relevant order or bye-law which fixed the rates of charges for supply of water in the Mattancherry area with retrospective effect would have very drastic effect on the finance of the Corporation, and may create serious difficulties. The counter affidavit filed on behalf of the Corporation states among other things, that "after the commencement of the Corporation,

bye-laws have been framed by the Corporation uniforming the rates and these have been forwarded to the Government for its approval". It further states that approval has not been granted by the Government so far, and hence the old rates are being continued. This is a tacit admission that the existing differential rates cannot be justified. The delay in taking the necessary steps cannot justify the continuance of a discriminatory levy.

10. For the reasons stated above, I quash the order or bye-law under which the Corporation is charging a higher rate for the supply of water for non-domestic purpose within the Mattancherry area than the rate charged within the Ernakulam area with prospective effect, and also prohibit respondents 1 to 3 from collecting from the petitioners in the future a higher rate of charge than the rate fixed for the Ernakulam area. The above writ petitions are allowed to this limited extent, and dismissed in other respects. In the circumstances of the case the parties will bear their own costs."

With respect, we are unable to subscribe to the reasoning or conclusion of the learned Judge confining the relief granted to the petitioner only from the date of judgment and not from the date of the filing of the petition. Indeed, this part of the judgment of the learned Judge was not supported by Counsel appearing for the Corporation. We are also of the opinion that neither on principle nor on authority can the conclusion be rested on the theory of "prospective overruling" referred to in the decision of the Supreme Court in Golak Nath v. State of Punjab (AIR 1967 SC 1643). The said decision has been overruled in Kesavananda Bharathy's case (AIR 1973 SC 1461). The doctrine of prospective overruling is as yet in the melting crucible; and after the pronouncement in Kesavananda Bharathy's case, noted supra, we see no justification for applying the theory. We should ordinarily grant the petitioner a full and complete refund of all the water charges collected at the discriminatory rate of levy. But the petitioner's Counsel stated that he would confine his claim for refund for the period from the date of filing the writ petition.

We allow this appeal, set aside the judgment of the learned Judge, and, in view of what the appellant's Counsel stated, direct that the appellant be granted refund of water charges collected from the date of filing the petition i.e. 1-4-1972. In the light of this declaration there is no need for any mandamus not to collect at a rate exceeding Rs. 3/- per 1000 gallons as we expect the Corporation to act in conformity with this judgment, and in accordance with law. No costs.

Appeal allowed.

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G. VISWANATHA IYER, J.

V. S. Thiru Venkita Reddiar, Petitioner v. S. Noordeen and another, Respondents.

C. R. P. No. 3375 of 1976, D/- 24-6-1977.

(A) Civil P. C. (5 of 1908), Sec. 64, O. 21 R. 54, O. 38 R. 10 and Appendix E, Form No. 24 — Attachment — Form and nature of order — Effect and object of attachment — Court sale in execution of attached property — All previous attachments fall to the ground.

Looking to the form and nature of an attachment order as disclosed by O. 21, R. 54 read with Appendix E Form No. 24 its effect is only to prevent alienation and not to confer title by way of charge or otherwise on the attaching decree-holder. Further it is only aimed at private alienations. It does not prevent involuntary alienations. On this aspect of the matter there is no difference between attachment in execution of a decree and an attachment before judgment as is clear from O. 38, R. 10. Such being the effect of an attachment, whether before or after decree, it does not bar a court sale in execution of another decree and with the court sale the interest of the judgment-debtor passes to the auction purchaser and there is nothing left to be sold later at the instance of another decree-holder who may have attached the property earlier. The purpose of the attachment is solely for the purpose of protecting the attaching creditor's right to bring to sale in execution the right, title and interest in the attached property of the judgment-debtor and there is no reason for holding that it continued to affect the attached property in

any way when the attached property no longer continues to be the property of the judgment-debtor. The auction purchaser takes the property free from attachment. Hence it must be taken as fairly settled that when a property is sold in execution of a money decree it cannot be sold again at the instance of the decree-holder who had attached it before it was actually sold. The consequence is on the happening of a judicial sale all previous attachments effected upon the property sold fall to the ground. (1886) ILR 12 Cal 317 and AIR 1921 Mad 30 and AIR 1921 Pat 409 and 14 Trav LT 767, Rel. on. (Para 3)

(B) Civil P. C. (5 of 1908), Sec. 65 — Sale in execution of money decree — On confirmation of such sale vesting of title in auction purchaser relates back to date of sale — Fact that another execution sale in pursuance of attachment before judgment in another suit was held after the earlier execution sale but before its confirmation is irrelevant. AIR 1921 Pat 409, Rel. on. (Para 3)

(C) Registration Act (16 of 1908), Ss. 17 (2) (vi) and 49 — Compromise decree creating charge over property attached before judgment which did not form part of plaint schedule properties in a suit for money on basis of equitable mortgage — Exempt from registration — Sale in execution of such charge decree prevails over subsequent sale in execution of another decree. AIR 1941 Bom 1 and AIR 1955 Raj 17, Not Foll.

If a decree or order is expressed to be made on a compromise and comprises immovable property other than that which is the subject-matter of the suit or proceeding, that requires registration. (Para 4)

In a suit for money by A against B on basis of an equitable mortgage, A attached before, judgment certain property which did not form part of the plaint schedule enumerating the mortgaged properties of which a sale was asked for. An unregistered compromise decree passed in the suit provided for payment of the decretal amount by instalments and in case of any default for sale of the mortgaged properties and the property attached before judgment. A then sold the attached property in execution and became the auction purchaser. The question was whether charge created by the compromise decree required registration and whether it was effective as against subsequent sale in execution of another decree.

Held that on the terms of the compromise decree in this case the attached properties were as well treated as subject-matter of the suit and compromise and hence the decree based on the compromise did not require registration. AIR 1935 Mad 232, AIR 1971 Mad 182, AIR 1974 Mad 199 and AIR 1960 Pat 179 Rel. on. AIR 1941 Bom 1 and AIR 1955 Raj 17, Not Foll. (Para 4)

Therefore by the decree following the compromise an effective charge was created in favour of the plaintiff A and that charge was not affected by the attachment and sale in execution of a decree of another decree holder. A, the decree-holder-auction-purchaser got right over the properties and that will prevail over the right claimed by the subsequent auction purchaser. (Para 4)

Cases Referred: Chronological	**Paras**
AIR 1974 Mad 199	4
AIR 1971 Mad 182	4
AIR 1960 Pat 179	4
AIR 1955 Raj 17	4
AIR 1950 Ori 140	4
AIR 1941 Bom 1	4
AIR 1935 Mad 232	4
AIR 1921 Mad 30: ILR 44 Mad 232	3
AIR 1921 Pat 409	3
(1886) ILR 12 Cal 317	3
14 Trav LT 767	3

S. A. Nagendran, N. N. Divakaran Pillai and K. B. Subhagamani, for Petitioner.

ORDER:— The petitioner in E. A. 57/75 who was also one of the respondents in E. A. 1061/74 in E. P. 91/66 in O. S. 38/60 on the file of the Quilon Sub Court is the revision petitioner. His application to set aside the court sale of items Nos. 1 to 7 in the proclamation schedule filed in execution of the decree in O. S. 38/60 was allowed by the Sub Court, Quilon, but dismissed in appeal by the District Court. While dismissing the appeal the District Judge observed that the application to set aside the sale was misconceived in the

sense the petitioner who claims to be a purchaser under an earlier charged decree and who is in actual possession of the property can assert his rights in the property and also his right to remain in possession of it when he is sought to be dispossessed in execution of the present decree and the exact nature of his rights and the question whether these rights can prevail against the decree-holder are matters which are to be properly determined at that stage. The lower appellate court in so observing lost sight of the fact that the petitioner came to court on receiving a notice to show cause why he shall not be evicted from the properties to put the decree-holder auction purchaser in O. S. 38/60 in possession of the same as per the sale certificate and application filed by him as E. A. 1061/74. The petition and objection filed by the revision petitioner before the Sub Court were really one in answer to that on asserting his preferential right to the property as against the respondent-decree-holder-auction purchaser and so in deciding whether the court sale in O. S. 38/60 is invalid and liable to be set aside this question arises for consideration. This question is also material in considering whether the petitioner's predecessor's right is affected by the sale to apply under O. XXI Rule 90, C. P. C. The execution court dismissed the application for delivery and allowed the petitioner's application. So the petitioner's right under the decree in O. S. 95/53 and the court sale following it on 26-6-1969 calls for consideration in this case and the case has been argued before me on that basis.

2. The Palai Central Bank Ltd. had filed a suit, O. S. 95/53, against the 2nd respondent herein for recovery of a very large amount due from him on the basis of an equitable mortgage. Before decree the present disputed items were attached on the ground that the properties mortgaged are insufficient to realise the amount due to the bank. Ext. X3 is the copy of the plaint in O. S. 95/53 and Ext. X2 is the copy of the report and of the list of properties attached. That suit was compromised and Ext. X5 is the copy of the compromise petition. Ext. X4 is the copy of the judgment to the effect that the suit is decreed in terms of the compromise. The copy of the decree produced in the case also shows that the decree contains the terms of the compromise. The bank subsequently went into liquidation and the Liquidator could bring the property to sale only on 26-6-1969. The Liquidator himself was the purchaser. He sold the property to the revision petitioner under Ext. X1 on 25-4-1974 for Rs. 35,000/- and the latter discharged the prior encumbrances in the property amounting to Rs. 55,000/-. In the meanwhile the 1st respondent, another creditor of the 2nd respondent, filed a suit O. S. No. 38/60 and obtained a money decree against the 2nd respondent. In execution of the decree he also attached the same and other properties, brought them to sale and himself purchased for Rs. 12,000/- and odd. The 2nd respondent had taken steps to set aside the sale, but did not succeed. After obtaining the sale certificate the 1st respondent applied for delivery of possession. In the meanwhile the revision petitioner had come into possession of the disputed properties under the proceedings referred to earlier and so in answer to the notice of the application for delivery he put forward his claim to the properties.

3. In this connection two questions arise for consideration. Firstly what is the effect of a prior attachment against an earlier sale in pursuance of a subsequent attachment and secondly whether the decree-holder in O. S. No. 95/53 had obtained an enforceable charge by the compromise decree. An attachment is the order prohibiting and restraining the defendant from transferring or charging the attached property by sale, gift or otherwise and all persons from so receiving it (See O. XXI R. 54 and Appendix E Form No. 24 of Civil P. C.) and S. 64 of the Civil P. C. provides that private transfer or delivery of property attached shall be void against all claims enforceable under the attachment. Its effect therefore is only to prevent alienation and not to confer title by way of charge or other-

wise on the attaching decree-holder. Further it is only aimed at private alienations. It does not prevent involuntary alienations. On this aspect of the matter there is no difference between attachment in execution of a decree and an attachment before judgment. O. XXXVIII R. 10, C. P. C. makes this position clear. That rule provides that the attachment before judgment shall not affect the rights existing prior to the attachment or persons not parties to the suit, nor bar any person holding decree against the defendant from applying for sale of the property attached. Such being the effect of an attachment, whether before or after decree, it does not bar a court sale in execution of another decree and with the court sale the interest of the judgment-debtor passes to the auction purchaser and there is nothing left to be sold later at the instance of another decree-holder who may have attached the property earlier. The purpose of the attachment is solely for the purpose of protecting the attaching creditor's right to bring to sale in execution the right, title and interest in the attached property of the judgment-debtor and there is no reason for holding that it continued to affect the attached property in any way when the attached property no longer continues to be the property of the judgment-debtor. The auction-purchaser takes the property free from attachment. The consequence no doubt to an earlier attaching creditor is very serious, but his rights are sufficiently safeguarded in such a situation by entitling him a rateable distribution of the proceeds of the sale. This is the only way left to a money-decree-holder when other like decree-holders proceed against the same property in execution. If this were not so complications will arise between an earlier attaching creditor and a subsequent attaching creditor. If the sale was under a private alienation with the earlier sale there is nothing left with the transferor to transfer subsequently to another. In the same manner the prior sale in pursuance of an attachment will prevail over a subsequent sale even if the latter sale was in pursuance of an earlier attachment. In other words with the court sale all attachment subsisting on the property will fall to the ground. I am supported in these conclusions by the decisions of the Calcutta High Court in Kashy Nath Roy Chowdhry v. Surbanand Shaha (1886) ILR 12 Cal 317), of the Madras High Court in Chamiyappa Tharagan v. Rama Ayyar, (ILR 44 Mad 232) : (AIR 1921 Mad 30) of the Patna High Court in Harnandan v. Pran Nath Roy (AIR 1921 Pat 409) and of the Travancore High Court in Civil Revn. Petn. No. 333 of 1115 : (14 Trav LT 767). If this was not so, it would give rise to great hardship and seriously affect court sales and there may not be any bidders in court-sale. Hence it must be taken as fairly settled that when a property is sold in execution of a money decree it cannot be sold again at the instance of the decree-holder who had attached it before it was actually sold. The consequence is on the happening of a judicial sale all previous attachment effected upon the property sold fall to the ground. On the facts of this case if the revision petitioner's right is only based on attachment before judgment in O. S. No. 95/53 he has no right over the properties because before he actually sold them in execution of the above decree they had been attached and sold in execution of the decree obtained by the respondent. The fact that the case before confirmation of the sale in O. S. No. 38/60 the sale in O. S. No. 95/53 was confirmed is also irrelevant for Section 65, C. P. C. provides that with the confirmation the vesting of title will relate back to the date of sale (see also AIR 1921 Pat 409).

4. But there is one more aspect to be looked into and that is what is the effect of the compromise decree creating a charge over these properties but which decree has not been registered under the Registration Act. According to the respondent's counsel the decree in O. S. No. 95/53 being a compromise decree and the disputed properties being not scheduled to the plaint therein the charge created by the decree

is ineffective for want of registration under Sec. 49 of the Registration Act. According to him, the decree comes under the exception mentioned in S. 17 (2) (vi) of the Registration Act. Section 17 specifies the documents of which registration is compulsory. All non-testamentary instruments which purport to create any right, title or interest of the value of Rs. 100/- and upwards, to or in immovable property should be registered (See S. 17 (i) (b) of the Registration Act). But, sub-section (2) exempts certain documents of the above category from registration. Cl. (vi) of sub-sec. (2) which is in the following terms:

"Nothing in Cls. (b) and (c) of sub-sec. (1) applies to—

any decree or order of a Court (except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding)"

exempts decrees and orders of a court from registration. There is an exception to this exemption. If a decree or order is expressed to be made on a compromise and comprises immovable property other than that which is the subject-matter of the suit or proceeding, that requires registration. Learned arguments were advanced on both sides as to whether the decree in O. S. No. 95/53 comes under this exception or not. According to the respondent's counsel, the properties now in dispute in this revision petition were not scheduled to the plaint in that case. That suit was for recovery of money based on an equitable mortgage. Some other properties were scheduled to the plaint and a decree was asked for sale of those properties mortgaged. The disputed properties were attached before judgment. Subsequently Ext. X5 compromise was entered into between the parties, and in the compromise there was a provision for payment of the amount due in instalments, and in case of default, for sale of the mortgaged properties and the properties attached before judgment. Ext. X4 is the copy of the judgment and it is to the effect that the suit is decreed in terms of the compromise. The copy of the decree available among the records of the case also shows that the decree is expressed to be based on the compromise. The revision petitioner's counsel contended that the disputed properties must also be taken to be subject-matter of the suit or proceeding. According to him, properties need not be scheduled to the plaint to form the subject-matter of the suit. Rights in or over the property need not be in dispute to form the subject-matter of the suit. If the properties are subject-matter of an interlocutory proceeding or if the creation of the charge over and a right to sell such properties form the consideration for the compromise such properties must be deemed to be subject-matter of the suit. In support of this contention he relied on the decision of the Madras High Court in Govindaswami v. Rasu (AIR 1935 Mad 232), M. P. Reddiar v. A. Ammal (AIR 1971 Mad 182), C. M. Pillai v. H. S. S. M. S. S. Kadhiri Thaikal (AIR 1974 Mad 199), Ramdas v. Jagarnath Prasad (AIR 1960 Pat 179) and the cases referred to in the latter decision. As against these the respondent's counsel relied on Chhotibai Daulatram v. Mansukhlal Jasraj (AIR 1941 Bom 1), Ganeshlal v. Ramgopal (AIR 1955 Raj 17) and Mani Sahoo v. Lokanath Misra (AIR 1950 Ori 140). In Ramdas v. Jagarnath Prasad (AIR 1960 Pat 179) cited by the petitioner the view was that the question whether a particular term of a compromise relates to the subject-matter of the suit is obviously a question to be answered on the frame of the suit, the relief claimed in it, and the matters arising for decision between the parties. In this connection the following observation made in that case is relevant (at p. 180):

"The question whether a particular term of a compromise relates to the subject-matter of the suit is obviously a question to be answered on the frame of the particular suit, the relief claimed in the suit and the matters arising for decision on the pleadings of the parties. The term is comprehensive enough, and if the compromise relates to all the matters which fall to be decided in the case, it cannot be said that any part of

the compromise is beyond the subject-matter of the suit.

In other words, where the compromise is really an adjustment of the rights and differences in respect of all matters in dispute between the parties and the compromise purports to be a final settlement and adjustment of these disputes on a fair and satisfactory basis acceptable to all, it must be held to relate to the suit." This view was followed by the Madras High Court in M. P. Reddiar v. A. Ammal (AIR 1971 Mad 182). The principle is stated thus in para. 5 (at p. 183):

"The words "the subject-matter of the suit" in S. 17 (2) (vi) cannot be read as subject-matter of the plaint nor even as subject-matter in dispute in the suit or proceeding. If the consent decree or order in the suit or proceeding covered the property, although it was not in the plaint or in dispute, such property constituting, as it does, an inseparable part of the consideration for the compromise, may well, in our view, be regarded as the subject-matter of the suit. This is because the decree passed on the basis of the compromise cannot stand without that property."

In this Division Bench decision, the earlier single Bench decision of the Madras High Court in Govindaswami v. Rasu (AIR 1935 Mad 232) where on the facts similar to the present case it was held that the property was subject-matter of the proceeding within the meaning of S. 17 (2) (vi) was approved. In AIR 1935 Mad 232 the question whether the compromise comprising immovable property not scheduled to the plaint will be subject-matter of the suit, was left open and His Lordship Mr. Justice Venkatasubba Rao took the view that the property will form the subject-matter of the proceeding for attachment and that was enough to exempt the decree from registration. No doubt, this latter view was held to be wrong in Chhotibai Daulatram v. Mansukhlal Jasraj (AIR 1941 Bom 1) and in Ganeshlal v. Ramgopal (AIR 1955 Raj 17). In the Bombay case the Single Bench decision of the Madras High Court was criticised as fallacious and the expression "proceeding" in S. 17 (2) (vi) was interpreted to mean only an independent originating proceeding which may be contrasted with a suit, a proceeding that is under some special Act. On a perusal of the judgment it is seen the terms of the compromise there were not similar to the terms of the compromise in this case. The compromise only provided that the mortgage is created over the properties not scheduled to the plaint for the amount due to the plaintiff. There was no attachment for the plaint amount and there was no term providing for the sale of such properties as we have in this case. The suit was a simple ordinary money suit and for a portion of the plaint amount some other properties were sold and for the balance amount a decree was granted against the defendant and then a provision was added that for the said balance amount due the defendant has by the compromise mortgaged the properties to the plaintiff. The question arose whether the compromise decree required registration and it was in that connection the Bombay High Court held that the decree is not effective without registration. The question whether the charge and the direction to sell the property in execution of the same decree constituted the consideration for the compromise did not arise. Ordinarily by the attachment the property is placed at the disposal of the Court to satisfy the amount due under the decree. The defendant is prohibited and restrained until further orders of the Court from transferring or charging the property. The plaintiff's right to bring to sale in execution the right, title and interest of the defendant in the attached property thus gets protected. Though this order of attachment does not create any interest or charge in the property, indirectly the property is secured for the plaintiff. In that way it has got involved in the suit and when a charge is created over it by the compromise and forms the consideration for it it can fairly be deemed to be subject-matter in the suit. Hence, with great respect, the view taken by the Madras High Court and the Patna High Court seems to me to be the better view than the Bombay view. In Ganeshlal v. Ram-

gopal (AIR 1955 Raj. 17) there was no discussion. The decision of the Bombay High Court was only followed. Thus, I hold that on the terms of the compromise decree in this case the attached properties were as well treated as subject-matter of the suit and compromise and hence the decree based on the compromise does not require registration. The Division Bench decision in M. P. Reddiar v. A. Amal (AIR 1971 Mad. 182) was followed in he later decision C. M. Pillai v. H. S. S. M. S. S. Kadhiri Thaikal (AIR 1974 Mad. 199). The same principle is stated there. In this view, I hold that by the decree following the compromise an effective charge was created in favour of the plaintiff, in O. S. No. 95/53 and that charge is not affected by the attachment and sale in O. S. No. 38/60. Therefore, as per the sale in O. S. No. 95/53 the decree-holder-auction-purchaser got right over the properties and that will prevail over the right claimed by the respondent. The right of the predecessor of the petitioner and that of the petitioner are not affected by the sale. It follows that the respondent is not entitled to recover possession of the properties from the revision petitioner. The revision petition is ordered in the above terms. But, in the circumstances, I make no order as to costs.

Order accordingly

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V. P. GOPALAN NAMBIYAR, Actg. C. J. AND T. KOCHU THOMMEN, J.

M. George and others, Petitioners v. Raju M. Mathew, Respondent.

C. R. P. No. 1403 of 1975, D/- 2-2-1977.

Arbitration Act (10 of 1940), Sch. I, R. 3 and S. 28 — "Entering upon the reference" — Meaning.

The Arbitrators can be said to have entered on the reference when they have applied their mind and done some act in furtherance of the arbitration. (Para 4)

Ext. A 1 notice in the instant case was merely by one of the arbitrators to one of the parties to the arbitration. It proceeded on the basis that the arbitrators had taken no steps to enter upon the reference. It did not by itself ask for the appointment of an Umpire, but only requested for speedy steps to enable the arbitrators to enter on the reference.

Held that it did not evidence an application of the mind by the arbitrators for the purpose of taking steps for proceeding with the arbitration. AIR 1973 Cal 253 (FB), Followed. (Para 4)

Held further that it could not be said that the arbitrators had become functus officio by reason of the expiry of over four months from the date of notice to them by the parties to the arbitration proceedings. Such a consequence could not follow from the issue of the notices sent earlier, in the light of the finding that the Arbitrators had not entered on the reference. AIR 1962 SC 78, Followed. (Paras 6, 7)

Cases Referred: Chronological Paras

AIR 1973 Cal 253 (FB)	4
AIR 1962 SC 78	6
AIR 1957 Pat 395	4
AIR 1956 Bom 146	4
AIR 1951 Cal 78	4
(1941) 1 KB 396 : 110 LJ KB 54	4
(1867) 2 QB 523 : 36 LJ QB 236	4

C. S. Thomas, T. L. Anandasivan, P. K. Jose and K. Prabhakaran, for Petitioners; T. L. Viswanatha Iyer, for Respondent.

ORDER:— This revision petition is against the order of the Sub-Court, Pathanamthitta in Arbitration O. P. No. 1 of 1970. The petitioner and the cr. petitioner were partners of a firm called M. George & Brothers, Bankers, Kozhencherry. There was a notice of dissolution of the firm issued by the one to the other; in response to which the arbitration clause in the agreement was invoked and one of the partners appointed an arbitrator Mr. K. V. Joseph. As the other partner did not appoint his arbitrators, a petition under S. 8 of the Arbitration Act, was filed to compel appointment of an arbitrator by the other partner or to have arbitration proceedings conducted by Mr K. V. Joseph as the sole arbitrator. That resulted in the appointment of an arbitrator on behalf of the other partner also. As

arbitration proceedings did not progress any further, I. A. No. 941 of 1971 was filed for appointment of a Receiver. The same was dismissed by order dated 18-7-1973. On 16-8-1973 I. A. No. 456 of 1973 was filed for reviewing the said order on the ground that it was vitiated by error apparent on the face of the record and that there was fraud on the part of the counter-petitioner. To substantiate the contentions taken in support of the review, I. A. 473 of 1973 was filed for permission to take out summons to the Income-tax Officer for production of certain records. The counter-petitioner resisted the application contending that it was not maintainable as the court had become functus officio with the passing of the final order on the O. P. and that for the same reason it had no jurisdiction either to appoint a Receiver or to summon documents. By its order dated 5-6-1974, the court held that the reference was pending before the Arbitrators and the court had jurisdiction under S. 41 (b) read with the IInd Schedule of the Arbitration Act, to appoint a Receiver. I. A. No. 473 of 1973 was allowed subject to the relevancy of the documents being considered and decided at the time of hearing (the statement in para 3 of the order under revision, where it is stated that I. A. 456 of 1973 was allowed seems to be a mistake for I. A. 473 of 1973). Against the said order, C. R. P. 662 of 1974 was filed in this Court. This Court concurred with the court below on the question of jurisdiction and remitted the matter back to the court to consider the question whether the arbitrators had become functus officio or not. That question was considered by the court below in the order against which this revision has been preferred.

2. Two arguments were advanced before the court below, which have been repeated before us also in this revision petition. The arguments were: (1) that the Arbitrators had actually entered upon the reference and done nothing further thereafter for a period of four months, and therefore the proceedings had come to an end; and (2) even if they had not entered upon the reference, they had become functus officio as notice had been issued to them on 15-10-1973 and 29-10-1973 by the petitioner and the counterpetitioner, calling upon the Arbitrators to appoint an Umpire and more than four months had expired thereafter. The court below held both these points against the petitioner in this revision petition. It held that the Arbitrators had not entered upon the reference. It held also that the Arbitrators had not become functus officio.

3. In support of the argument that the Arbitrators had actually entered upon the reference Counsel for the revision-petitioners relied on Ex. A1 notice dated 23-12-1974. That notice is issued by Mr. K. V. Joseph one of the arbitrators to the petitioner in the O. P. (respondent herein). The notice is as follows:

"Sub: Arbitration O. P I/1970 in the Sub-Court, Pathanamthitta.

You will be aware that no steps have been taken to enter upon the reference or to act in accordance with the appointment from the Honourable Court.

On 14-11-1973 I have sent a letter to Sri. O. Thomas, the Co-Arbitrator asking his convenience to take steps to the speedy disposal of arbitration. But no reply has been received so far.

I request you therefore to take immediate action through Court so that the arbitrators may be enabled to enter on the reference in accordance with law."

According to the revision petitioners' Counsel, this amounts to the arbitrators "entering upon the reference" within the meaning of R. 3 of Sch. I of the Arbitration Act. That Rule reads as follows:

"3. The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow."

4. As to what is meant by an entry on the reference has been the subject-matter of judicial decisions both in England and in our country. The Indian Arbitration Act at present is modelled, almost entirely on the

English Act. The decisions under the English Act would therefore be appropriate. On the facts presented in this case, it is unnecessary for us to take a detailed survey or examination of the case law dealing with this aspect of the question. Briefly stated, in the English decision in Iossifoglu v. Coumantaros (1941) 1 KB 396 at p. 401, a more liberal view in regard to the question of "entering upon the reference" was taken than what had prevailed in the earlier decision in Baker v. Stephens, (1867 (2) Q.B. 523). There have been decisions in this country following, or considering the principle of the earlier English decision. But subsequent to the later English decision, the High Courts of this country have considered the position. In particular, we would refer to the decisions in Messrs. Bajranglal Laduram v. Ganesh Commercial Co. Ltd. (AIR 1951 Cal 78), Dr. Babu Bhai Vanmalidas v. Prabhod Pranshankar (AIR 1956 Bom. 146), Soneylal v. Lachhminarain, (AIR 1957 Pat. 395) and in Ramanath Agarwalla v. Goenka & Co., (AIR 1973 Cal. 253 (FB)). The Full Bench of the Calcutta High Court after surveying the position stated the rule as follows (at p. 258):

"35. We, therefore, answer the questions referred to us as follows :

(1) An Arbitrator does not enter on the reference as soon as he assumes the office of an Arbitrator. An Arbitrator does not necessarily enter on the reference when he actually commences the decision of the matter in the presence of both parties or ex parte. An Arbitrator enters on a reference when he first applies his mind to the dispute or controversy before him depending on the facts and circumstances of each case.

(2) In view of our answer to question No. 1, this question need not be answered."

The two questions referred to the Full Bench have been stated in paragraph 8 as follows (at p. 255):

"8. The questions of law referred to us are as follows:

(1) When does an arbitrator enter on a reference? Does he enter it as soon as he assumed the office of an arbitrator, or does any act as an arbitrator, or does he enter it only when he actually commences the decision of the matter in the presence of both parties or ex parte? (2) Was Bajrangalal's case rightly decided in so far as it held that arbitrator must be held to have entered on the reference when they accepted their appointment?"

(The case referred to in Question 2 is AIR 1951 Cal. 78). The difficulty for the revision petitioner is, that even within the limit and within the meaning of the principle stated about "entering on the reference" as expounded by these decisions, the revision petitioner cannot fit his case. The principle that has crystallised from the decisions of the Indian Courts after considering the later English decision, stated broadly, is that the Arbitrators can be said to have entered on the reference when they have applied their mind and done some act in furtherance of the arbitration. The earlier Calcutta case (AIR 1951 Cal 78) and the Patna case (AIR 1957 Pat 395) and the Bombay case, were prepared to find such application of the mind when the Arbitrators corresponded with each other to appoint an umpire (Patna and Bombay) or when, at their instance, the Secretary of the Bengal Chamber of Commerce, called upon the parties to file their pleadings (Cal.). The later Full Bench of the Calcutta High Court also requires an application of the mind. It left open the correctness of the earlier decision in AIR 1951 Cal. 78, and did not answer question 2, which directly raised the question of the correctness of the earlier ruling. Ext. A1 notice dated 23-12-1974 relied on by the revision petitioner in the instant case is merely by one of the arbitrators to one of the parties to the arbitration. It proceeds on the basis that the arbitrators had taken no steps to enter upon the reference. It does not by itself ask for the appointment of an Umpire, but only requests for speedy steps to enable the arbitrators to enter on the reference. We are not prepared to find that it evidences an application of the mind by the arbitrators for the purpose of taking steps for proceeding with the arbitration. Ext. A1 refers to an earlier letter dated 14-11-1973 sent by one Arbitrator to the other. That letter is not before us, and the contents of

that letter, to the extent to which they have been noticed in Ext. A1, do not enable us to hold that the said letter evidences an application of the mind by the arbitrators to proceed with the arbitration proceedings within the meaning of the principle expounded in the decisions to which we have made reference.

5. In the result, therefore, we would negative the first contention of the revision petitioner and hold that there has been no entry on the reference by the arbitrators.

6. That brings us to the second contention raised by the revision petitioner viz. that even if there has been no entry on the reference, the arbitrators have become functus officio by reason of the expiry of over four months from the date of notice to them by the parties to the arbitration proceedings. Here again, the notices on the basis of which the arbitrators are stated to have become functus officio are not before us. But the court below in para 6 of its order has stated that notices were given by the parties on 15-10-1973 and 29-10-1973 to the arbitrators to appoint an Umpire. We will take it that this was so. The question then would be, whether, on the basis of this notice, the arbitrators can be said to have become functus officio. We have already extracted Sch. I, R. 3 of the Arbitration Act. With reference to the said provision and to the relevant case law on the point, the Supreme Court in Hari Shanker Lal v. Shambhunath Prasad (AIR 1962 SC 78), had occasion to consider the question and to lay down the following propositions (at p. 82):

"The legal position may be formulated thus: (a) a notice to act may be given before or after the arbitrators entered upon the reference, (b) if notice to act is given before they entered upon the reference, the four months would be computed from the date they entered upon the reference, (c) if a party gives notice to act within 4 months after the arbitrators entered upon the reference, the arbitrators can make an award within 4 months from the date of such notice, and (d) in that event, after the expiry of the said 4 months the arbitrators become functus officio, unless the period is extended by court under S. 28 of the act; such period may also be extended by the court, though the award has been factually made."

Earlier, in paras 9 and 10, construing R. 3 of Sch. I of the Arbitration Act, the Court observed (at page 81 of AIR SC):

"The object of the Rule is to prescribe a time-limit in the interest of expeditious disposal of arbitration proceedings. If under the second alternative notice to act can be given at any time, it would enable one of the parties to enlarge the period of time prescribed indefinitely: not only the time limit prescribed would become meaningless but one of the parties could also, without the consent of the other, resuscitate a dead or stale reference. This could not have been the intention of the Legislature and, therefore, a reasonable construction should be placed upon the provision. Such a limitation on the right of a party to reopen an abandoned reference is implicit in the words "to act". A party can ask the arbitrator to act if he is legally bound to act under the reference. If after the expiry of the four months from the date of entering on the reference an arbitrator can no longer act, a notice given thereafter cannot ask him to act. Realizing this difficulty, learned counsel for the respondents suggests that an arbitrator can act even after four months, though the award cannot be filed without getting an extension of time from the court. But the relevant provisions do not support this contention.

(10) The third alternative in R. 3 shows that an award can be made within the extended time allowed by the Court. S. 28 of the Act enables the court to extend the time for making of the award; extension of time may be given even after the award has been factually made. So till the time is extended an award cannot be made, though when extended, the award factually made may be treated as an award made within the time so extended. To put it differently, if time was not extended by court, the document described as an award would be treated as non est. In this view, the second alternative in R. 3 can be invoked only in a case where

a notice to act has been given to the arbitrators either before the arbitrators entered on the reference or after they have entered on the reference but before the period of four months from that date has run out."

In paragraph 11 of the judgment, the Court noticed that the construction put by them may start a chain of notices leading to the same result, which was sought to be avoided by the Rule. It was observed by the Court that though there might be some criticism it can be answered by confining the right to give notice by a party to the period of four months from the time the arbitrators entered upon the reference.

7. In the light of the above exposition of the law by the Supreme Court, it sounds incongruous that the Arbitrators had become functus officio before they had even actually entered on the reference. We are not prepared to hold that such a consequence would follow from the issue of the notices referred to earlier, in the light of our finding that the Arbitrators had not entered on the reference. This conclusion of ours is only strengthened by the provisions of S. 28 of the Arbitration Act which gives the Court the power to enlarge the time for making an award (if this power is exercisable on the terms of the section) "whether the time for making the award has expired or not, and whether the award has been made or not". In the face of this provision, we cannot hold that the Arbitrators had become functus officio even before they had entered on the reference.

8. We see no ground to interfere. We dismiss this revision petition with no order as to costs.

Petition dismissed.

AIR 1978 KERALA 21

G. BALAGANGADHARAN NAIR, J.

Muhammad and others, Petitioners v. Sinnamalu Amma, Respondent.

C. R. P. No. 583 of 1977-1, D/- 2-9-1977.

(A) Kerala Buildings (Lease and Rent Control) Act (2 of 1965), S. 11 (3) — Expression 'family' — Interpretation — Husband and son, held, to be members of landlord's family. (Words and Phrases — Word 'family').

The expression 'family' which is undefined by the Act is elastic and its ambit has to be determined in all the circumstances of the case, having regard to the habits, ideas and socio-economic milieu of the parties. Going even by its primary meaning the word 'family' includes the son. The husband although the head is certainly part of the family, even if he is not and cannot be a member of the tarwad of his marumakkathayee wife. Case law discussed. (Para 8)

(B) Kerala Buildings (Lease and Rent Control) Act (2 of 1965), S. 11 (3) — Expression 'dependent' — Meaning of — Not confined to one who is financially dependent.

It would be an undue restriction of the word 'dependent' to limit it to one who is only financially dependent upon the landlord. The Legislature has not undertaken to define the word and one has to determine its meaning keeping in view the context and the circumstances of each case. Section 11 deals with eviction of tenants and sub-sec. (3) must therefore be related to cases where the member of the family is dependent upon the landlord for the building—whether residential or non-residential, as when although financially independent of the landlord, he might have no building or a building that will answer his needs and the landlord bona fide needs to provide that member with a building. It is not possible nor would it be prudent to formulate tests that would govern all situations which arise under sub-sec. (3); the answer must depend upon the facts and circumstances of each case. 1971 Ker LT 119, AIR 1971 Delhi 151, Rel. on. (Para 9)

Cases Referred: Chronological Paras

AIR 1971 Delhi 151	6, 9
1971 Ker LT 119	9
(1965) ILR 15 Raj 149	7
ILR (1962) 2 Punj 484	9
AIR 1953 Nag 144	6
AIR 1953 Punj 156	6
AIR 1952 Punj 189	6
(1950) 1 KB 377 : (1949) 2 All ER 861, Standingford v. Probert	5
(1950) 1 All ER 71 : (1950) 2 KB 204, Jones v. Whitehill	6
(1949) 2 KB 388 : (1949) 1 All ER 715, Brock v. Wollams	5

(1930) 46 TLR 411 : 143 LT 333, Price v. Gould 4, 5, 6
(1925) 1 KB 584 : 132 LT 830, Salter v. Lask 6

K. Chandrasekharan and P. N. K. Achan, for Petitioners; V. R. Venkitakrishnan, for Respondent.

ORDER:— The first respondent in the revision who is the landlord sought eviction of the petitioners who were in occupation of the first floor of a two storeyed building under the tenant who was the first respondent in the petition for eviction. Apart from the allegation that rent was in arrears—that question is no longer relevant—the main ground on which the landlord claimed eviction was under S. 11 (3) of the Buildings (Lease and Rent Control) Act which provides that:

"A landlord may apply to the Rent Control Court for an order directing the tenant to put the landlord in possession of the building if he bona fide needs the building for his own occupation or for the occupation by any member of his family dependent on him."

2. In support of this ground the landlord had alleged that her husband P. W. 1 was running a stationery business and a medical shop in the ground floor, that her son Balagopalan was conducting a typewriting institute in a rented building some distance away in the same town and that if the premises in question which consist of three rooms and a hall are vacated P. W. 1 could expand his business and Balagopalan could move his institute into them. This ground was accepted by the authorities below which have agreed in granting the landlord's petition for eviction.

3. The finding that the ground put forward by the landlord is true and bona fide has thus become final and is not liable to challenge in this revision. Mr. Achan for the petitioners however contended that even so the petition must fail as neither P. W. 1 nor Balagopalan is a member of the landlord's family and in any event as neither of them is dependent upon the landlord.

4. Taking the first limb of this argument, the expression 'family' has not been defined in the Act nor could counsel produce any decision of this Court where it had been considered. However the expression 'family' has been the subject of discussion in several decisions, both Indian and English. In Price v. Gould, (1930) 46 TLR 411, which has been followed in several subsequent cases Wright J. said:

"It has been said in a number of equity cases, relating principally to wills or to settlements under powers of appointment, that the word 'family', was a popular, loose, and flexible expression, and not a technical term. It had been laid down that the primary meaning of the word 'family' was children; but that primary meaning was clearly susceptible of wider interpretation, because the cases decided that the exact scope of the word must depend on the context and the other provisions of the will or deed in view of the surrounding circumstances." The learned Judge who was considering the meaning of 'family' in S. 12, sub-sec. (1) (g) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 went on to say that the word—

"includes brothers and sisters of the deceased living with her (the tenant) at the time of her death. I think that that meaning is required by the ordinary acceptance of the word in this connection and that the legislature has used the word 'family' to introduce a flexible and wide term."

5. In Brock v. Wollams, (1949) 2 KB 388, the Court of Appeal held that the defendant Mrs. Wollams who had been adopted in fact but not in legal form at the age of five or six by the tenant and had lived with him till his death, except for an interval of about three years when she resided with her husband, was a member of the tenant's family within the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. In Standingford v. Probert, (1950) 1 KB 377, the Court of Appeal held that the tenant's married sons and their wives were members of his family within the expression "needs of the tenant and his family" under the same Act. Both these decisions followed Price v. Gould, (1930-46 TLR 411). Another case that deserves notice is Salter v. Lask, (1925) 1 KB 584 considered in Brock v. Wollams, (1949) 2 KB 388, 393, where the question was whether the husband of a tenant was a member of the tenant's family and Salter J. held that he was.

6. Turning to Indian cases, in Balabhadra v. Premchand, AIR 1953 Nag 144, a Bench consisting of Sinha, C. J. and Mudholkar J. held that the need of a widowed daughter and her children must be deemed to be those of her landlord-father entitling him to claim possession

of a building for their residence as they were depending on him, even though by marriage she had passed out of his family and gone into that of her husband. One of the cases followed by the learned Judges was Jones v. Whitehill, (1950) 1 All ER 71, where a niece of the tenant's wife was regarded as falling within the meaning of 'members of the tenant's family'. In Govind Dass v. Kuldip Singh, AIR 1971 Delhi 151, the question arose whether the younger brothers, their wives and children were members of the family of the landlord within S. 14 (1) Proviso (e) of the Delhi Rent Control Act, 1958. A Bench consisting of H. R. Khanna, C. J. and Prakash Narain J. held that in the circumstances of the case they were. After noticing that the Act had advisedly not defined the word 'family' the learned Judges observed (at pp. 152 & 153):—

"The concept of what constitutes a family when a number of persons are related or are living together is not something static or capable of concise definition. What constitutes a family in a given set of circumstances or in a particular society depends upon the habits and ideas of persons constituting that society and the religious and socio-religious customs of the community to which such persons may belong."

Their Lordships followed among other cases Ram Pershad Singh v. Mukand Lal, AIR 1952 Punj 189, where J. L. Kapur, J. held that in a given set up of social structure even nephews could be regarded as members of a landlord's family. It might be mentioned that AIR 1952 Punj 189 and a subsequent case Shri Nanak Chand v. Smt. Tara Devi, AIR 1953 Punj 156, also noticed by the Judges, followed the observations of Wright J. in Price v. Gould (1930-46 TLR 411).

7. It is unnecessary to quote further decisions except to mention that Radhavallabh v. Damodardas, ILR (1965) 15 Raj 149, contains a review of several cases on the point and that Andhyarujina's 'The Law of Rent Control' has a full and illustrated discussion of term 'family' under the commentaries to S. 5 (11) (c) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947.

8. From the above discussion it is obvious that the expression 'family' which is undefined by the Act is elastic and that its ambit has to be determined in all the circumstances of the case, having regard to the habits, ideas and socio-economic milieu of the parties. In the present case the concerned relations are the husband and son of the landlord. Going even by its primary meaning the word 'family' includes the son. The husband although the head is certainly part of the family, even if he is not and cannot be a member of the tarwad of his marumakkathayee wife. I reject this part of the contention.

9. The more important point urged on behalf of the petitioners is that the landlord is not entitled to claim eviction as neither the husband nor the son is dependent on her. Counsel contended that Anthony Kochuvariathu v. Chakkulinga Nadar, 1971 Ker LT 119, followed expressly by the Rent Control Court and the Appellate Authority and by reference by the Revisional Court, has unduly enlarged the scope of the word 'dependent' and that it requires reconsideration. Now in that case the landlord-father who was residing with his family in a house which contained three rooms sought to evict a tenant from another building for the occupation of his two married sons who though not financially dependent on him had no houses themselves and could not afford to take independent buildings for themselves. Upholding the landlord's claim as bona fide Sadasivan J. rejected the tenant's contention that the sons were not depending on their father, observing that dependency contemplated by the sub-section has to be viewed from a broader and humane angle and that it is not mere financial dependency. The learned Judge noted that for their residence the sons were depending entirely on the father because they could not afford to find separate buildings for their residence and that considering the position of the father the claim was bona fide. On the connotation of the word 'dependent' the learned Judge quoted with approval the following observation of Falshaw C. J. in C. L. Davar v. Amar Nath Kapur, ILR (1962) 2 Punj 484:

"In my opinion it (the word dependent) cannot be construed as meaning nothing but wholly dependent in the sense of not earning anything at all and being entirely dependent on the father for board, lodging and food. I think the term must be construed as meaning somebody not wholly independent or self-supporting and in a position to set up a separate residence. I also consider that dependence may not in all circumstances be entirely a matter of finance..."

This statement has also been followed in Govind Dass's case, AIR 1971 Delhi 151, where it was further observed that to restrict the word 'dependent' to a mere financial dependent would amount to shutting our eyes to the structure of our society. (That was a case where two Hindu brothers and their wives and children were held in the circumstances to be dependent for their residence upon the eldest brother). In my view it would be an undue restriction of the word 'dependent' to limit it to one who is only financially dependent upon the landlord. The Legislature has not undertaken to define the word and one has to determine its meaning keeping in view the context and the circumstances of each case. Section 11 deals with eviction of tenants and sub-sec. (3) must therefore be related to cases where the member of the family is dependent upon the landlord for the building — whether residential or non-residential, as when although financially independent of the landlord, he might have no building or a building that will answer his needs and the landlord bona fide needs to provide that member with a building. It is not possible nor would it be prudent to formulate tests that would govern all situations which might arise under sub-s. (3); the answer must depend upon the facts and circumstances of each case. I am not satisfied that any exception could be taken to the law in 1971 Ker LT 119 or that there is any need to send the case to a Bench for reconsidering it. On the facts, neither P. W. 1 nor Balagopalan has any non-residential building in the town and they have necessarily to depend upon the landlord. P. W. 1 has been doing so because he has been running his stationery business and medical shop in the ground floor of this building for long. Balagopalan's typewriting institute is in a rented building which is some distance from the premises in question. If the first floor is vacated P. W. 1 could expand his business and Balagopalan could establish his institute there and thereby save the rent which he has now to pay. Both of them are living with the landlord and Balagopalan's financial independence itself is in doubt for P. W. 1 swears that he is looking after the affairs of his daughter-in-law also. Under these facts the landlord's claim that she needs the first floor for the occupation— for business purposes — of her husband and son has been rightly upheld as bona fide.

I dismiss the revision but without costs.

Revision dismissed.

AIR 1978 KERALA 24

V. BALAKRISHNA ERADI AND T. KOCHU THOMMEN, JJ.

Neelakantanachari Velayudhanachari and another, Appellants v. Kerala State Road Transport Corporation, Respondent.

A. S. No. 14 of 1976, D/- 11-8-1977.

(A) Fatal Accidents Act (13 of 1855), S. 1-A — Death of non-earning children — Rights of parents to claim full benefits under the Act.

The mere fact that the children were not earning any money or money's worth would not disentitle their parents from claiming the full benefits under the Act. 1913 AC 1, Rel. on. (Para 6)

(B) Fatal Accidents Act (13 of 1855), S. 1-A — Estimation of damages under — Duty of Court.

In estimating damages under S. 1-A of the Act, the court has to ascertain the pecuniary loss suffered by the family of the deceased on account of his death which was caused by an actionable wrong. Non-pecuniary loss such as mental suffering and anguish for the loss of a spouse or a child will be excluded from the computation of damages. The Court has to evaluate the pecuniary loss resulting from death on the basis of a proper appreciation of the relevant circumstances and hard realities. In doing so, the Court has to take into account all reasonable probabilities of future benefits, but exclude from its consideration all fancied or bare possibilities or speculative conjectures. In other words, the damages are to be based on the reasonable expectation of pecuniary benefit or benefit reducible to money value. AIR 1970 SC 376, Rel. on. (Paras 7 and 8)

(C) Fatal Accidents Act (13 of 1855), S. 1-A — Female members of family of deceased not earning in past — Conclusion to be drawn.

Merely because no female member of the family had, in the past, earned any income, it could not be concluded that there was no reasonable possibility of the bright young girl (deceased) growing up into a healthy, vigorous, independent and earning member of the family. (Para 10)

JU/JU/D718/77/CWM

Cases Referred: Chronological **Paras**

(1977) C. M. P. No. 8535 of 1977, D/- 11-7-1977 (Ker) 4
AIR 1970 SC 376 8
1942 AC 601: '942) 1 All ER 657 7
1913 AC 1: 107 LT 564 6, 7
(1852) 18 QB 93: 118 ER 35 7

K. S. Rajamony, for Appellant.

KOCHU THOMMEN, J.:— This appeal is from the judgment and decree of the Subordinate Judge, Kottayam, in O. S. No. 46 of 1971. The appellants are the plaintiffs in a suit for damages arising on account of the death of their two children and their personal injuries and loss which were alleged to have been caused by the wrongful act of the defendants. The suit was decreed, but not in terms of the plaint as the court below awarded only part of the damages claimed. Hence the present appeal.

2. The 1st plaintiff is the husband of the 2nd plaintiff. On the night of 24-1-1969 the couple were walking back home along the Athirampuzha-Ettumanoor road with their daughter Vijayam (aged 12) and son Vikraman (aged 11) after seeing the fireworks at the Athirampuzha church. As they reached Uppupurakkal junction, bus No. KLT 8764 belonging to the 1st defendant and driven by the 2nd defendant suddenly hit them. Both the children died instantaneously and the parents were seriously injured. The learned trial Judge held that the accident was caused by the negligence of the 2nd defendant, and that the 1st defendant was vicariously liable in damages.

3. The plaintiffs claimed a total sum of Rs. 28,880 by way of damages from the 1st defendant under the following heads:

(a) Rs. 2,000 on account of the shock and injuries sustained by Vijayam;

(b) Rs. 2,000 on account of the shock and injuries sustained by Vikraman;

(c) Rs. 8,000 on account of the death of Vijayam;

(d) Rs. 10,000 on account of the death of Vikraman;

(e) Rs. 2,000 on account of the shock and injuries sustained by the 1st plaintiff;

(f) Rs. 2,000 on account of the shock and injuries sustained by the 2nd plaintiff; and

(g) Rs. 2,880 on account of the loss of earnings of the 1st plaintiff.

Although it is not specifically so stated in the plaint, from the nature of the above claims, it appears to be clear that the first four items arise under the Fatal Accidents Act (XIII of 1855), for short the Act; (a) and (b) being under S. 2 and (c) and (d) being under S. 1-A. The last three items are for personal injuries and loss suffered by the plaintiffs. The trial court awarded damages only in respect of items (d), (e) and (f) and limited the damages, under each of them, to Rupees 1,000, Rs. 1,000 and Rs. 2,000 respectively. The total sum thus awarded was only Rs. 4,000.

4. Both the suit and the appeal were filed in forma pauperis. Although in the appeal the plaintiffs claimed the entire balance of Rs. 24,880 they have subsequently amended the appeal memorandum after obtaining the leave of this Court* and limited their claim to Rupees 11,500. As per the amendment, the amounts claimed on account of shock and injuries sustained by Vijayam and Vikraman are given up. The claims on account of the death of Vijayam and Vikraman are limited to Rs. 5,000 each. Of the latter claim a sum of Rs. 1,000 was awarded by the lower court and the balance is now claimed. The claim for Rs. 2,000 on account of the shock and injuries sustained by the 1st plaintiff was allowed by the lower court only to the extent of Rs. 1,000 and the balance is claimed in the appeal. The claim on account of the shock and injuries sustained by the 2nd plaintiff was allowed in full by the lower court. The claim for Rs. 2,880 on account of the loss of earnings of the 1st plaintiff is now limited to Rs. 500. The plaintiffs have thus given up their claims under S. 2 of the Act and are now pursuing their claim only under S. 1-A and for personal injuries and loss.

5. The bus which was driven negligently by the 2nd defendant ran over the chest of Vijayam and the head of Vikraman. The children were instantaneously crushed to death. The bus hit the father (1st plaintiff) on the left side of his waist and he fell down unconscious. His stomach was operated upon in the Medical College Hospital, Kottayam, where he was hospitalised for several weeks. The bus hit the mother (2nd plaintiff) on her head and knocked her down, and then ran over her right arm. She lost half of her right thumb and she had to be operated upon twice in the

*Order dated 11-7-1977 in C. M. P. No. 8535/77.

Medical College Hospital, Kottayam, where she was hospitalised for a number of weeks. Flesh was cut off twice from her thigh and grafted on her injured arm. She has not yet completely recovered from the injury as she cannot even now bend her right arm or do any work with it. Both the children were extremely smart and healthy. The boy was studying in the III Standard and the girl in the IV Standard, and they were good in their studies. Both the parents were perfectly healthy and strong at the time of the accident. The grand-parents of the children had been blessed with long and happy life. The paternal grandfather died at the age of 75 and the paternal grandmother died at the age of 81. The maternal grandfather lived up to 89 years, and the maternal grandmother lived up to 79 years. The father is a goldsmith earning not less than Rs. 10 a day and the mother earned some income by making sweetmeats at home which she used to sell with the help of the daughter. In the normal course both the children would have lived long and healthy lives and brought happiness and prosperity to their home. In the normal circumstances, the parents could have looked up to the children in the future for financial support.

6. The children were not earning members at the time of their death, although the girl used to render some help to the mother in selling sweetmeats. Yet it is likely that they both would have successfully completed their education and attained suitable positions in life. Although they belonged to the family of a goldsmith and were brought up in circumstances which were by no means affluent, it is quite probable that, on account of the special protection enjoyed by the community to which they belonged, they would have had various opportunities to rise in life socially, educationally and economically. The mere fact that the children were not earning any money or money's worth would not disentitle their parents from claiming the full benefits under the Act; per Viscount Haldane L. C. in Taff Vale Railway Company v. Jenkins (1913) AC 1 at p. 4.

7. In estimating damages under S. 1-A of the Act, the court has to ascertain the pecuniary loss suffered by the family tal suffering and anguish for the loss of a spouse or a child will be excluded from the computation of damages: Blake v. Midland Ry. (1852) 18 QB 93. What is payable under the section is not a solatium for injured feelings: per Viscount Haldane L. C. in Taff Vale Railway Company v. Jenkins (1913 AC 1) (supra) It is an amount calculated on a reasonable expectation of the pecuniary benefit which the beneficiaries would have derived had not the death occurred. The beneficiaries have to prove that by the death of the person they lost a reasonable probability of pecuniary advantage.

"There is no question here of what may be called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities." (per Lord Wright in Davies v. Powell Duffryn Associated Collieries Ltd., (1942) AC 601 at 617) (HL).

8. There is no hard and fast rule about the assessment of damages under the Act. Each case depends upon its own facts and circumstances. In the absence of statutory guidelines, the Court has to make an estimate of the pecuniary loss suffered by the members of the family of the deceased. The observation of Lord Wright that it is a hard matter of pounds, shillings and pence may appear to be too severe. Circumstances and attitudes have changed.* Greater value is attributed to life while the purchasing power of the rupee has considerably diminished. Sentiments indeed have no place, but the Court has to evaluate the pecuniary loss resulting from death on the basis of a proper appreciation of the relevant circumstances and hard realities. In doing so, the Court has to take into account all reasonable probabilities of future benefits, but exclude from its consideration all fancied or bare possibilities or speculative conjectures. In other words, the damages are to be based on the reasonable expectation of pecuniary benefit or benefit reducible to money value. In C. K. Subramonia Iyer v. T. Kunhikuttan Nair (AIR 1970 SC 376),

*In the matter of awarding damages to the closest relatives, a more sympathetic attitude is now adopted in South Australia and Eire by means of statutory

Hegde J. observed as follows (at p. 380 of AIR):—

"The law on the point arising for decision may be summed up thus: Compulsory damages under S. 1-A of the Act for wrongful death must be limited strictly to the pecuniary loss to the beneficiaries and that under S. 2, the measure of damages is the economic loss sustained by the estate. There can be no exact uniform rule for measuring the value of the human life and the measure of damages cannot be arrived at by precise mathematical calculations but the amount recoverable depends on the particular facts and circumstances of each case. The life expectancy of the deceased or of the beneficiaries whichever is shorter is an important factor. Since the elements which go to make up the value of the life of the deceased to the designated beneficiaries are necessarily personal to each case, in the very nature of things, there can be no exact or uniform rule for measuring the value of human life. In assessing damages, the Court must exclude all considerations of matter which rest in speculation or fancy though conjecture to some extent is inevitable. As a general rule parents are entitled to recover the present cash value of the prospective service of the deceased minor child. In addition they may receive compensation for loss of pecuniary benefits reasonably to be expected after the child attains majority....."

9. Considering the circumstances in which Vijayam and Vikraman lost their lives and their parents suffered injuries, and the prospects of future benefits which the parents lost in the death of the children, we feel that the court below did not correctly estimate the damages. A sum of Rs. 1,000 awarded on account of the death of Vikraman was unreasonably small. The boy was strong and healthy. Even if he did not choose a profession other than that of his forefathers', he would have, as an artisan, earned a reasonably good income for the family and, in all probability, supported his parents as they grew older. In the circumstances we feel that the entire sum claimed i. e., Rs. 5,000 ought to have been awarded on account of Vikraman's death.

10. The court did not award any damages on account of the death of Vijayam. This in our view was wholly unjustified. The court failed to act on the right principle. The only reason stated by the court is that there was no material to indicate that there had been any earning female member of the family. In the first place the court ignored the fact that Vijayam had been helping her mother not only in the household work but also in preparing and selling sweetmeats. In the second place, the court failed to take note of the fact that women no longer remained cloistered in the kitchen, and in the modern society they earned as much income as the male members. Merely because no female member of the family had, in the past, earned any income, it could not be concluded that there was no reasonable possibiltiy of this bright young girl growing up into a healthy, vigorous, independent and earning member of the family. We therefore feel that a sum of Rs. 5,000 ought to have been awarded on account of her death.

11. While the court awarded Rs. 2,000 on account of the shock and injury sustained by the wife, it limited the damages under that head in respect of the husband to Rs. 1,000. We do not find any justification for doing so. The husband, like the wife, was seriously injured. He too was hospitalised for several weeks and underwent a serious operation. The court did not correctly estimate the damages under this head. We feel that in the circumstances it would have been just and proper if a sum of Rs. 2,000 had been awarded on account of the shock and injuries sustained by him.

12. As regards the claim for damages on account of the loss of earnings of the husband, the court below stated "apart from the mere statement of the 1st plaintiff there is no proof that he was actually in a position to carry on his business till recently". The claim on that count was therefore disallowed. The evidence is that the 1st plaintiff was earning not less than Rs. 10 per day as a goldsmith. After the accident he was hospitalised and he could not earn any income while at the hospital and also for quite some time after his discharge. We are of the view that the present claim of Rs. 500 on that account is absolutely reasonable.

13. In the circumstances, we award to the plaintiffs, in addition to the amounts already awarded to them by the trial court, a sum of Rs. 10,500 under the following heads:

(1) Rs. 5,000 on account of the death of Vijayam;

(2) Rs. 4,000 on account of the death of Vikraman;

(3) Rs. 1,000 on account of shock and injuries sustained by the 1st plaintiff; and

(4) Rs. 500 on account of the loss of earnings of the 1st plaintiff.

14. The decree of the court below is accordingly modified and the appeal is allowed to the extent indicated above. The plaintiffs are entitled to realise their proportionate costs of this appeal from the 1st defendant.

A copy of the decree will be sent to the District Collector for realisation of the court-fees.

Appeal partly allowed.

AIR 1978 KERALA 28

V. BALAKRISHNA ERADI AND T. KOCHU THOMMEN, JJ.

Nanoo Sukumaran and another, Petitioners v. Padmanabhan Sankaran, Respondent.

C. R. P. No. 2566 of 1975, D/- 22-6-1977.

Limitation Act (36 of 1963), Arts. 37 and 113 — Suit for recovery of chitty instalments — Chitty governed by Travancore Chitties Act (26 of 1120 ME) — Defendant making default in payment of instalment which made the whole amount payable under S. 32 (1) of the Travancore Chitties Act only if so demanded by the foreman — No such demand made by the foreman — Suit instituted after expiry of 3 years of the first default — Suit not barred by limitation on this count alone on all future instalments — Article 113 and not Article 37 applies — Only instalments falling within a period of 3 years before the institution of the suit are recoverable and beyond that are barred by limitation. 1963 Ker LT 68, Foll.; Observations in AIR 1975 Ker 18, Overruled.

(Paras 4, 5, 6)

Cases Referred: Chronological Paras

AIR 1975 Ker 18 : 1974 Ker LT 534 2, 4

1963 Ker LT 68 3, 4

C. V. Vasudevan, C. K. Sivasankara Panicker, D. N. Poti and P. G P. Panicker, for Petitioners.

BALAKRISHNA ERADI, J.:— In this civil revision petition filed under S. 22 of the Small Cause Courts Act, the petitioners, who were defendants 1 and 2 in the court below, contend that the suit claim was barred by limitation and that the lower court has acted erroneously and illegally in granting a decree in the plaintiff's favour. The plaintiff is a chitty foreman. The 1st defendant had taken one C class ticket in the chitty run by the plaintiff and he prized the chitty at the 11th instalment and drew the chitty amount after executing a chitty kychit on 7-10-1970. The 2nd defendant had joined in that bond as surety for the 1st defendant. Under the terms of the said chitty bond the defendants had undertaken to pay the full amount of future subscriptions in lump in case of default being committed in payment of any of the instalments. The 1st defendant defaulted payment of the 20th instalment which fell due on 10-6-1971 and no amounts were remitted by him towards the chitty thereafter. The term of the chitty came to a close on 10-5-1973. It was only thereafter that the foreman (plaintiff) issued a notice of demand to the defendants on 14-2-1974 calling upon them to remit the full amount of the defaulted instalments. Since the defendants failed to pay in spite of the said notice the plaintiff instituted the suit on 8-10-1974. The main plea put forward by the defendants before the court below in defence to the suit was that the plaint claim was barred by limitation. It was contended by them that under Art. 37 of the Limitation Act, 1963 (Act 36 of 1963), hereinafter referred to as the Act, the period of limitation for the suit has to be computed from 10-6-1971 on which date default was committed in payment of the 20th instalment and the entire amount of future instalments because payable in lump. Since more than three years calculated from that date had expired before the institution of the suit it was urged that the suit should be dismissed as barred by limitation. The lower court took the view that under the terms of the chitty kychit the prized subscriber becomes liable to pay the entire future instalments in lump only when a demand is made in that behalf by the foreman and if no such demand is made the cause of action for recovery of the entire amount in lump would accrue only on the date of termination of the chitty. Accordingly it was held by the court below that since the suit was instituted within three years of the date of termination of the chitty no portion of the plaint claim was barred by limitation. It therefore passed a decree in favour of the plaintiff entitling him to recover the amount of Rs. 315/- representing all

the defaulted instalments with interest and costs. Defendants Nos. 1 and 2 have come up with this revision petition challenging the legality and correctness of the said decision rendered by the court below.

2. Counsel for the petitioners contended before us that since the suit is based on the chitty security bond which while providing for payment in instalments contains also a stipulation that if default be made in payment of one or more instalments the entire balance amount shall be payable in lump, it is Art. 37 of the Act that applies to the case and the starting point for limitation is the date when default was committed by the defendants in paying the 20th instalment. Developing this argument it was further urged by counsel for the petitioners that since there is neither pleading nor evidence to the effect that there was any waiver by the foreman of the benefit of the provision empowering recovery of the full amount of future instalments in lump after the default was committed by the 1st defendant in payment of the 20th instalment the period within which the suit could be instituted expired on 10-6-1974. In support of the above contention reliance was placed by the learned advocate on the decision of our learned brother Bhaskaran, J. reported in Krishnan Madhavan v. Narayanan Jayadevan, 1974 Ker LT 534 : (AIR 1975 Ker 18).

3. In reply to the above arguments it was submitted by the counsel appearing for the respondent-plaintiff that Art. 37 of the Act does not govern the present suit since the provisions of chitty kychit which was executed in the erstwhile Travancore area must be regarded as subject to the provisions of S. 32 of the Travancore Chitties Act, 1120 and the liability for the payment of all the future instalments in lump does not automatically accrue on default being committed in payment of any of the instalments but only when a demand is made by the foreman as prescribed in the said section. Counsel sought to derive support for this contention from the observations of Raghavan, J., as he then was, in Kunjamma George v. Kesava Pillai, 1963 Ker LT 68.

4. Section 32 (1) of the Travancore Chitties Act, 1120 was in the following terms:—

"A foreman shall not be entitled to claim consolidated payment of all the future subscriptions from a defaulting prized subscriber unless he shall have demanded the same in writing."

This provision which is mandatory in character will apply to all chitty transactions entered into in the area wherein the Act was applicable irrespective of the stipulations that may be contained in the security bond executed between the parties and it has got to be read into every contract or chitty security bond as forming an integral part thereof. Such being the position, it is not possible to bring cases like the present one governed by sub-sec. (1) of S. 32 within the scope of Art. 37 of the Act which will cover only cases where the contract is to the effect that the entire balance amount will become due and payable immediately on default being committed in payment of any one of the instalments. In order that a case should be governed by Art. 37 of the Act the cause of action for recovery of the entire balance amount should accrue to the creditor on the date of default of payment of the instalment. Such is not the position in cases governed by S. 32 (1) of the Travancore Chitties Act where the cause of action will accrue to the foreman only when a demand in writing is made on the subscriber for consolidated payment of all the future subscriptions. We are in respectful agreement with the view expressed by Raghavan, J., in 1963 Ker LT 68 that Art. 75 of the Limitation Act, 1908 which corresponds to Art. 37 of the present Act cannot have any application to suits filed by foreman of chitties governed by the Travancore Chitties Act for recovery of the defaulted instalments from a prized subscriber and that in such cases unless a demand in writing is made by the foreman for consolidated payment of future instalments his right under the contract does not become enforceable and limitation cannot run against him regarding all the future instalments.

5. In the case before Bhaskaran, J. 1974 Ker LT 534 : (AIR 1975 Ker 18) the foreman had issued a notice demanding payment of the consolidated future subscriptions and the suit was instituted beyond three years from the date of service of that notice. Hence the learned Judge pointed out that even if it is Art. 113 and not Art. 37 that applied to the case the suit was barred. However, there are some observations in the judgment of the learned Judge to the effect that even in respect of a chitty transac-

tion governed by the provisions of the Travancore Chitties Act the period of limitation for a suit instituted by the foreman to recover from a prized subscriber the amount of defaulted instalments due under a chitty security bond would be governed by Art. 37. In the light of the conclusion already expressed by us on this aspect those observations cannot be regarded as embodying the correct legal position.

6. Counsel for the revision petitioners is well-founded in the further contention advanced by him that even if it is Article 113 and not Art. 37 of the Act that governs the case, the plaintiff can recover in this suit only the amount of such of the instalments as had fallen due within three years prior to the date of institution of the suit. As already noticed, the suit was instituted on 8-10-1974 and the plaint claim is for all the instalments that had accrued due from 10-6-1971 onwards. Under the scheme of the chitty the instalments were payable on the 10th of each month. Instalments Nos. 20 to 23 (inclusive) fell due on 10-6-1971, 10-7-1971, 10-8-1971 and 10-9-1971 respectively. Since the suit has been instituted only after the expiry of three years from the aforementioned dates the plaintiff is not entitled to recover the amounts payable in respect of the aforesaid instalments. He can get a decree only for the instalments beginning from the 24th instalment which fell due on 10-10-1971. Hence, in substitution of the decree passed by the court below the plaintiff is granted a decree only for recovery of a sum of Rs. 255/- with interest at 12% from 14-2-1974 till date of plaint and future interest at 6% per annum till date of realisation.

7. The civil revision petition is allowed to the extent indicated above and dismissed in other respects. The parties will bear their respective costs in this court.

Revision partly allowed.

AIR 1978 KERALA 30

GEORGE VADAKKEL, J.

A. P. Balakrishnan Nair and others, Petitioners v. State of Kerala and others, Respondents.

O. P. No. 1750 of 1974, D/- 22-6-1977.

JU/JU/D841/77/SVM

(A) Constitution of India, Art. 228-A — Constitutional validity of a State law — A single Judge of a High Court can examine the same.

Article 228-A proceeds on the basis that a State law, as long as the same has not been invalidated by the constitution Bench as contemplated therein, is valid and that the High Court can proceed on the basis that the same is valid. All legislative enactments have to be assumed to be constitutionally valid till a competent court as contemplated by the Article determines and declares the same to be not so. This means that unless a single Judge seized of the question of such validity comes to the conclusion that the law is liable to be invalidated and the matter has to be referred for decision by a constitution Bench, there is no inhibition against the Judge examining the question of constitutional validity of the State law and holding that it is constitutionally valid. (Para 6)

(B) Kerala Co-operative Societies Act (21 of 1969), S. 80 — Classification of Credit Societies and Urban Banks for purposes of pay scales — Constitutional validity of. (Constitution of India, Article 14).

Where the Govt. fixed different pay scales for the Class V Credit Society and the Class IV Urban Bank in the same range of working capital, the classification for purpose of pay scales could not be said to be hit by Art. 14 when the same was made on the basis of difference in the function, source of income and financial position. (Para 7)

N. Raghava Kurup, M. S. Narayana Pillai and P. S. Chandrasekharan Nair, for Petitioners; P. B. Radhakrishnan (G. P.), for Respondents.

ORDER:— The petitioners are the Secretary, Accountant, Senior Clerk and Junior Clerk of the 4th respondent Society and they impugn here the classification of Banking Co-operative Societies with working capital between Rs. 5 lakhs and 10 lakhs into Urban Banks coming under the Banking Regulation Act and Credit Societies for the purpose of regulating the qualification, remuneration, allowances and other conditions of service of officers and servants as contained in Appendix III to the Co-operative Societies Rules, 1969.

2. Section 80 (1) of the Kerala Co-operative Societies Act, 1969 enables the Government to classify the societies

governed by the Act according to their type and financial position. Sub-section (3) therein enables the Government to make rules regulating the qualification, remuneration, allowances and other conditions of service of the Officers and servants of different classes of Societies specified in sub-sec. (1). Sub-section (2) of the section enables the Government to fix or alter the number and designation of the Officers and servants of different classes of societies specified in sub-sec. (1). Pursuant to the aforesaid enabling provisions the Government has made rules which are contained in Chap. XV of the Co-operative Societies Rules, 1969. Rule 182 says that:

"For the purpose of sub-sec. (1) of S. 80, the societies in the State shall be classified as shown in Appendix III".

Turning to Appendix III to the rules it appears that the Co-operative Banks have been broadly classified into three, viz., (a) Apex Banks, (b) Central Co-operative Banks and (c) other Banks. The third category of Banks consists of (i) Urban Banks, (ii) Primary Land Mortgage Banks and Credit Societies. In the sub-classification captioned "Urban Banks" there are four classes of Banks. The fourth class consists of Banks having working capital below Rs. 10 lakhs. The classification appears to be as is seen from the several columns in the Appendix on the basis of financial position. The banks coming in the 4th class therein can have a Secretary, an Accountant, two Cashiers/Senior Clerks/Accountants, one Junior Clerk and two Peons. The Secretary's scale of pay is fixed in the appendix as Rs. 225-20-325-25-450; Accountant's Rs. 175-15-250-20-350; the Senior Clerk's scale of pay as per Appendix III is Rs. 150-10-200-15-275; and that of a Junior Clerk Rs. 130-10-190-15-250.

3. Credit Societies as per the Appendix consist of six classes. On the basis of financial position Class V therein takes in societies with working capital of Rs. 5 lakhs and above but below Rs. 10 lakhs, and loan outstanding above Rs. 3 lakhs but below 7.5 lakhs. Such a Society can have a Secretary, a Senior Clerk, a Junior Clerk and an Attendant as its employees. The Secretary's pay scale in such a society is fixed as per Appendix III as Rs. 125-8-165-10-195; the Senior Clerk's Rs. 90-5-130; and the Junior Clerk's as Rs. 80-5-120.

4. It is the case of the petitioner that there is no basis for fixing different scales of pay for the several employees of a Class V Society coming under the category of Credit Societies and the employees of a Class IV Urban Bank having a working capital of below Rs. 10 lakhs. It is contended that there is no nexus between the classification and the object of the classification. It is on that basis that the petitioners seek quashing of the classification as aforesaid.

5. All the petitioners are at present admittedly drawing a pay scale higher than that fixed by Appendix III for Class V Credit Societies. Chapter XV of the Rules framed under S. 86 of the Act came into force only on 27-9-1973 after the petitioners have entered service of the 4th respondent-Bank. Rule 200 of the Rules saves the higher scale of pay obtained before Chapter XV came into force. Therefore if the classification is quashed, the result would only be that the petitioner will be entitled to get the pay at the scale of pay at which they were getting prior to the coming into force of the rules which they are drawing even after the rules came into force. In that view it can be said that the petitioners are not aggrieved persons.

6. I am also not inclined to accept the contention that the classification is without any basis and that the same is arbitrary. At this juncture I should notice the contention urged on behalf of the petitioners that in view of Article 228-A of the Constitution this question cannot be decided by a single Judge. The contention is that it can be decided only by a constitution Bench consisting of five Judges. It appears to me that the scheme of Cls. (2), (3) and (4) of Art. 228-A is that no State law shall be declared 'to be constitutionally invalid' except by the majority decision of a constitution Bench. Clause (2) provides that the High Court may determine questions relating to constitutional validity of State laws; Clause (3) says that the minimum number of Judges who shall sit for the purpose of determining any question as to the constitutional validity of any State law shall be five; Clause (4) says that a State law shall not be declared to be constitutionally invalid by the High Court except in the manner stated in sub-cls. (a) and (b) of that clause. The scheme as a whole is that the said provisions proceed on the basis that a State law, as long as the same has not been invalidated in

the manner stated therein, is valid and that this Court can proceed on the basis that the same is valid. All legislative enactments have to be assumed to be constitutionally valid till a competent court determines and declares the same to be not so. In that view unless the petitioners establish that the same is liable to be invalidated this Court will have to proceed on the basis that the law is valid. Therefore, I do not think that unless I come to the conclusion that the law is liable to the invalidated the matter has to be referred for decision by a constitution Bench. In other words, it appears to me that there is no inhibition against a single Judge examining the question of constitutional validity of a State law and holding that it is constitutionally valid.

7. As earlier said the averments in the counter-affidavit clearly show that there is a distinction between Agricultural Credit Societies to which class the 4th respondent Co-operative Society belongs and Urban Banks and Co-operative Banks mentioned in the Appendix III. It is pointed out in the counter-affidavit that Urban Banks mentioned in the appendix are carrying on banking activities like collection of cheques, discounting of bills etc., whereas the Agricultural Credit Societies are not engaged in such activities. It is also averred in the counter-affidavit that the main income of Agricultural Credit Societies is the margin in the interest-rates between borrowings and lendings and this generally is 2¼% of the lending whereas in the case of Urban Banks they depend on their own funds including deposits and as such they get a higher margin of profits at or about 5 to 6 per cent of the lendings. It is also averred in the counter-affidavit that there are vast differences in the function, source of income and financial position of Co-operative Banks and Credit Societies. It is also the case of the respondents as is seen from the counter-affidavit that the credit societies have to depend upon loans obtained from the Central Land Mortgage Bank whereas the Urban Banks with their multi-banking activities are in a better position to raise funds by several kinds of deposits. It is further averred in the counter-affidavit that the classification is not only according to the type of the Societies but also according to the financial position of the societies and the same is warranted by S. 80 of the Act which provides that the government may classify the societies according to their types and financial position. In view of the averment as aforesaid it cannot be said that the classification is in any way constitutionally invalid or hit by Art. 14 of the Constitution. I am not prepared to say that the classification is liable to be held constitutionally invalid.

8. In view of what is stated above, there is no merit in this Original Petition. The same is dismissed. However, in the circumstances of the case, there will be no order as to costs.

Petition dismissed.

AIR 1978 KERALA 32

V. BALAKRISHNA ERADI AND T. KOCHU THOMMEN, JJ.

Ukkru Kutty, Appellant v. The Canara Bank, Trichur, Respondent.

Ex. First Appeal No. 2 of 1976, D/- 21-6-1977.

Civil P. C. (5 of 1908), O. 21, R. 85 — Sale held for assisting parties in implementing compromise between them — Only decree-holder allowed to participate — It is not sale under O. 21 — Not liable to cancellation on failure to produce stamp papers within 15 days.

Where the Court held the sale only to assist the parties in implementing the terms of the compromise arrived at between them by allowing only the decree-holder Bank to participate in it, the sale was not one under O. 21. Consequently, the sale would not stand cancelled when the decree-holder bank did not produce stamp papers within 15 days as required by O. 21, R. 85. (Para 3)

Anno: AIR Comm. (8th Edn. 1971), C. P. C. O. 21, R. 85, N. 4-A.

P. Kochupappu Achan and V. Rama Shenoi, for Appellant.

BALAKRISHNA ERADI, J.:— The appellant before us was the 3rd defendant in O. S. No. 93 of 1952 which was a suit instituted by the Poornathrayeesavilasom Bank for recovery of an amount of Rs. 69,000 due from the defendants under a mortgage executed by them in favour of the Bank. The suit was decreed in favour of the plaintiff-Bank. The assets of the Poornathrayeesavilasom Bank having been taken over by the Canara Bank Ltd. the Canara Bank as attorney for collection filed E. P. No. 52 of 1963 in the District Court, Trichur for execu-

tion of the decree by sale of the plaint schedule properties. In that execution petition a compromise was entered into between the decree-holder and the judgment-debtors and a joint petition—M. P. No. 400 of 1968 — was filed incorporating the terms of the said agreement. Under that compromise the decree-holder-Bank agreed to forgo a substantial portion of the decree amount and for the balance amount of Rs. 39,000 it was agreed between the parties that the decree schedule properties may be purchased by the decree-holder-Bank at a sale to be conducted by the court. It was further agreed that the sale was to be treated as effective and absolute only in the event of failure on the part of the judgment-debtors to pay up the amount of Rs. 39,000 with interest at 4% per annum within three years from the date of sale. The said compromise was recorded by the executing court and pursuant thereto the decree schedule properties were brought to sale and purchased by the decree-holder on 21-8-1968. Under the agreement aforementioned the judgment-debtors had time till 21-8-1971 to pay up the decree debt as to clear the liability due under the decree as reduced by consent of parties. The judgment-debtors failed to honour their commitment to discharge the liability within the said period of three years. The sale could however not be confirmed for some time thereafter because the judgment-debtors filed a petition under the Kerala Agriculturists' Debt Relief Act, 1970 and obtained a stay of all proceedings. That stay was vacated by the executing court after hearing both sides on 9-4-1975. Thereafter on 21-7-1975 the respondent-Bank filed E. A. No. 5 of 1975 in the executing court praying for permission to furnish stamp papers for drawing up the sale certificate. That petition was allowed by the executing court but it would appear that before doing so no notice had been given to the judgment-debtors. Subsequently the sale was confirmed by the executing court on 21-7-1975 itself.

2. The 3rd judgment-debtor who is the appellant before us filed E. A. No. 9 of 1975 in the executing court seeking a declaration that the court sale held on 21-8-1968 stood automatically vacated on account of the failure of the decree-holder-auction purchaser — to produce stamp papers within the period of 15 days prescribed by R. 85 of O. XXI of the Civil P. C. The District Court, Trichur wherein the execution was till then pending transferred the said E. A. for disposal to the Subordinate Judge's Court, Trichur where it was renumbered as E. A. No. 947 of 1975 of that court. The learned Subordinate Judge after an elaborate consideration of the various points urged on both sides rejected the contentions of the judgment-debtors and dismissed E. A. No. 947 of 1975. It is against the said order passed by the court below that the 3rd judgment-debtor has come up to this court with this appeal.

3. We see no merit in this appeal. The sale held on 21-8-1968 was not one conducted strictly in accordance with the provisions of O. XXI, C.P.C. It was a step taken by the court in enforcement of the terms of the compromise entered into between the parties which had been recorded by the court as per its order in M. P. No. 400 of 1968. Under the provisions of O. XXI, R. 92, C.P.C. an execution sale becomes absolute when within the prescribed period no application is made under R. 89, R. 90 or R. 91 or in case where such an application is filed when the same is rejected. Order XXI contemplates only sales by public auction to the highest bidder. It does not envisage a sale wherein the decree-holder alone is entitled to participate nor is it within the contemplation of the said provision that the sale conducted by the court should become effective only after three years on the happening of a contingency stipulated by the parties. It is therefore not possible to regard the sale of the plaint schedule properties conducted on 21-8-1968 as one held by the court strictly in accordance with the provisions of O. XXI, C.P.C. The court has merely assisted the parties in implementing the terms of the compromise arrived at between them and recorded by it by permitting its machinery to be utilised for the purpose of conducting a sale of the properties to the decree-holder. Further, it is manifest that when the parties agreed that the sale was to become effective only after the expiry of the stipulated period of three years and the said agreement was recorded by the court both the parties as well as the court had proceeded on the basis that the provisions of O. XXI, R. 85 will not apply to the said sale because it is wholly unreasonable to think that the decree-holder-Bank was expected to expend a sum of very nearly Rs. 4,000 on the purchase and production of stamp papers for the sale certificate the draw-

ing up of which might ultimately turn out to be wholly unnecessary in the event of the decree debt being paid by the judgment-debtors within the period of three years. We are, therefore, clearly of opinion that the lower court was right in holding that the provisions of O. XXI, R. 85 have no application to the sale held in the present case and that the contention put forward by the judgment-debtor that the sale must be treated as having become automatically cancelled by reason of the default of the decree-holder to produce the stamp papers within 15 days of the date of the sale is devoid of substance.

4. The appeal therefore fails and it is dismissed. The appellant will pay the costs of the respondent.

Appeal dismissed.

AIR 1978 KERALA 34

V. P. GOPALAN NAMBIYAR, C. J.
AND K. K. NARENDRAN, J.

Peedikayulla Parambath Devi and others, Appellants v. State of Kerala and others, Respondents.

W. A. No. 341 and O. P. No. 4133 of 1974, D/- 17-6-1977.

Kerala Revenue Recovery Act (15 of 1968), S. 2 (e) — 'Defaulter' — Term includes legal representatives as they in law continue the persona of the deceased — Default occasioned by deceased — Coercive process of recovery can be taken against his legal representatives — Recovery proceedings not confined to signatories to the written agreement referred to under S. 68. 1976 Ker LT 182 and 1962 Ker LJ 951, Approved; 1969 Ker LT 860 and O. P. Nos. 1440 and 1557 of 1961 (Ker), Disting. (Paras 1, 3 and 4)

Cases Referred: Chronological	Paras
1977 Ker LT 781	4
1976 Ker LT 182	1, 2, 4
ILR (1974) 2 Ker 391	1
(1972) O. P. No. 3344 of 1972 (Ker)	4
(1971) 80 ITR 82 (Ker)	1
1969 Ker LT 860	2
1962 Ker LJ 951	2
(1961) O. P. Nos. 1440 and 1557 of 1961 (Ker)	1

In W. A. No. 341 of 1974.

Govind Bharathan, for Appellants; Govt. Pleader, for Respondents.

In O. P. No. 4133 of 1974.

M. P. R. Nair and P. F. Francis, for Appellants; Govt. Pleader, for Respondents.

GOPALAN NAMBIYAR, C. J.:— The question raised in these cases is the same, namely, whether the coercive process of recovery under the provisions of the Kerala Revenue Recovery Act can have operation against the legal representatives of a deceased person for default occasioned by the deceased. In W. A. No. 341 of 1974 the question arises in respect of amounts due from the deceased-president of a Co-operative Society, who, it is said, had executed an agreement in respect of the amounts for which the liability was occasioned. After his death, proceedings were taken to recover the amounts due against his legal representatives, namely, wife and children under the provisions of the Revenue Recovery Act. The contention urged is that under S. 2 (e) of the Revenue Recovery Act the term 'defaulter' has been statutorily defined, and the definition would not take in or include a legal representative of the person from whom the amount is due. The definition reads as follows:—

" 'defaulter' means a person from whom an arrear of public revenue due on land is due, and includes a person who is responsible as surety for the payment of any such arrear;"

The answer to the contention is furnished by a ruling of one of us (myself) in Janaki v. State of Kerala (1976 Ker LT 182) that the legal representative in law continues the persona of the deceased. Adverting to the identical argument now advanced before us, I stated thus:

"3. The contention of the petitioner was that the petitioner is not a 'defaulter' as defined in the Revenue Recovery Act; that no steps having been taken against the property of the deceased during his lifetime, the coercive processes of the Revenue Recovery Act cannot be put into operation against the deceased's property, which had devolved on the petitioner by inheritance; and therefore the proceedings are illegal and void. Reliance was placed on the definition of 'defaulter' under S. 2 (e) of the Kerala Revenue Recovery Act, as a person from whom an arrear of public revenue due on land is due and as including a person who is responsible as surety for the payment of any such arrear. It was stressed that the absence in the definition, of any

mention of legal representative was significant. This was read along with S. 68 of the Act, under which, inter alia, all moneys due from any person to the Government under a written agreement executed by him are recoverable as arrears of public revenue. It was contended that S. 28 of the Abkari Act authorises only the recovery of arrears of Abkari dues from the person liable to pay the same or his surety.

4. The argument, to my mind, ignores the concept of a legal representative, that, in law he is not a different person from the deceased, but only continues the persona of the deceased. The counter-affidavit in para. 3 stated that the petitioner's husband had executed the necessary agreements but had defaulted payment of kist for the shop, and hence the shop was under departmental management, and a sum of Rs. 11;551.27 was due from him on 1-4-1969. Together with future interest, Revenue Recovery proceedings were taken out in respect of this amount. I do not see any flaw or infirmity in the proceedings thus started." Counsel for the petitioners relied upon the decision of a learned Judge in Mariam v. Tahsildar, N. Wynad (1969 Ker LT 860), which, in its turn relied on an unreported judgment of a learned Judge of this Court (as he then was) in O. P. Nos. 1440 and 1557 of 1961 (Ker). This judgment had been cited before me in the decision in Janaki v. Tahsildar, N. Wynad (1976 Ker LT 182) and was distinguished as follows:

"5. Petitioner's counsel relied on the decisions in Mariam v. Tahsildar, North Wynad (1969 Ker LT 860) and Kunhi Ayisia Umma v. District Collector, Kozhikode (ILR (1974) 2 Ker 391). It is plain that these cases can have no application. In the first of these, coercive proceedings were sought to be taken out against a person in whom title had become vested by assignment in respect of dues which had accrued against the assignor prior to the assignment. In the second, title had similarly become vested in a third party by gift, and proceedings were in respect of dues which had accrued against the donor prior to the gift. The position here disclosed is fundamentally different. The arrears due from the deceased are sought to be recovered from his legal representative who continues the persona of the deceased."

It will be noticed that in both these cases the property that was sought to be proceeded against had ceased to be the property of the person liable for the dues, by a transfer effected in favour of the wife and children or other close relations. The coercive processes were sought to be put into operation without avoiding or setting aside the transfer by processes known to law. It was in such circumstances that it was ruled that it was not open to the authorities to start coercive proceedings against the properties on the assumption that notwithstanding the transfer, the properties continued to be the properties of the person from whom the amounts were due. Such is not the position disclosed in this case. We may, however note, that there is the authority of a Division Bench Ruling in Thangal Kunju Musaliar's case ((1971) 80 ITR 82 at pp. 91-93) (Ker) that coercive processes can be put through even without setting aside or avoiding transfers effected by the person from whom arrears are due. We need not dilate on this aspect, as we are concerned with the simple question whether proceedings not having been taken against the defaulter in his lifetime, can be initiated against his legal representatives after his death.

2. The learned Government Pleader drew our attention to the decision of Madhavan Nair J. of this Court in Kochu Narayanan v. Janaki Amma (1962 Ker LJ 951). The learned Judge had taken the same view as I took later in 1976 Ker LT 182. The relevant portion of the judgment reads as follows:

"6. The word 'defaulter' was not defined in the Act, but has been defined in the Travancore-Cochin Revenue Recovery Act (VII of 1951) as meaning 'a person from whom an arrear of public revenue is due, and includes a person who is responsible as surety for the payment of any such arrear of revenue'. This definition, being in accordance with the ordinary sense of the word in common parlance, may be deemed to indicate the meaning in the old Act also. The defaulters then are primarily the landholders. Under S. 1 (c) of the Act:

"'Landholder means the registered holder for the time being of any land, and includes his legal representatives."

It follows that a defaulter is the person entered in the thandaper as the landholder or his legal representative. In the context of this case, the defaulters were Marthandan Raman, Kunju Kalyani and

the legal representatives of the deceased Narayanan Parameswaran."

We may point out that S. 2, Cl. (g) of the Kerala Revenue Recovery Act contains similar, if not identical, provision as S. 1 (c) of the Travancore Revenue Recovery Act. The reasoning of our learned brother Madhavan Nair J. therefore applies with full force to the case on hand.

3. We are therefore of the opinion that there is no force in the objection raised in this appeal. Our learned brother, Subramonian Poti J. against whose judgment this appeal is preferred was also of the view that proceedings under the Revenue Recovery Act for default of a deceased person can be taken against his legal representatives. We affirm the judgment and dismiss this appeal with no order as to costs.

O. P. No. 4133 of 1974.

4. The question raised in this writ petition is also the same as in W. A. No. 341 of 1974, heard along with this, and in which we have just delivered judgment. The Revenue Recovery Proceedings in this case were also started and were sought to be continued, against the legal representatives, namely, the wife and children of the deceased person from whom amounts were due, under an agreement dated 28-10-1952. Over Rupees 12,000 appears to be the amount that is due. The contention raised is precisely the same as that in W. A. No. 341 of 1974. Our attention was called to the reference order made in this case by our learned brother Eradi J. Therein it is stated:

"It is contended on behalf of the writ petitioner that under S. 68 (1) of the R. R. Act, Revenue Recovery proceedings can be taken only in respect of moneys due to the Government from any person which, under a written agreement executed by such person, are recoverable as arrears of public revenue due on land, and that hence even if after the death of the contractor who has executed the agreement his liability may be enforceable against his legal representatives to the extent to which they have come by his assets resort cannot be taken to the process of summary recovery authorised by the R. R. Act unless the legal representatives are also signatories to the written agreement referred to in S. 68. I find there is prima facie force in this contention. It is however, brought to my notice that a similar contention raised in O. P. 3344 of 1972 (Ker) was not accepted by a learned single Judge of this Court and that against the said judgment Writ Appeal No. 341 of 1974 is now pending before the Division Bench. I direct that this case also be posted before the Division Bench along with Writ Appeal No. 341 of 1974 With respect, we can find no warrant to confine proceedings under the Revenue Recovery Act only to signatories to the written agreement referred to in S. 68. On principle, a legal representative continues the persona of the deceased, as was recognised in 1976 Ker LT 182 by one of us, and by Madhavan Nair J. in 1962 Ker LJ 951.

5. Counsel for the petitioners urged that the quantification of liability was made without notice to petitioners 2 to 10 at any stage of the proceedings whatsoever. Averments to this effect have been made in para. 6 of the petition. In answer to the same it is pointed out in paras. 2 and 8 of the counter-affidavit that the proceedings were taken against the 1st petitioner, one of the legal representatives of the deceased. It is the contention of the petitioners' counsel that in such circumstances, petitioners 2 to 10 would not be bound by the quantification of liability or by the coercive proceedings sought to be put into operation against them. Assuming, without deciding, that this is so, it is open to these petitioners, if they claim to be not defaulters, as urged before us, to prefer a claim under S. 46 of the Revenue Recovery Act; and since this alternative remedy is open to them, we do not, and indeed cannot, in these proceedings grant the reliefs prayed for. Nothing said herein should be understood as precluding petitioners 2 to 10, if so advised, from preferring their objection under S. 46 of the Act. Subject as above, we dismiss this Original Petition with no order as to costs.

Appeal & Petition dismissed.

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V. P. GOPALAN NAMBIYAR, C. J. AND K. K. NARENDRAN, J.

Joseph Abraham, Appellant v. Ouseph Eapen and others, Respondents.

A. S. A. No. 5 of 1975, D/- 31-8-1977.

(A) Kerala Land Reforms Act (1 of 1964), S. 3 (i) (v) Proviso Cl. (iv) (as

added by Act 35 of 1969) — Tenant from mortgagee — Right of fixity of tenure — Claim as to — Maintainability.

Where a land is given on lease by certain persons not as mortgagees but as full owners, they having become owners by purchasing the right of equity of redemption, the lessee would be entitled to fixity of tenure by reason of Cl. (iv) of the Proviso to S. 3 (1) (v). And where the right of equity of redemption was purchased benami for all the co-owners, the fact that the transferee from one of the co-owners was not a party to the proceeding culminating in the decree for declaration that the purchase was benami would not affect the position as regards fixity of tenure of the lessee and Cl. (iv) to the proviso to S. 3 (1) (v) would still be attracted by reason of the provision of transitory S. 108 (3) of the Act. (Para 9)

(B) Kerala Land Reforms Act (1 of 1964), S. 3 (1) (v) Proviso, Cl. (iv) (as added by Act 35 of 1969) — Tenant of mortgagee — Right of fixity of tenure — Not affected on ground that Receiver continued in possession of land long prior to commencement of Act 35 of 1969 — 1976 Ker LT 237, Overruled. (Civil P. C. (1908), O. 40, R. 1).

Where the plaintiff took possession of certain land as Receiver in 1961, i.e. long before commencement of Amendment Act 35 of 1969, he could not on that ground claim that he was entitled to continue in possession unaffected by any claim of fixity of tenure which was conferred on tenants of mortgagees only by the Amendment Act 35 of 1969., 1976 Ker LT 237, Overruled. (Para 10)

The appointment of a Receiver is an act of the Court that puts the property in custodia legis;, the tenants become therefore, the tenants, so to say, of the Court, in custody of the property. The appointment of a Receiver would not therefore amount to a termination of the leasehold right or a dispossession of the tenant. (1894) ILR 17 Mad 501, Rel. on. (Para 10)

(C) Kerala Land Reforms Act (1 of 1964), S. 3 (1) (v) Proviso, Cl. (iv) (as added by Act 35 of 1969) — Right of fixity of tenure — Execution of surrender deed by tenant — Effect — Doctrine of "substituted security" — Applicability — (T. P. Act (1882), S. 44).

A tenant's claim for fixity of tenure was negatived by the trial Court. The tenant executed surrender deed in favour of the plaintiff during pendency of appeal against the decision of the trial Court. In first and second appeal, the finding of the trial Court was overruled and the tenant was held entitled to fixity of tenure.

Held in the circumstances that the plaintiff could not deny restitution of possession on ground of the surrender deed. Case law discussed. (Para 12)

Held further that the tenant as the lessee from a co-owner of an undivided one-fourth share was entitled to fixity of tenure in respect of the property ultimately allotted to the lessor-plaintiff irrespective of whether the principle involved be labelled "substituted security" or not. This is clear also from the provisions of S. 44 of T. P. Act. Case law discussed. (Paras 13, 15)

Cases Referred: Chronological Paras:

AIR 1977 Ker 123 : 1977 Ker LT 180 (FB) 12
1976 Ker LT 237 10
AIR 1973 Ker 76 : 1971 Ker LT 155 (FB) 12
1973 Ker LT 475 12
1972 Ker LT 939 12
AIR 1971 Ker 154 14
(1971) S. A. No. 46 of 1971 (Ker) 6
(1970) S. A. No. 936 of 1970 (Ker) 6
1968 Ker LJ 539 12
(1960) A. S. No. 891 of 1960 (Ker) 4, 5
(1958) O. S. No. 230 of 1958 (Ker) 4, 5
(1894) ILR 17 Mad 501 10, 11
(1874) 1 Ind App 106 (PC) 14

S. Narayanan Poti, for Appellant; T. S. Venkiteswara Iyer, C. S. Ananthakrishna Iyer and P. K. Balasubramoniam, for Respondents.

GOPALAN NAMBIYAR, C. J.:— This appeal is by the plaintiff against the final decree in a suit for partition of his one-fourth share of an extent of nearly 88 acres of paddy land. The Jenm right in the same belongs to Karinganampalli of Nedumprath palace. There was an otti to four sisters—, one Bhagirathi (deceased), and defendants 13 to 15. Each of them was entitled to an undivided 1/4th share. Bhageerathi's legal representatives are defendants 10 and 11. On 4-11-1121 M. E. Ext. P-1 pattom chit was executed by the 1st defendant and one deceased Ouseph (represented by his legal representatives, defendants 2 to 8) to defendants 10 and 13, representing all the four co-owners. This was in respect of the entire 88 acres. Defendant 1 died pending suit and the legal representatives are defendants 9 and 16 to 19. By

Ext. D-8 dated 17-4-1952 there was a division for convenience of enjoyment among the lessees. The 1st defendant was put in possession of the western half of an extent of nearly 44 acres and Ouseph, of the eastern half, of the same extent. The 9th defendant took a lease-deed from defendants 13 and 14 regarding the western half. In 1953, Bhageerathi's legal representative sold his undivided 1/4th share in the otti right to the plaintiff by Ext. P-2. The plaintiff also obtained 1/4th share of the jenm right under Ext. P-3 from the 21st defendant who had become the owner of the said right under Exts. P-7 and P-12. In pursuance of these rights the present suit was instituted for partition. Paragraphs 11, 13 and 15 of the plaint are clear that it was the undivided 1/4th share in the reversionary right of the plaintiff that was sought to be partitioned. By a preliminary judgment dated 28-1-1959 the plaintiff's right to partition of a 1/4th share was declared. The question of physical delivery of possession of the share was to be considered after vacating the statutory stay then in operation under the provisions of the Kerala Act 1 of 1957.

2. The 20th defendant had obtained right to a one-fourth share in enforcement of a hypothecation. He filed O. S. No. 230 of 1958 for partition of his share. Plaintiff and all the concerned persons were parties to the suit. On 28-7-1959 that suit ended in a preliminary decree for a 1/4th share in the entire 88 acres. A final decree followed on 15-7-1960 by which the plaintiff (the 20th defendant herein) was allotted the C plot in Ext. P-1 plan — in occupation of the 7th defendant. The 7th defendant surrendered that plot (plot E in Ext. P-4 plan to be noticed presently) to the plaintiff by a joint application by both, Ext. P-15 dated 27-2-1961.

3. The present suit ended in a preliminary decree on 28th January 1959, and a final decree followed on 8-8-1960. Plot A in Ext. P-1 plan was allotted to the 13th defendant, plot B to the 14th defendant, plot C (2) to the plaintiff, and plot D to the 15th defendant. There was thus duplication of allotment in respect of C plot by the two final decrees.

4. There was an appeal—A. S. No. 891 of 1960 (Ker)— to this Court against the final decree dated 8-8-1960. In the appeal the plaintiff claimed that he was entitled to a 1/4th share in the entirety of 88 acres and that he was not concerned with the loss that had occurred of 22 acres by reason of the allotment of a 1/4 share to the plaintiff in O. S. No. 230 of 1958. A learned Judge (Vaidyalingam J.) of this Court (as he then was), by judgment dated 5-7-1965 held that the plaintiff can claim a 1/4 share only in the extent of properties left after allotment of the one-fourth share to the plaintiff in O. S. No. 230 of 1958. The Commissioner was directed to take into account the remaining properties, after the allotment to the plaintiff in O. S. No. 230 of 1958.

5. In pursuance of the judgment in A. S. No. 891 of 1960 (Ker), the trial court appointed a Commissioner to divide the 66 acres of land (the balance after excluding the 22 acres allotted to the plaintiff in O. S. No. 230 of 1958). A fresh plan Ext. P-4 was prepared. By the revised final judgment the trial court negatived the claim of the contesting defendants to fixity of tenure against the plainiff. The two C plots were allotted to the plaintiff, the A & B plots to the defendants 13 & 14; and the D plots (two) to defendant 15. The E plot was allotted to the 20th defendant (plaintiff in O. S. No. 230 of 1958). C2 plot had been surrendered by the 6th defendant, and as for C1 plot, it was ordered that plaintiff could take possession. By order of the High Court dated 22-6-1961, the plaintiff had been appointed Receiver in respect of the 22 acres in possession of the 6th defendant. Hence it was found that the 6th defendant was not liable to pay rent from the year 1137 M. E., and that there was no need for a fresh delivery of C2 plot. As plaintiff was appointed Receiver in respect of 22 acres, and as, after the decree in A. S. No. 891 of 1960 (Ker), he was entitled only to one-fourth in the balance of 66 acres, left after allotment to the plaintiff in O. S. No. 230 of 1958, his share would be only of an extent of 16½ acres. Hence he was directed to surrender the excess of 22-16½=5½ acres to the 6th defendant. Against the said judgment the 6th defendant filed A. S. No. 52 of 1967. Defendants 13 & 14 filed A. S. No. 49 of 1967, and the 15th defendant filed A. S. No. 42 of 1967 to the District Court. A. S. No. 42 of 1967 and A. S. No. 49 of 1967 were dismissed. A. S. No. 52 of 1967 was partly allowed to the extent of holding the 6th defendant to be entitled to fixity of tenure to the texent of the 16½ acres allotted to the plaintiff's share, as well

(?) covered by plots C1 and C2. Plaintiff was to surrender possession of the excess area over and above the C plots allotted to him, of which he was in possession as Receiver, to defendants 6 and 7. The direction that the plaintiff might retain 16½ acres was vacated.

6. Against the said decision the plaintiff filed S. A. No. 936 of 1970 (Ker) and the 15th defendant filed S. A. No. 46 of 1971 (Ker). In the latter appeal the only contention raised was that S. 4-A of the Land Reforms Act was unconstitutional. It was conceded that the contention cannot stand, and the appeal was dismissed. In S. A. No. 936 of 1970 (Ker) the learned Judge negatived the contention that the 6th defendant is not entitled to fixity in respect of the C1 and C2 plots allotted to the plaintiff, on the principle of "substituted security", and dismissed the appeal. The memorandum of cross-objections by the 9th defendant to be restituted to C-1 plot was also dismissed. This further appeal is by the plaintiff.

7. In pursuance of the final decree of the trial court dated 30-6-1966 plots C1 and C2 had been allotted to the plaintiff. The 9th defendant who, under an arrangement noticed already, was in possession of the entire western half of the suit properties comprising plots A, B and C1, surrendered C1 plot to the plaintiff. The two together filed a joint application (Exts. P-13 dated 7-12-1966) to record the fact of surrender. Apparently, having second thoughts in regard to his action, the 9th defendant moved the Land Tribunal for restoration of possession of the C1 plot, alleging dispossession in 1967. By Ext. P-14 order dated 30-11-1971 the Trbiunal dismissed the application, holding that there was no evidence of such dispossession. The 7th defendant surrendered the E plot in Ext. P-4 to the 20th defendant (the plaintiff in O. S. No. 230 of 1958). Ext. P-15 dated 27-2-1961 is the copy of the joint application moved by the two to record the fact of surrender.

8. On these facts, counsel for the appellant contended that the decree recognising fixity of tenure for the 6th defendant was wrong and unsustainable as the 6th defendant was only a lessee from a mortgagee and had no right to fixity of tenure in 1964 when the Land Reforms Act 1963, came into force, under S. 3 (1) (v) of the Act. Next, it was contended that as Receiver, the plaintiff had taken possession as early as on 16-9-1961, and that it was only the Amendment Act 35 of 1969 that conferred protection on tenants of mortgagees. For that reason again, it was said that the 6th defendant was not entitled to fixity of tenure. Thirdly it was contended that the 6th defendant was a quandom tenant who had lost possession and therefore not entitled to fixity of tenure. Finally, it was argued that tenancy rights should not have been recognised on propery ultimately allotted to the plaintiff and others on the doctrine of "substituted security" so as to make good to the 6th defendant the extent of 11 acres which he lost by surrender of C-1 plot of 11 acres. We shall proceed to examine these contentions.

9. Ext. P-1 lease of 1121 was regarding the entire 88 acres in favour of four co-owners. Defendants 13 to 15 were not only mortgagees but had also become owners of the equity of redemption. It was found in O. S. No. 136 of 1953 that the purchase by the 21st defendant of the equity of redemption under Exts. P-7 and P-12 was benami for defendants 13 to 15 and Bhageerathi. That suit was instituted by the 13th defendant to declare that the purchase was benami for all the four co-owners. It was compromised by Ext. D-1 petition followed by Ext. D-30 compromise decree, to which defendants 13 to 15 were parties, but not the legal representatives of Bhageerathi. But that would not make a difference on this aspect of the case. If the equity of redemption vested in defendants 13 to 15, the lease Ext. P-1, as far as they are concerned, would be one not as mortgagees but as full owners. The lessee would therefore be entitled to fixity of tenure by reason of Cl. (iv) of the proviso to S. 3 (1) (v) of the Land Reforms Act, (the proviso was added by Act 35 of 1969). The provision in so far as it is material, is as follows:—

"3. Exemptions— (1) Nothing in this Chapter shall apply to—

x x x x

(v) tenancies in respect of land or of buildings or of both created by mortgagees in possession or by persons deriving title from such mortgagees:

Provided that nothing in this clause shall apply to such tenancies—

x x x x

(iv) where the mortgagee or his successor-in-interest has acquired or acquires equity of redemption; or"

x x x x.

But how stands the position in regard to the plaintiff, who is a transferee from

the legal representative of Bhageerathi, not a party to Ext. D-30? The trial court held in paragraphs 16 and 17 that the lease in respect of Bhageerathi's undivided 1/4th share would only be a lease by a mortgagee. The lower appellate court held in paragraph 3 that by reason of continuous possession of himself and his predecessors since the date of Ext. P-1 of 1044 M. E., the 6th defendant is entitled to fixity of tenure even in respect of plaintiff's 1/4th share, under Sec. 4-A of the Land Reforms Act read with Explanation I. Counsel for the respondent (Shri T. S. Venkateswara Iyer) is right in stressing that against this important finding and declaration of right there was no specific and direct frontal attack in Second Appeal before the learned Judge (vide paragraph 15 of the learned Judge's judgment). Also, the plaintiff's assignor under Ext. P-3 (21st defendant) had admitted in Ext. D-1 and Ext. D-30 that his purchase of the equity of redemption under Exts. P-7 and P-12 was benami for all the co-owners, including the plaintiff .That is sufficient to attract Cl. (iv) to the newly added proviso to S. 3 (1) (v). The proviso was newly added by the Amendment Act 35 of 1969; but is attracted to the appeal by reason of the provision of transitory S. 108 (3), headed 'Transitory Provisions', which reads as follows:—

"108. Transitory Provisions:—

x x x x

(3) If in any suit, application, appeal, revision, review, proceedings in execution of a decree or other proceedings pending at the commencement of this section before any court, tribunal, officer or other authority, any person claims any benefit, right or remedy conferred by any of the provisions of the principal Act or the principal Act as amended by this Act, such suit, application, appeal, revision, review, proceedings in execution or other proceedings shall be disposed of in accordance with the provisions of the principal Act as amended by this Act."

In view of the above section there can be little doubt that the 6th defendant is entitled to fixity of tenure. We affirm the finding that the 6th defendant is entitled to fixity of tenure. It is supportable, certainly with respect to the provisions of S. 3 (1) (v) and Cl. (iv) of the proviso thereto. The finding as to fixity based on S. 4-A entered by the Lower Appellate Court was not specifically objected to, as seen from the judgment of the learned Judge. We have traced the developments which led to the surrender of C1 plot and to the loss of 22 acres by reason of the decree in O. S. No. 230 of 1958. It was in the process of partition that the plaintiff got his 1/4th share.

10. Counsel for the appellant contended that the plaintiff having taken possession as Receiver even in 1961 was entitled to continue in possession unaffected by any claim of fixity of tenure which was conferred on tenants of mortgagees only by the Amendment Act 35 of 1969. He relied on the decision of a learned Judge of this Court in Percy Bhanu v. Yohannan Skaria (1976 Ker LT 237). In that case, the lease deed of 1953 was for a term of one year, at the expiry of which, the demand for surrender was made and a suit for recovery of possession followed. A receiver was appointed in that suit who took possession in 1955. The assignee from the tenant claimed the fixity of tenure. The learned Judge observed thus:

"3. In this case the defendant was removed from the possession of the property in 1955. On that date he had no right to continue in possession as against the plaintiff. The term of the lease had expired, the rent was in arrears and so Act VIII of 1950 was not available to him and there was no law in force then to protect the possession of a person like the defendant. The possession of the Receiver, if the state of affairs in 1955 alone is considered, can only be a possession on behalf of the plaintiff. The delay of the court in disposing of the suit cannot place the defendant in a better position. Normally the rights of the parties as on the date of suit alone are adjudicated in the suit and if subsequent events or change of law have to be taken into account, which the court very often is bound to look into, the party who claims the benefit of it must strictly comply with the terms on which the new right accrues. The effect of the appointment is to remove the parties to the action from the possession of the property.

x x x x

This being the legal position the doctrine that the Receiver's possession is treated as possession of successful party on termination of the suit cannot be pushed to the extent of enabling a party to treat the Receiver's possession previous to the termination of the suit as his possession and claim a right to succeed in the suit solely on such deeming. He must succeed

in the suit on other grounds, namely either that he has title to the property or that he has got a right to be in possession and if he succeeds on such grounds on the termination of the suit he may be able to contend that the Receiver's possession is his possession. In other words, only because he succeeds in the suit the possession of the Receiver enures to his benefit. This deeming is a consequence of success only and is not available to succeed in the suit. As stated earlier, a quondam tenant continuing in possession on the date when Act 1 of 1964 came into force will also be a tenant within the meaning of Act 1 of 1964. Here the defendant was removed and the Receiver put in possession in 1955 and that possession of the Receiver is not his possession."

With respect, we are unable to endorse either the decision or the principle stated by the learned Judge; and we would overrule the said decision. It is important to remember in this case, that the property was in an undivided state, both in respect of the reversionary right of the lessors, as well as with respect to the leasehold right. As noticed in a very early decision Muttusami Ayyar J. in Orr v. Muthia Chetti ((1894) ILR 17 Mad 501), the appointment of a Receiver is an act of the Court that puts the property in custodia legis; the tenants become therefore, the tenants, so to say, of the Court, in custody of the property. The appointment of a Receiver would not therefore amount to a termination of the leasehold right or a dispossession of the tenant. The decision in Percy Bhanu v. Yohannan Skaria (1976 Ker LT 237) states the proposition widely, and we cannot endorse the statement of principle.

11. In Orr v. Muthia Chetti ((1894) ILR 17 Mad 501) Muttusami Ayyar J. observed regarding the appointment of a Receiver:

"The appointment is the act of the Court and once made in the interests of justice or ex debito justitiae, he is an officer or representative of the Court, and subject to its orders. His possession is the possession of the Court by its receiver, and the tenants in possession, when he is appointed to receive rents and profits of immovable property, become virtually tenants pro hac vice of the Court, their landlord. His possession is the possession of all the parties to the proceeding according to their titles..... For, it has been held in England in similar cases that a receiver appointed by the Court is appointed on behalf and for the benefit of all persons interested, parties to the suit or proceeding. This being so, it is clear that if a loss arises from the default of the receiver, the estate must bear the loss as between the parties to the suit or proceeding. It is true that when the party entitled to an estate is ascertained, the receiver will be considered his receiver and their (that?) principle is applicable in the case of a suit in which title to property is decreed, and not to the case before me, for the decree under execution is a money decree, the title in the property under attachment continuing to vest in the judgment-debtor. The first mentioned rule is only the result of the general principle that the loss must fall on the estate or its owner, subject to the receiver's liability. The terms "receiver" and "manager" are synonymous, and though the appointment of a receiver may, in certain cases, operate to change possession, yet it has no effect whatever on the title of either party to the property which is placed in the possession of the receiver." (pp. 503 & 504).

We think, the above exposition represents the correct principle of law. See further: Woodroffe: 'On Receivers' p. 61, para. 15, Kerr: 'On Receivers' pages 134 to 138.

12. It was argued that the quondam tenant who had lost the possession cannot claim the fixity of tenure. It was further argued that the 9th defendant having surrendered possession of C-1 plot to the plaintiff by joint application, Ext. P-13 dated 7-12-1966, would not be entitled to restoration of the said plot under S. 13-A of the Land Reforms Act, as a voluntary surrender recorded by Court on joint application cannot amount to an 'eviction' within the meaning of the section. The decision of one of us (myself) in Vaisyan Sebastian v. Augusteenju Marsal (1973 Ker LT 475) was cited. We think, the decision is inappropriate to the peculiar facts disclosed. The claim to fixity of tenure of the 6th and 9th defendants was negatived by the trial court in paragraph 16 of its final judgment dated 30-6-1966. Ext. P-13 was thereafter, and pending appeal against the said judgment. In appeal and in second appeal the finding and judgment of the trial court were reversed and it was held that defendants 6 and 9 were entitled to fixity of tenure. The plaintiff is bound to make restitution and cannot deny the same on

the ground of the surrender under Ext. P-13. The provision in the appellate judgment directing plaintiff to surrender to be 6th defendant was therefore quite justified. Our attention was invited to the decisions in Aypu Kuncheria v. Ramachandra Iyer (1968 Ker LJ 539) and Ouseph Lonan v. Kochunarayana Pisharady, 1971 Ker LT 155: (AIR 1973 Ker 76) (FB) to the effect that even a quondam tenant is entitled to fixity of tenure. Dispossession had not taken place in these cases. For convenience of enjoyment among the lessees, the 9th defendant was in possession of an undivided half of the leasehold under Ext. D-9 executed in favour of defendants 13 and 14; and defendants 6 and 7 were in similar enjoyment of the other undivided half under defendants 10 and 15. It was in such circumstances that the plaintiff purchased the mortgage right from the 10th defendant under Ext. P-2. This could only be subject to the 6th defendant's tenancy right, which was under a co-owner of an undivided right. Whatever ultimately fractionates as share of the lessor co-sharer, to that the leasehold right must attach. In that sense the 6th defendant's leasehold would attach to C-1 property allotted to the plaintiff. We have also noticed earlier that the finding of the lower appellate court that the 6th defendant is entitled to fixity of tenure under S. 4-A of the Land Reforms Act was not specifically objected to before the learned Judge. The principle of the Full Bench ruling in Balakrishnan Nair v. Kunhikrishnan, 1977 Ker LT 180 : (AIR 1977 Ker 123) (FB) affords some support that despite such loss of possession as has occurred, the provisions of the Act should be projected back to the date of dispossession. The decision of our learned brother Poti J. in Moideen v. Aysa Bee (1972 Ker LT 939) supports the principle of making restitution to a tenant who had been dispossessed in execution proceedings. We are unable to accept the argument that Ext. P-13 would bar the claim to fixity of tenure.

13. There remains the last point of counsel for the appellant about the applicability of the doctrine of "substituted security" — as the learned Judge put it, so as to attach the leasehold right and fixity of tenure, not to the property actually held in possession by the 9th defendant since the date of Ext. P-1, but to the one ultimately allotted to the lessor, on partition. The learned Judge in para. 15 of his judgment stated:

"The contention on behalf of the 6th defendant is that Ext. D 9 executed by the 9th defendant in favour of defendants 13 and 14 was for an undivided one half of the property, that for the other undivided half defendants 6 and 7 were paying rent to defendants 10 and 15, that the plaintiff's purchase of the mortgage right from defendant 10 was subject to the lease in their favour, that although defendants 6 and 7 were in possession of the eastern half, the leasehold right of defendant 6 would attach to the plots C-1 and C-2 allotted to the plaintiff on the principle of substituted securities, that the fact that the plaintiff has taken possession of plot C-1 from defendant 9 is immaterial and that the direction of the court below that the plaintiff would surrender plots C-1 and C-2 to defendant 6 is therefore right."

Again, the learned Judge stated in paragraph 16:

"Despite the division or arrangement among the lessees, there has not been any partition of the reversion among the co-owners until the decree in this case. Under that decree the plaintiff who claims under defendant 10 has been allotted, inter alia, plot C-1. Even though that plot was with defendant 9, the leasehold right of defendant 6 is fastened to that plot, as he was holding under defendant 10 whose right is now vested in the plaintiff. That is the result of the operation of the principle of substituted securities. I accept the contention of defendant 6 on this point."

Counsel for the appellant strongly contended that the doctrine of "substituted security" has no application to leases and is a concept applicable only to mortgages. In that form, we think the statement involves a misconception. The position disclosed is that two lessees were inducted into possession by four lessors, each entitled to an undivided one-fourth share of the entire 88 acres of land. There was no partition of the revisionary right. That being so, on principle, the leasehold right must take effect on the property allotted finally on fractionation of the shares and the allotment of the same to the lessor-co-owners. It matters little whether the principle is labelled "substituted security" or not. Logically, and on principle, the conclusion that the 6th defendant as the lessee from a co-owner of an

undivided one-fourth share is entitled to fixity of tenure in respect of the property ultimately allotted to the lessor-plaintiff is correct.

14. Counsel for the respondent also contended that the principle of substituted security is not altogether alien even to leases and lessees. He cited the decision in Byjnath Lall v. Ramoodeen Chowdry, ((1874) 1 Ind App 106 at p. 117 (PC) and following). It was decided that a mortgage of an undivided share in land may be enforced against lands, which, under the revenue partition, have been allotted in lieu of such share, whether such lands be in the possession of the mortgagor or of one who has purchased his right, title and interest. The applicability of the doctrine of substituted security generally, to properties alienated by one of the coparceners or co-owners, when a partition takes place among them, fell to be considered by our learned brother Poti J. in Padmanabha Pillai v. P. Abraham (AIR 1971 Ker 154). It was held that the doctrine would apply, irrespective of whether the right of a coparcener or co-owner is transferred by private sale or by Court auction purchase. When allotment has been made in partition, to such coparcener or co-owner, the alienee or the auction-purchaser, as the case may be, will be entitled to seek partition and also allotment at such partition, to himself, of so much of the properties as may fall to the share of the coparcener or the co-owner, as is required to make up the value of the property sold to the alienee or the auction-purchaser, as the case may be.

15. For the appellant, it was stressed that though the original lease (Ext. P-1) was of the undivided rights in the entire 88 acres, the same was given the go-by by the conduct of the lessors and the lessees, as evidenced by Exts. D-8 and D-9. By Ext. D-8 dated 17-4-1952, as noticed earlier, the lessees agreed to hold the property in two separate halves, eastern and western. This was accepted by the lessors as evidenced by Ext. D-9 lease-deed dated 28-4-1952 and by acceptance of rent and issue of rent receipts, separately in respect of the different portions. Our attention was called to the discussion and finding regarding this aspect of the case in paragraphs 19 and 20 of the trial court's judgment, para 5 of the lower appellate court's judgment, and para 16 of the judgment of the learned Judge in Second Appeal. It was argued that the surrender of the C-1 plot on 7-12-1966 had to be viewed against this background. Even with these facts supplied or emphasised, the crucial point remains that the lessors' rights were undivided and the leasehold right of an undivided one-fourth share, could fasten only on the property ultimately allotted to the lessors on fractionation of their shares. Section 44 of the T. P. Act, relied on by counsel for the respondents is another pointer to the same conclusion.

16. The judgment of the learned Judge was right. We affirm the same and dismiss this appeal with costs.

Appeal dismissed.

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V. BALAKRISHNA ERADI AND T. KOCHU THOMMEN, JJ.

The State of Kerala and another, Appellants v. K. Cheru Babu, Respondent.

A. S. No. 413 of 1973, D/- 2-11-1977.

Torts — Vicarious liability — Government servant — Liability of State for tortious acts committed by its servants in course of their official duties — Doctrine of immunity — Applicability.

The doctrine of immunity is now confined to narrow regions, namely, (a) the immunity of a foreign State from the jurisdiction of the local courts in regard to Acts jure imperii (non-commercial activities of States in its sovereign capacity) as distinguished from acts jure gestionis (commercial activities of State); and (b) the immunity of a State from the jurisdiction of its own courts in regards to acts of state and matters arising from military operations. The principle of State immunity—whether of the territorial state or of the foreign state—is a survival of the period when the sovereign was considered to be above the law. This is no longer the position. (Para 16)

In a republican and democratic form of Government there is no justification for recognising the archaic theory of sovereign immunity which was founded on the feudalistic notions of justice in England. (Para 18)

In India, ever since the time of the East India Company, the sovereign has been held liable to be sued in tort or in contract, and the common Law immunity never operated in India. All powers

vested in the State are derived from the Constitution or the relevant statute. Under the Constitution, there is no scope for immunity based on any prerogative or arbitrary right. Except where special provisions have been made under the Constitution (e. g. Art. 361), or reasonable classification is made under a statute, treating the State or certain individuals as a special class and conferring upon them special privileges and exemptions or immunities, against a citizen the State has no right to immunity. The State is not protected from liability for the tortious act of its servant which is either ultra vires the statute granting the powers under which he is purported to have acted or is a negligent exercise of such powers. In other words the State is vicariously liable to third parties in such circumstances as would render a private employer liable. (Paras 18, 19)

The concept of sovereignty is not a satisfactory test for deciding questions of immunity. Sovereign exercise of power is not the dividing line between jurisdiction and immunity. Apart from constitutional or statutory provisions granting certain immunities or exemptions or privileges to the State or its instrumentalities, and with the exception of matters arising from war damage, the State, in relation to its citizens, has no immunity from liability or from the jurisdiction of its Courts. (Para 20)

In the instant case the Adviser to the Governor at the material time was proceeding to Sultan's Battery on a private visit after attending a private function at Calicut. The driver of the jeep car escorting the Adviser was not performing any act which was referable to the exercise of a sovereign power. There is no evidence to show that the Adviser or the driver of the jeep escorting him was performing any function which was attributable to an exercise of sovereignty. Therefore the State was vicariously liable for the tortious act of the driver. (Para 21)

Cases Referred: Chronological Paras

AIR 1974 SC 890 : 1974 Lab IC 598 11, 12, 13, 14

1970 AC 179 : (1969) 2 WLR 926, Att. Gen. v. Nissan 17

1970 AC 1004 : (1970) 2 WLR 1140, Home Office v. Dorset Yacht Co. 17, 19

AIR 1967 SC 997 : 1967 Cri. LJ 950 17

AIR 1965 SC 1039 : (1965) 1 SCR 375 8, 12

1965 AC 75 : (1964) 2 All ER 348, Burmah Oil Co. v. Lord Advocate 16, 17

AIR 1962 SC 933 : (1962) Supp. 2 SCR 989 7, 18

(1878) 3 AC 430, Geddis v. Bann Reservoir (Proprietors) 19

(1868-69) 5 Bom HCR App A 1 9

Govt. Pleader, for Appellants; K. Kunhirama Menon and P. Ramakrishnan Nair, for Respondent.

KOCHU THOMMEN J.:— The question which arises for our consideration is whether the State is responsible for the wrongful acts committed by its servants in the course of their official duties.

2. This appeal arises from the judgment of the Subordinate Judge of Kozhikode in a suit for damages. The 1st defendant, the State of Kerala, is the first appellant before us. The trial court found that the plaintiff was injured as a result of the negligence of the 2nd defendant who was an employee of the 1st defendant and that both the defendnts were liable in damages to the plaintiff.

3. The facts of this case may be briefly stated as follows: On the morning of 11-12-1966, the plaintiff who was a student of St. Joseph's College, Devagiri, Calicut, was knocked down by a jeep car (Reg. No. K.L.D. 476) while crossing the Cannanore road. The jeep belonged to the Government of Kerala, the 1st defendant, and it was driven by V. V. Sreenivasan, the 2nd defendant. The Revenue Divisional Officer, Calicut, was travelling in the jeep. The jeep was escorting the Adviser to the Governor who was proceeding to Sultan's Battery after attending a College function at the B.T. College, Calicut. As a result of the accident, the plaintiff was seriously injured. His facial bone and right leg were fractured. He had to be hospitalised at the Calicut Medical College Hospital for a number of days. Even at the time of the institution of the suit, he had not completely regained his normal health. The plaintiff therefore claimed from the defendants a sum of Rs. 15.000/- by way of damages.

4. The defendants contended that the accident was caused by the negligence of the plaintiff in rashly and recklessly crossing the road. They stated that there was no negligence at all on the part of the 2nd defendant. It was further contended that the State was, in any case, not liable for the tortious acts of its servants.

5. The trial court found that the accident was caused by the negligence of the driver, the 2nd defendant, and held that he was liable in damages to the plaintiff.

The court further held that the State, as the employer of the driver, was vicariously liable for the consequences of its employee's negligence. It was accordingly held that the defendants were liable to pay the plaintiff a sum of Rs. 8,000/- by way of damages together with proportionate costs.

6. The only question that was urged before us by the Govt. Pleader at the time of the arguments was as regards the liability of the State for damages in respect of the tortious act committed by its servant in the course of his employment. He contended that the State was immune from the conquences of such acts.

7. In State of Rajasthan v. Mst. Vidhyawati (1962) Supp. 2 SCR 989 : (AIR 1962 SC 933) the Supreme Court stated that the liability of a State for damages in regard to the tortious act committed by its servant within the scope of his employment and functioning as such was the same as that of any other employer. The Court held that the State was not entitled to any immunity from vicarious liability for the tort committed by a Government driver while driving a Government jeep car from a workshop to the residence of the Collector for the latter's official use. Speaking for the Court, Sinha C. J. observed: (at p. 938 of AIR)

"In this connection it has to be remembered that under the Constitution we have established a welfare State, whose functions are not confined only to maintaining law and order, but extend to engaging in all activities including industry, public transport, state trading, to name only a few of them. In so far as the State activities have such wide ramifications involving not only the use of sovereign powers but also its powers as employers in so many public sectors, it is too much to claim that the State should be immune from the consequences of tortious acts of its employees committed in the course of their employment as such."

The court pointed out that in England the Crown was no longer immune from proceedings in court in regard to the tortious acts of its servants. The Court stated: (at p. 940 of AIR)

"It was impossible, by reason of the maxim 'The King can do no wrong', to sue the crown for the tortious act of its servant. But it was realised in the United Kingdom that that rule had become outmoded in the context of modern developments in state-craft, and Parliament intervened by enacting the Crown Proceedings Act, 1947, which came into force on January 1, 1948. Hence the very citadel of the absolute rule of immunity of the sovereign has now been blown up."

The Court therefore concluded as follows:

"Viewing the case from the point of view of first principles, there should be no difficulty in holding that the State should be as much liable for tort in respect of a tortious act committed by its servant within the scope of his employment and function as such as any other employer. The immunity of the Crown in United Kingdom, was based on the old feudalistic notions of Justice, namely, that the King was incapable of doing a wrong, and, therefore, of authorising or instigating one, and that he could not be sued in his own courts. In India, ever since the time of the East India Company, the sovereign has been held liable to be sued in tort or in contract, and the Common Law immunity never operated in India."

The Court held that in an independent India, governed by a Constitution, there was no justification for upholding the principle of immunity which was based on an outmoded common law theory that no longer operated as such in the country of its birth.

8. The question of immunity again came up for the consideration of the Supreme Court in Kasturilal Ralia Ram Jain v. State of Uttar Pradesh (1965) 1 SCR 375 : (AIR 1965 SC 1039). In that case, the question was whether the State was vicariously liable for the tort committed by certain police constables. The claimant who was a dealer in bullion was taken into custody by three police constables who seized gold and silver from him. Although silver was returned to him after he was released, the gold could not be traced as it had been misappropriated by one of the constables who had escaped to Pakistan. The Supreme Court held that the trial court was right in finding that the loss suffered by the claimant was on account of the tortious act of the police officers. It was however held that since the act was committed by public servants in the discharge of their statutory duties which were referable to the exercise of sovereign powers, the State could not be held vicariously liable for the consequences of

such acts. The Court pointed out that a distinction had to be drawn between acts which were referable to the exercise of sovereign powers and acts which were not so referable. In respect of the former, it was pointed out that the State was not vicariously liable for the wrongful acts of its servants. Speaking for the Court, Gajendragadkar C. J., stated: (at p. 1046 of AIR)

"If a tortious act is committed by a public servant and it gives rise to a claim for damages, the question to ask is: was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on, the delegation of the sovereign powers of the State to such public servant? If the answer is in the affirmative, the action for damages for loss caused by such tortious act will not lie. On the other hand if the tortious act has been committed by a public servant in discharge of duties assigned to him not by virtue of the delegation of any sovereign power an action for damages would lie. The act of the public servant committed by him during the course of his employment is, in this category of cases, an act of a servant who might have been employed by a private individual for the same purpose. This distinction which is clear and precise in law, is sometimes not borne in mind in discussing questions of the State's liability arising from tortious acts committed by public servants. That is why the clarity and precision with which this distinction was emphasised by Chief Justice Peacock* as early as 1861 has been recognised as a classic statement on this subject."

9. Relying on such distinction, the Court concluded as follows: (at p. 1048 of AIR)

"In the present case, the act of negligence was committed by the police officers while dealing with the property ... which they had seized in exercise of their statutory powers. Now, the power to arrest a person, to search him, and to seize property found with him, are powers conferred on the specified officers by statute and in the last analysis, they are powers which can be properly characterised as sovereign powers."

For this reason, the claim for damages arising from the tort committed by the police constables was dismissed.

*Peninsular and Oriental Steam Navigation Co., (1868-69) 5 Bom HCR App. A, 1.

10. The Court apparently felt compelled to follow the Common Law as it existed in England prior to the Crown Proceedings Act, 1947. In the opinion of the Court, the Common Law doctrine of immunity in its original form still operated in India. This is clear from the followng observation of the Supreme Court: (at p. 1049 of AIR)

"... the doctrine of immunity which has been borrowed in India in dealing with the question of the immunity of the State in regard to claims made against it for tortious acts committed by its servants, was really based on the Common Law principle which prevailed in England; and that principle has now been substantially modified by the Crown Proceedings Act."

The Court was not however satisfied with the position, for it stated: (at p. 1049 of AIR)

"In dealing with the present appeal, we have ourselves been disturbed by the thought that a citizen whose property was seized by process of law, has to be told when he seeks a remedy in a court of law on the ground that his property has not been returned to him, that he can make no claim against the State. That, we think, is not a very satisfactory position in law. The remedy to cure this position, however, lies in the hands of the legislature".

11. The question once again appeared for the consideration of the Supreme Court in Shyam Sunder v. State of Rajasthan (AIR 1974 SC 890). Mathew J., speaking for the Court referred to the following contention of the State: (at p. 893 of AIR)

"It was, however, argued on behalf of the respondent that the State was engaged in performing a function appertaining to its character as sovereign as the driver was acting in the course of his employment in connection with famine relief work and therefore, even if the driver was negligent, the State would not be liable for damages."

In answer to that contention, the Court stated: (at p. 894)

"We are of the view that, as the law stands today, it is not possible to say that famine relief work is a sovereign function of the State as it has been traditionally understood. It is a work which can be and is being undertaken by private individuals. There is nothing peculiar about it so that it might be predicated that the

State alone can legitimately undertake the work."

(Italics supplied).

Referring to the doctrine of sovereign immunity, the Court observed (at p. 893 of AIR):

"We do not pause to consider the question whether the immunity of the State for injuries on its citizens committed in the exercise of what are called sovereign functions has any moral justification today."

After referring to Blackstone and Justice Holmes, two ardent supporters of the doctrine of sovereign immunity, the Court pointed out: (at p. 894 of AIR).

"Today, hardly anyone agrees that the stated ground for exempting the sovereign from suit is either logical or practical. We do not also think it necessary to consider whether there is any rational dividing line between the so-called sovereign and proprietary or commercial functions for determining the liability of the State."

12. Although in Kasturilal Ralia Ram Jain v. State of Uttar Pradesh (1965) 1 SCR 375 : (AIR 1965 SC 1039), the Su-Supreme Court felt that the distinction between acts which are referable to the exercise of sovereign powers and other acts, was clear and precise in law, the judgment of the Supreme Court in Shyam Sunder v. State of Rajasthan (AIR 1974 SC 890) indicates that such distinctions are not always clear and precise. In the latter case, it was held that the driver of a government vehicle in the Department of Public Works, and acting in the course of his employment connected with the famine relief work which was undertaken by the Department, was not exercising any function which could be referable to the exercise of a sovereign power. For, as the court pointed out, it was a work "which can be and is being undertaken by private individuals." The test applied by the court for determining the nature of the act, namely, whether or not it was an exercise of sovereign power was whether such act could be undertaken by private individuals. The negligence on the part of the driver arose in the course of and in connection with famine relief work and the State was held to be not entitled to any immunity from vicarious liability; the reason being that famine relief work was, ex hypothesi, not referable to sovereignty. The nature of the work was thus determined with reference to its object. In the former case (Kasturilal Ralia Ram Jain), misappropriation of gold by a police constable after seizing the same from a person in police custody was held to be an act in respect of which the State was entitled to claim immunity, presumably because the original act of seizure was an act which no private individual was competent to do. Here immunity from vicarious liability was recognised, although the tort (misappropriation), unlike in Shyam Sunder's case, arose subsequent to and unconnected with the seizure of gold the object of which was held to be referable to sovereignty. One basic distinction that can be pointed out between the two cases is that while in Shyam Sunder the tort arose while the servant of the State was engaged in carriage of goods, which on the face of it was not referable to sovereignty, although the nature of the act was tested with reference to its object (famine relief), in Kasturilal the tort was held to emanate from seizure of gold which on the face of it was a statutory exercise of power, although the object of the tortious act was personal gain for the tort-feaser. In this connection, the Court cited with approval the following passage from the judgment of the Chief Justice Peacock: (at p. 1046 of AIR 1965 SC).

"Where an act is done, or a contract is entered into, in the exercise of powers usually called sovereign powers; by which we mean powers which cannot be lawfully exercised except by sovereign, or private individual delegated by a sovereign to exercise them, no action will lie."*

P. & O. Steamship Navigation Co. v. Secretary of State for India (1868-69) 5 Bom HCR App. A 1; See (1965) 1 SCR 375, at p. 386 : (AIR 1965 SC 1039 at p. 1046).

13. The nature of the act cannot be truly determined except in connection with its object. Whether the driver of a truck was performing a function which could be undertaken by any private individual would depend upon the object for which he was employed at the relevant time, if the truck was transporting ammunitions or provisions for the army in the battle field, the nature of his function would very well assume a different

*This test was suggested by M. Weiss Hague Academy of International Law, Recueil des Cours, (1923). For a criticism of this test, see H. Lauterpacht, British Year Book of International Law, (1951) 220.

complexion from that in Shyam Sunder, (AIR 1974 SC 890) although in either case the physical act performed by the driver was the same, namely, carriage of goods.

14. The logic or rationale of such nice distinctions is in many cases not easily discernible. Armed forces are one of the most striking instrumentalities for the exercise of state sovereignty and their field of operation is in most cases out of bounds for private individuals. Supposing the driver of a military truck was carrying provisions for the defence personnel who were employed in famine relief work, would his functions be referable to an exercise of sovereign power merely because he was engaged in the service of the armed forces who were in the interest of the State, catering to the needs of the civilian population in times of famine? Or would it have made any difference if the famine occurred during and as the result of a war in which the nation was engaged? None of these cases can be characterised as a commercial activity, and yet, if the ratio in Shyam Sunder (AIR 1974 SC 890) is applied, none of them can be referable to an exercise of sovereign power any more than the act of the driver in that case, as such work of transporatation of provisions to succour the famished populace can as well be undertaken by private individuals. And yet can it not be pertinently asked, "Is not famine relief work an integral and essential part of military preparedness, and is not the ultimate object as relevant as the immediate object in judging the character and nature of an act?"

15. The ultimate or immediate object may not be always discernible. Take for example, the production of armaments in a military factory. Munitions and equipment can as well be produced by a civilian factory as they can be by a military factory, and it is conceivable that part of the products of a military factory are reserved for commercial purposes just as the products of a commercial factory can be exclusively or partially reserved for the military. And yet, can it be said that a military factory producing weapons is not performing a function which is referable to sovereignty? If a truck belonging to and operated by such a military factory negligently ran over and killed a citizen, can the State, in the absence of a statutory exemption, claim immunity from vicarious liability? A similar question may arise, if there was an explosion in that factory which killed or injured persons in the neighbourhood and damaged private property. The answer to any one of these questions would depend upon the view that one ultimately takes on the scope of sovereign immunity. Yet neither the nature nor the object of the act seems to be a sure test to demarcate regions of sovereignty. It is true that extreme cases are easy to recognise; such as acts of war or 'hot pursuit' of a foreign ship as example of sovereign functions on the one hand, and carriage of goods and passengers for reward or sale of commodities as examples of commercial activities on the other hand. In between these two extremes, innumerable examples can be cited where it will not be easy to draw any rational or clear distinction between sovereign acts (acts jure imperii) and commercial activities (acts jure gestionis). It is because of this difficulty and the inequity of exempting the State from private law obligations that it has been increasingly recognised in most jurisdictions that an unlimited claim of State immunity from legal proceedings has no theoretical or legal basis. That is the reason why the Crown Proceedings Act, 1947 drastically curtailed the operation of the doctrine of immunity in England.

16. The doctrine of absolute immunity never formed part of classical law. Neither Gortius* nor Bynkershoek** nor Vattel† accepted the doctrine in its absolute form.†† Nor does it find acceptance in modern jurisprudence.§ The doctrine is now confined to narrow regions, namely, (a) the immunity of a foreign State from the jurisdiction of the local courts in regard to acts jure imperii (non-commercial activities of States in its sovereign

*De Jure Belli ac Pacis (Carnegie edition, 1913).

**Quaestiones Juris Publici (Carnegie edition, 1930).

†Droits des Gens, Book III Ch. 15.

††See the Judgment of Lord Reid in Burmah Oil Co. Ltd. v. Lord Advocate (1965) A.C. 75, 108-109.

§See H. Lauterpacht "The Problem of Jurisdictional immunities of Foreign States", British Year Book of International Law, Vol. 28 (1951) pp. 220 et seq.; J. G. Castel, American Journal of International Law, Vol. 46 (1952) p. 520; Jean-Flavien Lalive, Recueil des Cours, 84 (1953-III 9.209); M. Weiss, Recueil des Cours, 1923

capacity) as distinguished from acts jure gestionis (commercial activities of State); and (b) the immunity of a State from the jurisdiction of its own courts in regards to acts of state and matters arising from military operations. The principle of State immunity — whether of the territorial state or of the foreign state — is a survival of the period when the sovereign was considered to be above the law. This is no longer the position.**

17. In the United Kingdom the principle of State immunity from the jurisdiction of the British Courts was founded on the doctrine of royal prerogative which in the words of Dicey† is "The residue of discretionary or arbitrary authority. which at any given time is legally left in the hands of the crown." Prerogative in its absolute form is no longer recognised in that country except in matters arising from war in which the sovereign was or is engaged or from act of state.§ If property belonging to a citizen is taken or damaged or destroyed under orders of the crown, albeit in the exercise of the prerogative power, the owner of the property is entitled to be compensated unless such loss arose from war damage.§§ Subject to such defence, the crown is no longer protected from claims/for compensation for the act of its servant if such act was performed negligently or ultra vires the statute creating the powers under which it is purported to have been done.††

18. In a republican and democratic form of Government, as we have under our constitution, there is no justification for recognising the archaic theory of sovereign immunity which was founded on the feudalistic notions of justice in England. It is highly doubtful whether such doctrine had ever struck roots in the jurisprudence of our country, for, as pointed out by the Supreme Court in State of Rajasthan v. Mst. Vidhyawathi (1962) Supp 2 SCR 989 : (AIR 1962 SC 933). In India ever since the time of the East India Company, the sovereign has been held liable to be sued in tort or in contract, and the Common Law immunity never operated in India."

19. All powers vested in the State are derived from the Constitution or the relevant statute. Under the Constitution, there is no scope for immunity based on any prerogative or arbitrary right. Any such right is alien to our system. Ours is a Government of laws and not of men. Except where special provisions have been made under the Constitution (e.g. Art. 361), or a reasonable classification is made under a statute, treating the State or certain individuals as a special class and conferring upon them special privileges and exemptions or immunities, against a citizen the State has no right to immunity. The State is not protected from liability for the tortious act of its servant which is either ultra vires the statute granting the powers under which he is purported to have acted or is a negligent exercise of such powers: Home Office v. Dorset Yacht Co. Ltd. (1970) A.C. 1004 H.L. (E); per Lord Blackburn in Geddis v. Proprietors of Bann Reservoir (1878) 3 A. C. 430, 456. In other words the state is vicariously liable to third parties in such circumstances as would render a private employer liable.

20. The concept of sovereignty is not a satisfactory test for deciding questions of immunity. Sovereign exercise of power is not the dividing line between jurisdiction and immunity. As stated earlier, apart from constitutional or statutory provisions granting certain immunities or exemptions or privileges to the State or its instrumentalities. and with the exception of matters arising from war damage, the State, in relation to its citizens, has no immunity from liability or from the jurisdiction of its courts.

21. In the present case, the learned Judge, on the basis of the available evidence, came to the conclusion that the Adviser to the Governor at the material

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**For a survey of legislation and judicial practice in common law and civil law countries, see Lauterpacht, op. cit.
See H. M. Seervai. Constitutional Law of India, 2nd ed., Vol. II pp. 1137-1139; See also State of West Bengal v. Corporation of Calcutta (AIR 1967 SC 997.)

†Law of the Constitution, 10th ed., p. 424.

§See War Damages Act, 1965, reversing in effect the decision of the House of Lords in Burmah Oil Co. Ltd. v. Lord Advocate (1965) A.C. 75, H.L. Sc.)
The doctrine of act of state cannot be pleaded in a British Court as a defence against a citizen or a resident alien who is the subject of a friendly state, Nissan v. Attoreny General (1970) A.C. 179 (H.L.E.) and the various authorities cited therein.

§§Burmah Oil Co. Ltd. v. Lord Advocate (1965) A.C. 75 (H.L.(Sc.)), and War Damages Act, 1965.

††Home Office v. Dorset Yacht Co. (1970) A.C. 1004 H.L. (E); See the judgments of Lord Reid and Lord Diplock.

time was proceeding to Sultan's Battery on a private visit after attending a private function at Calicut. It was accordingly held that the driver of the jeep car escorting the Adviser was not performing any act which was referable to the exercise of a sovereign power. In our view, the learned Judge was perfectly justified in coming to such conclusion. There is no evidence to show that the Adviser or the driver of the jeep escorting him was performing any function which was attributable to an exercise of sovereignty. In our view, the learned Judge correctly held that the State was vicariously liable for the tortious act of the 2nd defendant and that both the defendants were liable in damages to the plaintiff. The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

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T. CHANDRASEKHARA MENON, J.

Tharur Panchayat and others, Appellants v. Kunchayi and another, Respondents.

Second Appeal No. 936 of 1976-E, D/-6-7-1977.

Easements Act (5 of 1882), Ss. 15, 18 — Right to water — Right to receive water by means of water courses artificially created — Acquisition by prescription.

The right to discharge water over the land of others or to receive the discharge of water from the lands of others by means of water courses artificially created, is not a natural right of property, but may be subject-matter of contract between the parties or be established like any other easement, either by express grant or by prescription which presumes a grant. No doubt, it is distinct from water flowing in a natural channel, which arises as incidental to the ownership of land, and as such prima facie entitles each successive riparian owner to the unimpeded flow of water in its natural course, to its reasonable enjoyment as it passes through his land as a natural incident to his ownership of it. The right to water flowing to a man's land through an artificial watercourse must rest on some grant or arrangement, either proved or presumed from or with the owners of the lands from which the water is artificially brought, or on some other legal origin. Case law discussed.

(Para 14)

Held on facts that the plaintiffs were entitled to claim the right of getting water flowing to their land through a water chal and the fact that the chal is also being used as a pathway could not in any way detract from the plaintiff's right. (Para 18)

Anno: AIR Manual (3rd Edn.); Easements Act, S. 15 N. 6, S. 18 N. 7.

Cases Referred: Chronological Paras

(1900) 2 IR 664, Hanna v. Pollock 8
(1881) 6 AC 740 Dalton v. Angus 10, 11
(1879) ILR 4 Cal 633 15
(1879) 11 Ch D 852 : 41 LT 219, Sturges v. Bridgman 10
(1876) 2 AC 95 : 35 LT 639, Wilson v. Waddell 6
(1871) 6 QB 578 : 25 LT 239, Mason v. Shrewsbury and Here Ford Ry Co. 6
(1865) 19 CBNS 732 : 144 ER 974, Gaved v. Martyn 6
(1863) 32 LJQB 136 : 27 JP 613, Sutcliffe v. Booth 15
(1853) 8 Exch 291 : 155 ER 1357, Greatrex v. Hayward 15
(1849) 3 Exch 748 : 154 ER 1047, Wood v. Waud 13, 15
(1840) 11 A & E 571 : 113 ER 532, Magor v. Chandwick 15
(1839) 8 LJ Ex 201 : 151 ER 87, Arkwright v. Gell 6, 7

T. L. Viswanatha Iyer, P. S. Narayanan and K. B. Menon, for Appellants; V. R. Venkatakrishnan, for Respondents.

JUDGMENT:— Defendants 1 to 3 are the appellants in this second appeal which arises out of a suit filed by the respondents for an injunction to restrain the appellants and another from interfering with a water chal described as item 2 in the plaint and from trespassing into the northern portion of item 1 and for a mandatory injunction for restoration of the chal to its original condition.

2. Plaint item 1 belongs to the plaintiffs and they are in actual possession of the same besides other properties. Defendants 1 to 3, who are the appellants, are the President, Executive Officer and a Member of the Tharur Panchayat respectively, within whose limits the property is situated. It appears that a peon of the Panchayat is also impleaded as the 4th defendant in the suit. The Panchayat had purchased the northern portion of item 1 for conducting a shandy. The plaintiffs have raised objection to the construction of a market place in that property as it would obstruct the flow of water to the plaintiffs' paddy field in item 1 through the vellachal in item 2. It is alleged in the plaint that on 15-8-1969

the defendants filled up a portion of the chal. The varichal runs along the northern side of item 1 also. It is contended in the plaint that the plaintiffs and their predecessors-in-interest have been using this water flowing through the chal concerned for irrigation of their properties for over 100 years without interruption peacefully and as of right and to the knowledge of all concerned. The suit was brought forward on the allegation that the defendants have no right to obstruct the same.

3. Defendants 1 to 3 had contended in the suit that there is no varivellachal on the western side of the property purchased by the panchayat as alleged in the plaint. Their case was that the property was purchased for the public need of constructing a market and as there is no chal in existence there is no question of any one tampering with the chal. It was contended that item 2 is an imaginary item, and the plaintiffs cannot claim as easement right over a non-existent chal. In the written statement the plaintiffs are put to strict proof of their claim to item 1.

4. The trial court held that the easement right claimed by plaintiffs over item 2 is proved, that the plaintiffs have title and possession over item 1 and that the attempted tampering is true and accordingly decreed the suit as prayed for with costs against defendants 1 and 2. The matter was taken up by the present appellant to the lower appellate court—District court, Palghat. The learned District Judge dismissed the appeal with costs confirming the decree and judgment of the trial court. It is in these circumstances that the S. A. has been filed.

5. What was strongly contended before me by the learned counsel for the appellants was that the courts below have not really found the ingredients required to establish a case of easement. Even if the chal had existed and water flowed through that, it will not result in an acquisition of any easementary right on the part of the plaintiffs. It was urged that the Malampuzha canal is of recent origin and nobody has an easementary right to have the water from that canal flowing through a defined channel. As regards the question of fact, that is whether there is a defined channel as contended by the plaintiffs and whether the plaintiffs were using the water flowing through the channel for cultivation purpose in their properties, I do not think this court sitting in second appeal could interfere with the findings of fact entered into by the courts below.

6. The only question that has to be seriously considered is the contention of the appellant that even if the chal had existed and water flowed through that, it will not result in an acquisition of any easementary right on the part of the plaintiffs. It was pointed out by the learned counsel for the appellants that the right which may be acquired by a land-owner or which may exist as a natural right to conduct or to cause water, either from a natural or artificial source, to flow over the adjoining land of a neighbour, which may be an easementary right will not impose an obligation upon the dominant owner to continue the supply of water for the benefit of the owner of the land to which the water is discharged. He referred me to the following passage in John Leybourn Goddard's treatise on the Law of Easements, 6th Edn. pages 92 and 93:—

"Among rights which have relation to the flow of water, the right which may be acquired by a land or mine-owner, or which may exist as a natural right to conduct or to cause water, either from a natural or artificial source, to flow over the adjoining land of a neighbour, must be included. It is unnecessary to say more in this place than that such a right may exist, and that it is an easement. The acquisition of such an easement will not, however, impose an obligation upon the dominant owner to continue the supply of water for the benefit of the servient tenement; in other words, the servient owner does not by the continued reception of the water on his land, acquire an easement against the dominant owner that the latter shall continue to supply him with the water in an unfailing stream."

The decisions referred to therein are Gaved v. Martyn (1865) 19 C.B.N.S. 732; Arkwright v. Gell ((1839) 8 LJ Ex. 201; Mason v. Shrewsbury and Hereford Railway Company ((1871) 6 Q.B. 578) and Wilson v. Waddell ((1876) 2 AC 95).

7. It was contended that it is well established that no easement rights can be acquired over water flowing in an artificial stream unless it is definitely established that it was constructed with a view to its being permanently enjoyed In Arkwright v. Gell ((1839) 8 LJ Ex. 201) where a water-course was constructed with the sole object of getting rid of the water which had over-flowed the mines and prevented the owner thereof from

digging out ore, it was held that as the flow of water in the artificial water-course so constructed was necessarily to be of a temporary nature, no length of user could give a prescriptive right to a claimant to insist on the continuance of this water indefeasibly.

8. It was also contended that in the case of claims by prescription at common law or under the doctrine of lost grant, whether to light or to any other kind of easement, it is also necessary to show an enjoyment as of right. The following passage from the decision of Fitzgibbon, L.J. in Hanna v. Pollock (1900) 2 I.R. 664 671 was referred to:

"The whole doctrine of presumed grant rests upon the desire of the law to create a legal foundation for the long-continued enjoyment, as of right, of advantages which are prima facie inexplicable in the absence of legal title. In cases such as this, where the grant is admittedly a fiction, it is all the more incumbent on the judge to see, before the question is left to the jury, that the circumstances and character of the user import that it has been 'as of right'."

9. What Mr. Viswanatha Iyer contended was that in the nature of the chal which is really only a pathway for the village folk to pass through, collection of rain water drawn from the adjoining lands and discharge of such water to the plaintiffs' land cannot result in the acquisition of a right as such in the plaintiff. Nobody could prevent the owners of land where the rain water is being collected and discharged to the pathway from preventing the discharge of water from the pathway, if he so desires. The Panchayat's primary duty would be to see that the pathway is kept as pathway. He also strongly urged that before the plaintiffs could succeed they will have to establish that the Panchayat or the predecessors-in-interest had knowledge of the right that is being put forward by the plaintiffs. The enjoyment of easement or even a right which might be acquired under the principle of lost grant must be one of which the servient owner has knowledge either actual or constructive.

10. In Sturges v. Bridgman (1879) 11 Ch. D. 852, 863 Thesiger L J, in delivering the judgment of the court of appeal had stated the Law governing acquisition as follows:

"The law governing the acquisition of easements by user stands thus: Consent or acquiescence of the owner of the servient tenant lies at the root of prescription, and of the fiction of a lost grant, and hence the acts or user, which go to the proof of either the one or the other, must be, in the language of the civil law, nec vi nec clam nec precario; for a man cannot, as a general rule, be said to consent to or acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive, or which he contends and endeavours to interrupt, or which he temporarily licenses. It is a mere extension of the same notion, or rather it is a principle into which by strict analysis it may be resolved, to hold, that an enjoyment which a man cannot prevent raises no presumption of consent or acquiescence." Again, in delivering his opinion to the House of Lords in Dalton v. Angus ((1881) 6 App. Cas. 740) Fry, J. said:

"In my opinion, the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence. The courts and the judges have had recourse to various expedients for quieting the possession of persons in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me that acquiescence and nothing else is the principle upon which these expedients rest. It becomes then of the highest importance to consider of what ingredients acquiescence consists. In many cases, as for instance, in the case of that acquiescence which creates a right of way, it will be found to involve, first, the doing of some act by one man upon the land of another; secondly the absence of right to do that act in the person doing it; thirdly, the knowledge of the person affected by it that the act is done; fourthly, the power of the person affected by the act to prevent such act either by act on his part or by action in the courts; and lastly, the abstinence by him from any such interference for such a length of time as renders it reasonable for the courts to say that he shall not afterwards interfere to stop the act being done. In some other cases, as for example, in the case of light, some of these ingredients are wanting; but I cannot imagine any case of acquiescence in which there is not shown to be in the servient owner: 1, a knowledge of the acts done; 2, a power in him to stop the acts or to sue in respect of them; and 3, in abstinence on his part from the exercise of such power. That such is the

nature of acquiescence and that such is the ground upon which presumptions or inferences of grant or covenant may be made appears to me to be plain, both from reason, from maxim, and from the cases."

11. This opinion of Justice Fry was accepted in Dalton v. Angus (1881-6 A.C. 740) by Lord Benzance in his speech in the House of Lords and stated that he was in "entire accord" with the opinion of Justice Fry; the opinion being also described by Lord Blackburn as "a very able one" — ((1881) 6 App Cas 803, 823).

12. Peacock in his law relating to Easements, 3rd Edn. (1922) at p. 109 observes:—

"With reference to this topic an important question arises as to whether a servient owner whose natural rights have been restricted by the diversion of water from its natural course, or by the discharge of water on to his land, can require the dominant owner to continue the exercise of the easement, or in other words, whether he thereby acquires a reciprocal easement as against the dominant owner that the latter shall continue the diversion or discharge of the water.

The question has been fully discussed in the courts and it has been decided that the servient owner cannot acquire any such right."

13. In Wood v. Waud ((1849) 3 Exch. 748) Pollock, C.B. in the course of his judgment said:

"The flow for water of twenty years from the eaves of a house could not give a right to the neighbour to insist that the house should not be pulled down or altered so as to diminish the quantity of water flowing from the roof. The flow of water from a drain for the purposes of agricultural improvements, for twenty years, could not give a right to the neighbour so as to preclude the proprietor from altering the level of the drains for the greater improvement of the land. The state of circumstances in such cases shows that one party never intended to give, nor the other to enjoy, the use of a stream as a matter of right."

14. The right to discharge water over the land of others or to receive the discharge of water from the lands of others by means of water courses artificially created, is not a natural right of property, but may be the subject-matter of contract between the parties or be established like any other easement either by express grant or by prescription which presumes a grant. No doubt, it is distinct from water flowing in a natural channel, which arises as incidental to the ownership of land, and as such prima facie entitles each successive riparian owner to the unimpeded flow of water in its natural course, to its reasonable enjoyment as it passes through his land as a natural incident to his ownership of it. The right to water flowing to a man's land through an artificial watercourse must rest on some grant or arrangement, either proved or presumed from or with the owners of the lands from which the water is artificially brought, or on some other legal origin. Wood v. Waud's case relied on by the learned counsel for the appellants is itself an authority for the proposition.

15. Mr. Venkatakrishnan, learned counsel for the respondents had pointed out that the law on the matter has been well defined and explained in the decision of the Privy Council in the case reported in R. P. Narain Sing v. K. B. Pattuk ((1879) ILR 4 Cal 633). The distinction regarding the right to water flowing through a natural channel and artificial watercourse is referred to in that case as follows:

"The above distinction seems to be now clearly established, for, although it was said by the court of Queen's Bench, in the case of Magor v. Chadwick (1840) — 11 A & E 571 — that it was no misdirection to tell the jury that the law of watercourse is the same, whether natural or artificial, it was held in the subsequent case of Wood v. Waud —(1849) 3 Exch. 748 which appears to their Lordships to be correctly decided, that this expression is to be considered as applicable to the particular case, and that as a general proposition it would be too broad. On the other hand, it appears to their Lordships that the proposition that a right to the use of water flowing through an artificial channel cannot be presumed from the time, manner, and circumstances of its enjoyment, is equally too broad and untenable. It was said by the court, in Wood v. Waud:—

"We entirely concur with Lord Denman, C. J., that the proposition that a watercourse of whatever antiquity, and in whatever degree enjoyed by numerous persons, cannot be enjoyed so as to confer a right to the use of the water, if proved to have been originally artificial, is quite indefensible; but on the other hand, the general proposition that under all circumstances, the right to watercourses,

arising from enjoyment, is the same, whether they be natural or artificial cannot possibly be sustained. The right to artificial watercourses, as against the party creating them, surely must depend upon the character of the watercourse, whether it be of a permanent or temporary nature, and upon the circumstances under which it is created. The enjoyment for twenty years of a stream diverted or penned up by permanent embankments clearly stands upon a different footing from the enjoyment of a flow of water originating in the mode of occupation, or alteration, of a person's property, and presumably of a temporary character, and liable to variations."

In a case which occurred soon after this decision — Greatrex v. Hayward — (1853) 8 Exch. 291—Baron Parks shortly states the principle thus:—

"The right of the party to an artificial watercourse, as against the party creating it, must depend upon the character of the watercourse and the circumstances under which it was created."

In the case then in question, the court considered that the watercourse was of a temporary nature only, and that no right had been acquired by an enjoyment of twenty years.

In the subsequent case of Sutclife v. Booth—(1863) 32 L.J. Q.B. 136—the court of Queen's Bench directed a new trial, on the ground that the jury might have been misled by the direction of the learned judge who tried the cause, to the effect that if the stream were an artificial one, no right whatever could have been acquired in it. The court held the direction was incorrect, "because (in the words of the court) "although it may have been an artificial watercourse, it may still have been originally made under such circumstances and have been so used, as to give all the rights that the riparian proprietors would have had, had it been a natural stream."

In that case the Privy Council pointed out that it had been proved that the water has been used and enjoyed for irrigating the mouzahe from a time beyond living memory. Therefore it appears to their Lordships that, from all these facts a presumption fairly arises that this enjoyment had an origin which conferred a right. The right claimed was to have certain villages belonging to him irrigated with the water flowing from a tal or artificial reservoir, constructed on the defendants' lands, and to compel the defendants to remove certain obstruction erected by them. The artificial reservoir had been fed partly by water which was brought from a natural river by artificial channels, and partly by the collection of the rainfall on the adjoining land.

16. In the light of the decision of the Privy Council I find no mistake committed by the courts below in allowing the right claimed by the plaintiffs.

The learned Munsiff in his judgment had pointed out, after a detailed discussion of the evidence:

"Under these circumstances it is predominantly clear that water is being used by the plaintiff through the chal for a pretty long period. When the plaintiffs are found to have been using the water peaceably, openly, and for more than the period prescribed by the statute it can be presumed that it has got a lawful origin. I am, therefore, inclined to hold that the plaintiff has got a right of easement to use the rain water flowing through the lane and that the defendants are not entitled to meddle with the way so as to create any obstruction in the flow of water."

The learned District Judge also has considered the question in the correct perspective. He points out the relevant portion in the Commissioner's report Ex-C4, where it is stated that:

"from the south-eastern corner of the northern road, water flows into the pathway and flows west. It is from there that the water also flows to the south, according to plaintiffs. From the point B the Commissioner found remnants of a chal along the northern side of plaintiffs' property. Even during inspection, which took place in December, the Commissioner saw water flowing through the chal and pathway to the west."

The learned District Judge concludes:

"All these circumstances lend strength to the evidence adduced on behalf of plaintiffs that water is being used for irrigation of their lands since over 35 years along the lane-cum-chal mentioned by them. The defendants have no case that such user was permissive. In the very nature of things, the user must have been open and continuous. It could only be as of right."

17. In the nature of the right that has been exercised by the plaintiffs it is impossible to say that the defendants or their predecessors-in-interest had no knowledge of the exercise of such rights

and the right as has now been found by the courts below is certainly related to the pleadings in the case. In para 5 of the plaint it is stated:

(Translation of Paras 5 & 9 of the plaint.)

Para 5. Therefore, the Ist and 3rd defendants with an idea of putting the plaintiffs to troubles and also to cause loss to him purchased the northern portion of the plaint schedule item No. 1 property for the Tharur Panchayat and published a notice in the Mathrubhumi daily on 7-7-1969 about their intention to convert the same into a market place. The plaintiffs thereafter understood the motive behind the said purchase of the Ist and 3rd defendants. Their idea being to prevent rain water and also the water from Malampuzha Dam coming through the plaint schedule item No. 1 drainage and the property alleged to have been purchased by the Panchayat. Therefore, the Ist plaintiff sent a complaint through registered post on 8-7-1969 to the Panchayat. Thereafter the 2nd defendant without enquiring into the veracity of the petition sent a reply and opened a portion of the drainage on 15-8-1969. The said act of the defendants 3 and 4 was prevented by the plaintiffs and hence they withdrew from the place.

Para 9 of the plaint reads:

Para 9. The drainage shown in the plaint schedule Item No. 2 which passes through the western side of the northern boundary of plaint item No. 1 and alleged to have been purchased by defendants 1 and 2 is an ancient one. The water taken from the eastern side is a continuation of the water fall. The water passing through the said drainage is highly essential for the plaint schedule item No. 1 and the plaintiffs are entitled to easement right and has been using it openly and under an easement right and the same has been used and enjoyed by the predecessors of the plaintiffs for more than 100 years. The plaintiff submits that the defendants had no right to prevent the same. It is further submitted that the drainage is taken upto Ravunny's kudiyirippu and also the Malampuzha canal. The water in the Malampuzha canal flows through the north western end of the property purchased by the Panchayat and the same is shown as item No. 2 in the plaint schedule. The same flows through the Ittil way and also the drainage.

18. On the basis of the pleadings and evidence in the case I have no hesitation in holding that the plaintiffs could certainly claim right of getting water flowing to their land through the water chal described as item 2 in the plaint. That part of the chal is also being used as a pathway cannot in any way detract from the right that the plaintiffs could claim. In the circumstances I affirm the decree and judgment of the courts below and dismiss the S. A. with costs.

Appeal dismissed.

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FULL BENCH

V. P. GOPALAN NAMBIYAR, C. J., GEORGE VADAKKEL AND T. CHANDRASEKHARA MENON, JJ.

N. Mohammed Kutty, Petitioner v. High Court of Kerala and others, Respondents.

O. P. No. 1872 of 1974, D/- 31-8-1977.

(A) Constitution of India, Arts. 162 and 309, Proviso — Madras Judicial Ministerial Service Rules which are framed under Proviso to Art. 309 are statutory — Kerala G. O. D/- 14-1-1961 and Ker. G. O. D/- 6-10-1965 which are not statutory but executive in character cannot override Madras Rules. W. A. No. 949 of 1969 (Ker), Overruled. (States Reorganization Act (1956), S. 115 (7)).

The Madras Judicial Ministerial Service Rules are undoubtedly framed under the Proviso to Art. 309 of the Constitution. But (Ex. P-3) Ker, G. O. D/- 14-1-1961 which prescribed tests in Office Procedure and Account Test Lower for the ministerial staff of the different offices of the Kerala State and (Ex. P-5) Ker. G. O. D/- 6-10-1965 cannot be regarded as having been promulgated under Art. 309 of the Constitution. Neither in form, nor in substance do they purport to be so. They say nothing about the Madras Judicial Ministerial Service Rules, whether these are repealed or not. And they, by themselves are incapable of repealing the Madras Rules in the face of the proviso of S. 115 (7) of the States Reorganisation Act. Taken at their proper worth, the G. Os. are not under the proviso to Article 309 and cannot get rid of the Madras Rules. Therefore, the contention that the G. Os. in question are statutory in character and override the Madras Judicial Ministerial Service Rules cannot be accepted. AIR 1966 SC 1942, Rel. on. Case law Ref. W. A. No. 949 of 1969 (Ker), Overruled. (Paras 7, 9, 12, 16)

(B) Kerala Civil Services (Classification, Control and Appeal) Rules (1960),

R. 8 and Sch. II, Items 18 and 22 — Kerala G. O. (P) 190/77, D/- 16-6-1977 inserting a proviso to R. 13 of Kerala State and Subordinate Services Rules, with effect from 14-1-1963 — Expression 'Kerala Ministerial Subordinate Service in the G. O. tallies exactly with Item 22 and not with Item 18 and therefore the G. O. does not cover Item 18. (Para 11)

(C) Madras Judicial Ministerial Service Rules, R. 5 — Class IV, Category No. 4 — 'Upper division clerk is a generic name to all those clubbed together in category 4 — It is not a class recognised as such by the Rules.

In the scheme of classification of the several categories in Class IV Category No. 4, the Upper Division is a generic name — although not so expressly mentioned to cover the posts of Head Clerks of Judicial District Magistrate Courts, Head Clerks of Subordinate Judges' Courts, Head Clerks of Sub-Divisional Magistrate's Courts, etc., all of which are clubbed together in Category 4. Having regard to the provision in Rule 5 that the service shall consist of all the classes and categories enumerated, there is no scope for inventing a new and unnamed category of Upper Division Clerks, not expressly enumerated by the Rules. Whether the Upper Division category is expressly mentioned or not, there is little doubt that on the scheme of the Rules, promotion to Category 3 of Class IV is from Category No. 4, of the same class. That cannot be denied by introducing an Upper Division as a sort of buffer, which would involve a violation of the scheme and framework of the Rules, and in particular of Rule 5. (Para 12)

Cases Referred: Chronological Paras

1977 Lab IC 654 : AIR 1977 Bom 193 (FB) 6
AIR 1976 SC 410 : 1976 Tax LR 1407 16
1975 Lab IC 881 : AIR 1975 SC 1331 7
1976 Lab IC 1012 : AIR 1976 SC 1455 16
AIR 1976 SC 1441 16
1974 Lab IC 1380 : AIR 1974 SC 2192 8
1974 AC 810 : (1974) 2 WLR 507, Geelong Harbour Trust Commr. v. Gibbe Bright and Co. 16
1973 Lab IC 427 : AIR 1973 SC 698 7
1973 Lab IC 920 : AIR 1973 SC 1252 7
1972 Lab IC 618 : AIR 1972 SC 1767 7
(1969) W. A. No. 949 of 1969 (Ker) 1, 2, 3, 6
(1968) O. P. No. 1846 of 1968 (Ker) 1, 2, 3, 6
AIR 1966 SC 704 7
AIR 1966 SC 820 7
AIR 1966 SC 1942 7
AIR 1964 SC 648 6
AIR 1964 SC 1043 6

T. L. Viswanatha Iyer, for Petitioner; Govt. Pleader, P. K. Appa Nair, for Respondents.

GOPALAN NAMBIYAR, C. J.:— The case was referred to a Full Bench by a Division Bench of myself and Balagangadharan Nair J. as we doubted the correctness of the view taken by Mathew J. of this Court (as he then was) in O. P. 1846 of 1968 (Ker) which was confirmed by a Division Bench in W. A. No. 949 of 1969 (Ker).

2. The petitioner is an allotted Officer from the Madras State governed by the Madras Judicial Ministerial Service Rules, and entitled to protection under S. 115 of the States Reorganisation Act, viz., his conditions of service shall not be varied to his prejudice or disadvantage except with the previous approval of the Central Government. He entered service on 1-8-1954 in the Malabar area of the Madras State which after reorganisation of States became part of Kerala. Respondents 4 to 7 are also allotted Officers and members of the same service who joined prior to the petitioner. Rule 22 of the Madras Judicial Ministerial Services Rules provides:

"22. Test or examination to be passed before appointment.— No person shall be eligible for appointment to the class and category and by the method specified in columns (1) and (2) of the table below unless he has passed the test or examination specified in the corresponding entry in column (3) thereof.

(For Table see page 57)

The petitioner had become test qualified on 6-3-1962. A post of Upper Division Clerk became vacant on 9-7-1963 and the petitioner was promoted to the said post. None among respondents 4 to 7 were qualified. The Account Test specified in the Madras Rules was conducted in July 1963 and the results of the same were published on 12-11-1963. Respondents 5 and 7 had passed the test and respondents 4 and 6 not. By Ex. P-2 order dated 4-6-1973, the 2nd respondent the District Judge Kozhikode, placed the petitioner below respondents 5 and 7. The petitioner filed Ex. P-6 representation which was rejected by Ext. P-7 order of the High Court on the ground of Exts. P-4 and P-5 G. Os. — (to be noticed presently), and the judgments of the High Court in O. P. No. 1846 of 1968 (Ker) and W. A. No. 949 of 1969 (Ker).

Class and category	Method of recruitment	Test or Examination
1	2	3
Class I—		
12 Upper Division Clerk and Accountant in the Sheriff's Office.	Promotion	(i) Account test for Subordinate Officers, Part I, (ii) Civil Judicial Test. (iii) Govt. Technical Examination in Typewriting by the Lower Grade.
Upper Division Clerks in the Presidency Court of Small causes City Civil Court,	do.	(i) Civil Judicial Test, (ii) Account Test for Subordinate Officers Part I.
Office of the Administrator-General and Official Trustee including Cash-keeper, Record-keeper, Schedule Clerk and Accountants in the Office of the Administrator-General and Official Trustee.		
Upper Division Clerks in the Presidency Magistrates' Courts including Bench Clerks in the Stipendiary Magistrates Courts.	do	(i) Criminal Judicial Test except the Medical, Jurisprudence part of the test. (ii) Account Test for Subordinate Officers, Part I.
Upper Division Clerks in the Office of the Editor, Indian Law Reports Madras.	do	(i) Proof Examiner's Test. (ii) Government Technical Examination in Typewriting by the Lower Grade

The petitioner's representation to the Government was rejected as not maintainable. The writ petition seeks to quash Exts. P-2 and P-7.

3. The petitioner's trouble started with Ext. P-3 G. O. dated 14-1-1963 (G. O. (P) No. 22 — Public (Services-D) Department) which prescribed tests in office procedure and Account Test Lower for the Ministerial Staff of the different offices of the State Government. Paras. 2 (d) and (3) of the G. O. ran thus:

"2 (d) Lower Division Clerks in the remaining offices except the High Court but including the Civil and Criminal Courts subordinate to the High Court and subordinate offices of the public relations Department should pass a test on the new Manual of Office procedure for use in Offices other than Secretariat during the period of probation; and

(3) The penalty for not passing the tests in office procedure during the period of probation will be as indicated in Rules 19 (b) and 21 of Part II of the Kerala State and Subordinate Services Rules, 1958. In cases where probation has not already been prescribed, the persons concerned should be required to pass the tests within a period of two years from the date of orders or from the date of appointment, whichever is later. Persons who on the date of issue of orders have either passed the Travancore-Cochin Secretariat Office Manual Test or have already secured promotion to the Upper Division or Grade I will not be required to pass the new test in Office Procedure." The syllabus of the notified test was prescribed by Ex. P-4 G. O. (P) No. 455/23rd October 1963. After noticing the test then being conducted for the Travancore-Cochin personnel and for the allotted Officers from Madras, it was ordered that the test then conducted by the Public Service Commission for the Officers of the former Travancore-Cochin State and those allotted from Madras 'will be abolished' (Emphasis supplied). Clause 4 of Ext. P-4 G. O. stated that candidates who have passed in one or more papers of Travancore-Cochin or Madras Tests will be deemed to have passed in the corresponding paper or papers of the new tests. The G.O. wound up with para. 7 as follows:

"7. The above orders will come into force with effect from 1-1-1964."

By Ext. P-5 G. O. (P) No. 628 Public (Services-D) Department dated 6-10-1965, the Government noticed that the introduction of the new test will alter the conditions of service, of all allotted Officers to their disadvantage and attracted the proviso to S. 115 (7) of the States Reorganisation Act, and the principles adopted by the Govt. of India for imposition of new tests on the allotted personnel in accordance with the rules of the State to which they were allotted. After consideration of these, para. 3 of the G. O. stated:

(i) For the persons allotted from Madras as well as from Travancore-Cochin the tests prescribed in G. O. (P) 22, Public (Services) dated 14-1-63 will be made compulsory only from the 14th Jan., 1967. In the meanwhile none of those persons will be debarred from confirmation, promotion, increments etc.,

as the case may be, for want of these test qualifications. However promotions and confirmations given during the period of exemption will be purely provisional subject to their acquisition of the test qualifications before the expiry of the period of exemption. In case a person thus promoted does not acquire the requisite qualification within the period of exemption then the promotion given to him will be cancelled and he will be reverted to his earlier position. Similarly an officer who obtained confirmation on the basis of the exemption referred to above, the confirmation will be cancelled unless he acquires the qualification within the period of exemption. The increments granted on the basis of this order will be stopped after the period of exemption unless the officer acquired the test qualification.

(ii) All Officers to whom G. O. (P) 22 Public (Services) dated 14-1-1963 would otherwise be applicable will be exempted from passing these tests, if on the date of the above G. O. they had completed 45 years of age."

The cumulative effect of Exts. P-3, P-4 and P-5 G. Os. was set out in Ext. P-1 letter dated 8-9-1972 from the Secretary to the Government to the Registrar of the High Court, with copy to the writ petitioner. That letter stated that the additional time granted to the allotted personnel for passing the new test is necessary for getting their promotion to the Upper Division post and that in view of the judgment in O. P. No. 1846 of 1969 (Ker) and W. A. No. 949 of 1969 (Ker), the G. Os. Exts. P-5, P-3 required no modification and that the additional time under Ext. P-5 is applicable to the allotted Officers of the Malabar Courts also. The G. O. and the communications indicate sufficiently clearly that the allotted personnel are not to be visited with any disqualification before 14-1-1967, the outer-most limit of time available to the personnel for qualifying themselves in the revised test.

4. Counsel for the petitioner submitted with force that Exts. P-3, P-4 and P-5 will not have any effect on the petitioner; nor would they, in any way, improve the prospects of respondents 4 to 7. The ban of Exts. P-3 to P-5 would become operative only on 1-1-1964 as indicated in the last paragraph of Ext. P-4. He referred to Ext. P-9 Memorandum of the Government dated 13th Dec., 1963 granting an overall exemption, to the allotted personnel who had passed the Madras District Offices Manual Test before the date of Ext. P-3 G. O. and to Ex. P-11 order, which, after noticing the provision in the Madras Judicial Ministerial Service Rules that a Lower Division Clerk should be on probation for a period of two years on duty within a continuous period of three years, and that all Lower Division Clerks from Madras had completed more than three years on the date of Ext. P-3 G. O. had stated that they might have satisfactorily completed their period of probation, and that they need not pass the test in Office Procedure. As the Travancore-Cochin personnel had to pass the said test an overall exemption was granted to them.

5. It was strongly contended by the counsel for the petitioner that neither Ex. P-3 nor Ex. P-4 can validly displace the Madras Judicial Ministerial Services Rules, and that such was not their effect. Exts. P-3 and P-5 were executive orders of the Government and the statutory Madras rule was continued in force by Art. 372 (1) of the Constitution, and protected by the proviso to S. 115, Cl. (7) of the States Reorganisation Act. It was pointed out that the Government themselves had realised this position as was revealed by Ext. P-5 G. O., Ext. P-10 Official Memorandum, and Ex. P-12 letter from the Home Secretary to the Registrar of the High Court. Ex. P-10 dated 11-7-1968 enclosed a letter dated 10-5-1967 from the Secretary to the Government to the Registrar of the High Court. It categorically stated that Ex. P-3 G. O. was not issued under Art. 309 of the Constitution and hence cannot adversely affect a person who on the date of the decision was governed by statutory rule like the Madras Judicial Ministerial Service Rules. It stated:

"Thus the position is that till the issue of the unified Kerala Special Rules (Statutory), the Madras Special Rules will apply only to those allotted to Kerala from the Madras Government Service consequent on the Reorganisation of States on 1-11-1956 P. 11 while persons appointed to Kerala Service on or after 1-11-1956 (irrespective of whether the appointment happens to be made in the Malabar area or the Travancore-Cochin area of the State) are being governed by the Travancore-Cochin Rules. The application of these rules is with reference to the personnel governed by the Madras or Travancore-Cochin Rules and not in relation to the area in which

the employees happen to work or got appointed."

Ext. P-12 was in answer to a letter from the Registrar. Dealing with the specific question whether Ext. P-3 G. O. was in supersession of the Madras Judicial Ministerial Service Rules, it was stated that all those allotted from Madras will be governed by the Madras Rules and that Ext. P-3 G. O. cannot be deemed to be in supersession of the Madras Rules. Ext. P-12 also stated that the concurrence of the Government of India has been sought for extension of the orders in the G. O. to the allotted personnel. The petitioner's counsel only cited Exts. P-10 and P-12 to show that even the Government itself had expounded Ext. P-3 G. O. as not meant to override the statutory Madras rule. Its legal effect should, of course, be determined quite apart from the Government's exposition of it.

6. The learned Advocate General contended that Ext. P-3 is made under the proviso to Art. 309 and that the judgment of Mathew J. in O. P. 1846 of 1968 (Ker) and of the Division Bench in W. A. No. 949 of 1969 (Ker) had proceeded on the same basis. The judgment of Mathew J. (a copy of which has been produced as Ext. R-1 with the counter-affidavit of respondents 4 to 7) dealt with the matter thus:

"3. Counsel for the petitioners argued that the provisions in the rules cannot be altered by a G. O. like Ext. P-1 and that even otherwise it is clear from Ext. P-3 communication that Government did not intend to alter or modify the operation of the rules by Ex. P-1. Ex. P-3 no doubt, says that Ex. P-1 was not intended to supersede the Rules. But it does not follow that it was not open to the Government to prescribe unified tests in substitution of the test prescribed by the rules. In their letter No. 29428/C4/66 Home dated 8-8-1966 the Government have stated that the Account Test (Lower) introduced by Ext. P-1 is a new test of a higher standard."

On appeal, the Division Bench in W. A. No. 949 of 1969 (Ker) dealt with the matter thus:

"The main argument of the counsel of the appellants is that Ex. P-1 is an executive order and it cannot replace R. 22 of the Madras Judicial Ministerial Service Rules passed under Art. 309 of the Constitution. As rightly pointed out by the single Judge, Ex. P-1 prescribed unified tests in substitution of the tests prescribed by R. 22 of the Madras Rules and it is not just an executive order as claimed by the counsel. Therefore, this contention was rightly rejected by the single Judge."

With respect, neither Mathew J. nor the Division Bench in appeal had considered or dealt with the argument whether, and if so, how, the Madras Judicial Ministerial Service Rules could be overridden by orders of the type of Ex. P-3. Apart from the Government's exposition contained in Ex. P-5 and Ext. P-12 that Ext. P-3 cannot have this effect, we have the fact noticed in Ext. P-3 that the Central Government's approval had actually been sought for the variation effected by Ext. P-3 in regard to the conditions of service of the Madras personnel. There is no explanation as to the Government of India's reply. The counter-affidavit of the State would state in para. 4 that a general approval would suffice as expounded by the Supreme Court decisions, and that moreover, the Central Government had given its prior approval as can be seen from the letter of the Ministry of Home Affairs dated 3-12-1963. The letter is not produced. (The reference to the Home Secretary's letter dated 3-12-63 is possibly a mistake for Ext. P-12 dated 31-12-1963 which states the position exactly contrary to what is averred in the counter-affidavit). On the other hand, we find a volte face in the present proceedings that Ext. P-3 is a statutory rule. The point was pressed by the Advocate General and the jurisprudential concept of a 'law' as distinct from an executive order, were explained with reference to the recent decision of a Full Bench of the Bombay High Court in Chandrakant v. State of Maharashtra, AIR 1977 Bom 193, paras. 14, 15, 200, 206, 207 and 214: (1977 Lab IC 654). It was stressed that the question whether Ext. P-3 was a law or an executive order had to be decided with reference to the subject-matter and generality of its application. For the said proposition reliance was placed also on the decision in State of Gujarat v. Vora Fiddali (AIR 1964 SC 1043, para. 56), where, the order of delegation, the effect of which was disputed, was construed to be a law on account of its general application. The observations of Subba Rao J. in paragraph 96 and of Shah J. in para. 106 and of Hidayatullah J. that it was not a rule of human conduct should also be taken note of in this context.

7. Counsel for the petitioner strongly demurred to the proposition that Exts. P-3 and P-5 could be regarded as law or as rules promulgated under Art. 309 of the Constitution. Ex facie they do not purport to be so; the Government themselves did not understand them to be so (vide Exts. P-10 and P-12). The Madras Judicial Ministerial Service Rules are undoubtedly framed under Art. 309 of the Constitution. It was ruled in Nagarajan v. State of Mysore (AIR 1966 SC 1942, para. 3: (1966 (3) SCR 682) that "if there is an Act or a statutory rule on any matter, the executive must abide by that Act or Rule, and it cannot, in exercise of the executive power under Art. 162 of the Constitution, ignore or act contrary to that rule or Act. R. N. Nanjundappa v. Thimmaiah, AIR 1972 SC 1767: (1972 Lab IC 618) had to deal with the argument that the regularisation of appointment was itself a rule under Art. 309 of the Constitution read with the power under Art. 162. The argument was rejected as unsound and unacceptable. It was observed (at pp. 623-624 of Lab IC):

"The Executive has the power to appoint. That power may have its source in Art. 162. In the present case the rule which regularised the appointment of the respondent with effect from 15th February, 1958 notwithstanding any rules cannot be said to be in exercise of power under Art. 162. First, Art. 162 does not speak of rules whereas Art. 309 speaks of rules. Therefore, the present case touches the power of the State to make rules under Art. 309 of the nature impeached here. Secondly, when the Government acted under Art. 309 the Government cannot be said to have acted also under Art. 162 in the same breath. The two Articles operate in different areas. Regularisation cannot be said to be a form of appointment. Counsel on behalf of the respondent contended that regularisation would mean conferring the quality of permanence on the appointment whereas counsel on behalf of the State contended that regularisation did not mean permanence but that it was a case of regularisation of the rules under Art. 309. Both the contentions are fallacious. If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution illegality cannot be regularised. Ratification or regularisation is possible of an act which is within the power and province of the authority but there has been some non-compliance with procedure or manner which does not go to the root of the appointment. Regularisation cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules."

Our attention was also called to the distinction between law and executive order expounded recently by the Supreme Court in Shukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi (AIR 1975 SC 1331, paras 18, 21, 22 and 24) : (1975 Lab IC 881). Attention was also called to the decision in State of Madhya Pradesh v. Lal Rampal Singh (AIR 1966 SC 820), to State of Madhya Pradesh v. Lal Bhargavendra Singh (AIR 1966 SC 704), Venkateswararac Naidu v. Union of India AIR 1973 SC 698 : (1973 Lab IC 427), and State of Assam v. Basanta Kumar Das, AIR 1973 SC 1252 : (1973 Lab IC 920). These decisions have expounded the concept of law and the limitations on the said concept.

8. Counsel for the petitioner particularly invited our attention to Samsher Singh v. State of Punjab, AIR 1974 SC 2192, paras. 41, 43 and 141 : (1974 Lab IC 1380) to show that the principle in Jayanthilal's case (AIR 1964 SC 648) was actually confined to Art. 258 of the Constitution. We were also taken through the discussion in Seerval's Constitution of India, Vol. II, page 1053 and following, regarding this aspect of the question.

9. We are satisfied that Exts. P-3 and P-5, cannot be regarded as having been promulgated under Art. 309 of the Constitution. Neither in form, nor in substance do they purport to be so. There is no reference to Art. 309 at all in Exts. P-3 and P-5. It is not possible to trace them to that source of power. They say nothing about the Madras Judicial Ministerial Service Rules — whether these are repealed or not. And they, by themselves are incapable of repealing the Madras Rules in the face of the proviso of S. 115 (7) of the States Reorganisation Act. Taken at their proper worth, we have too, the exposition by Government Pundits in Exts. P-10 and P-12 that Exts. P-3 and P-5 G. Os. are not under the proviso to Art. 309 and cannot get rid of the Madras Rules (See also Ex. 15). We think that represents the correct position.

10. After arguments concluded and judgment was reserved on the 14th June 1977, a reposting of the case was sought with a petition — C. M. P. 11046 of 1977 — filed by Counsel for respondents 4 and 5 to receive Exts. R-5 and R-6 as additional evidence. Ext. R-5 is G. O. (P) 190/77 D/- 16-6-1977 which inserted a proviso in R. 13 of the Kerala State and Subordinate Services Rules, with effect from 14th Jan. 1963. The said notification is as follows:

"S. R. O. No. 563/77. — In exercise of the powers conferred by sub-sec. (1) of S. 2 of the Kerala Public Services Act, 1968 (19 of 1968), the Government of Kerala hereby make the following amendment to the Kerala State and Subordinate Services Rules, 1958, namely:—

AMENDMENT

In Part II of the said rules, in R. 13, the following proviso shall be inserted, namely:—

"Provided that in the case of the ministerial staff of the different departments/offices in the Kerala Ministerial Subordinate Service the unified tests prescribed in G. O. (P) No. 22/63/PD dated the 14th Jan. 1963 as subsequently amended or clarified shall be applicable, until the Special Rules for the Kerala Ministerial Subordinate Service came into force.

This amendment shall be deemed to have come into force with effect from 14th Jan. 1963."

Ext. R-6 is the explanatory note which meant to explain the circumstances leading to Ext. R-5.

11. It is obvious that Ext. R-5 cannot at all affect the question. Rule 8 of the Kerala Civil Services (Classification, Control and Appeal) Rules enacts that the subordinate services shall consist of those specified in Sch. II. Turning to Sch. II, Items 18 and 22 read as follows:

"18. The Kerala Judicial Ministerial Service.

22. The Kerala Ministerial Subordinate Service."

It was attempted by the learned Advocate General and by the counsel for respondents 4 and 5 to connect Ext. R-5 with both the items of subordinate services 18 and 22 in Schedule II. It is obvious that the attempt is futile. The Gazette notification Ext. R-5 speaks only of service in the singular and not of service in the plural as the typed copies handed over to us did. The expression "Kerala Ministerial Subordinate Service" occurring in Ext. R-5 tallies exactly with Item 22 and not with Item 18. We are therefore of the opinion that Ext. R-5 does not cover Item 18 of Schedule II of the Kerala Civil Services (Classification, Control and Appeal) Rules and is therefore unhelpful to the respondents.

12. The learned Advocate General attempted an argument that the passing of the test under the Madras Judicial Ministerial Service Rules for Upper Division Clerks was made compulsory only by a G. O. in 1958. For this he placed reliance on G. O. (P) 411 dated 7th November, 1958 a copy of which has been produced with the additional counter-affidavit of respondents 4 to 7 dated 5th April 1977 (Ext. R-5) (There has been a duplication of Exhibits — one of the exhibits produced on 28th July 1977 also has been referred to as Ext. R-5). Ext. R-5 dated 7th Nov., 1958 only recalls certain recommendations of the Pay Revision Commission in regard to fixing the proportion between the Upper Division and Lower Division Clerks and accepted the same, and said that this will take effect from 1-11-1958. On the basis of this order it was argued by the learned Advocate General that the expression Upper Division Clerk is not mentioned at all in Category 4 of Class IV of R. 5 of the Madras Judicial Ministerial Service Rules which provides for the constitution of the service. Category 3 of Class IV of R. 5 is: "Central Nazirs"; and promotion to that post is by direct recruitment if no qualified and suitable member is available for promotion, or recruitment by transfer from any other service. Rule 6 provides for appointment to the several classes of posts and categories. There is no reference eo nomine to 'Upper Division'. The learned Advocate General, by way of contrast, pointed to Categories 12 and 13 of Class I of R. 5, and to Class I, Category 12 of R. 5, both of which make express reference to Upper Division Clerks. The argument appears to us to be laboured and involved, and we are not prepared to accept it. We rather feel, with the Counsel for the petitioner, that in the scheme of classification of the several categories in Class IV, Category No. 4, the Upper Division is a generic name — although not so expressly mentioned — to cover the posts of Head Clerks of Judicial District Magistrate Courts, Head Clerks of Subordinate

Judges' Courts, Head Clerks of Sub Divisional Magistrates' Courts, etc., all of which are clubbed together in Category 4. Having regard to the provision in R. 5 that the service shall consist of all the classes and categories enumerated, there is no scope for inventing a new and unnamed category of Upper Division Clerks, not expressly enumerated by the Rules. Whether the Upper Division category is expressly mentioned or not, there is little doubt that on the scheme of the Rules, promotion to Category 3 of Class IV is from category No. 4 of the same class. That cannot be denied by introducing an Upper Division as a sort of buffer, which would involve a violation of the scheme and frame work of the Rules, and in particular of R. 5. There is also the danger that even if such a category were to be invented the persons in that category will only stagnate, as appointment to fourth (third ?) category is by promotion from Category No. 3 (No 4 ?). The reply affidavit dated 6-4-1977 filed on behalf of the petitioners, has, we think, rightly pointed out that the direction in the G. O. (R-5) dated 7-11-1958 recognising a certain proportion between the Upper Division and Lower Division Clerks from 1-11-1958 was only a recognition of the recommendations of the Pay Commission and the application of a well-understood designation to all the posts enumerated in Category 4 of Class IV of R. 5. We are therefore unable to accept the argument of the learned Advocate General that Exts. P-3 and P-5 are statutory in character and override the Madras Judicial Ministerial Service Rules. We are also unable to accept his contention that whether these were statutory or not, the Upper Division Clerks were a category unknown to Class IV, Category 4 of R. 5, and came to be recognised as such only on and from 1-11-1958 by Ext. R-5 G. O. We cannot also accept the further argument that the tests came into force from 14-1-1963 and not from 1-1-1964 as expressly stated in Ext. P-4. The syllabus was prescribed only by Ext. P-4 dated 23-10-1963. Anyway, the petitioner passed the tests on 6-3-1962.

13. That takes us to some of the other contentions advanced by the learned Counsel for the petitioner which also appear to us to be well founded. Counsel invited our attention to R. 22 of the Madras Rules that no person shall be eligible for appointment to the Class and Category and by the method specified in Columns 1 and 2 of the table below, unless he has passed the test or examination specified in the corresponding entry in Column 3. In Class IV, Category 4 under Column (1) the comprehensive entry is: "All posts" and the test prescribed is only the translation test. By virtue of R. 13-A, sub-cl. (3) of the Kerala State and Subordinate Services Rules, substituted in 1974 with effect from 13-5-1966, if any new test or tests of a higher standard for promotion are sought to be introduced, the same shall be subject to the three conditions mentioned therein, viz. (1) that additional time, double that of the ordinarily permissible time, for passing the test shall be allowed to an allotted employee; (2) penalties for not passing the tests such as denial of benefits like increments, promotion etc. shall be held in abeyance till the expiry of the time given for passing the prescribed test; and (3) allotted employees of, and above, the age of 45 years, shall not be required to pass the test. The second of these conditions had been stated even earlier in Ext. P-1.

14. Counsel for the petitioner also relied on R. 35 (f) of the Kerala State and Subordinate Services Rules which is as follows:

"35 (f)— Notwithstanding anything contained in these rules or in the Special Rules, in the case of persons allotted to the State of Kerala from Service under the Government of Madras consequent on the Reorganisation of States, pass in Account Test for Executive Officers (Madras) and pass in Account Test for Subordinate Officers Part I (Madras) shall respectively be accepted as sufficient qualification in lieu of pass in Account Test for Executive Officers of the Kerala State and pass in Account Test (Lower)."

15. The above two contentions of the petitioner's Counsel based on R. 13-A, Cl. (3) and on R. 35 (f) also appear to us to be sound and acceptable. But as we have accepted the main contention urged on his behalf we do not think it necessary to base our conclusion on these two contentions.

16. It only remains for us to add that in view of our discussion on the main point argued, we cannot agree with the principle of the decisions in O. P. 1846 of 1968 and in W. A. No. 949 of 1969 in so far as they regard Exts. P-3 and P-5 G. Os. as overriding the Madras Judicial

Ministerial Rules. To that extent, we would hold these decisions to be wrong and overrule the same. An appeal was made by the Advocate-General to save these decisions on the principle of stare decisis. He cited the decisions of the Supreme Court in AIR 1976 SC 410, AIR 1976 SC 1441 and AIR 1976 SC 1455 : (1976 Lab IC 1012), and the English decision in Geolong Harbor Trust Commrs. v. Gibbe Bright & Co. (A FIRM) (1974 AC 810). We do not propose to examine these cases elaborately. We are unable to sustain the plea of stare decisis. There was no consideration in O. P. 1846 of 1968 or in W. A. 949 of 1969 as to how the Madras Rules could be jettisoned by Exts. P-3 and P-5 orders; nor as to whether the proviso to S. 115 (7) of the States Reorganisation Act was violated; nor of the warnings contained in Exhibits P-5, P-10 and P-12. And the allotted personnel have not allowed the grass to grow under their feet since the decisions were rendered. There can be no question of stare decisis in the circumstances.

17. We allow this writ petition and quash Exts. P-2 and P-7 orders. There will be no order as to costs.

Petition allowed.

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K. K. NARENDRAN, J.

Kunhanunni Nair and others, Petitioners v. Kunhanunni Mooppil Nair and others, Respondents.

C. R. P. No. 2441 of 1976, D/- 8-11-1977.

(A) Kerala Court-Fees and Suits Valuation Act 1959 (10 of 1960), S. 25 (d) — Suit for declaration against a hereditary trustee of a temple that he has no right to continue in management, for permanent injunction to restrain him from continuing in management and for appointment of plaintiff in his place — Relief claimed is incapable of valuation — Court-fee payable is one under S. 25 (d) (ii) — S. 25 (d) (i) not applicable.

A hereditary trustee who has only a bare right of management of the properties of the endowment ceases to be in possession of the properties the moment another succeeds to the office by removing him from office and the possession of the properties automatically passes on to the successor. So, in a suit for a declaration that a hereditary trustee who has only a bare right of management has ceased to have any right to continue in office and for the appointment of another as trustee in his place the market value of the properties of the endowment cannot at all be a relevant factor for the valuation of the suit for the purposes of court-fee. The right involved in the suit is only a bare right of management and not any right in the properties of the trust. So, the relief is not one which is to be valued under Section 25 (d) (i) of the Act as the same is not capable of valuation. On the other hand the relief is one which is to be valued under S. 25 (d) (ii) and the plaintiff is free to put his own valuation. The Court cannot interfere with that valuation. (Para 4)

(B) Constitution of India, Art. 19 (1) (f) — "Property" — Bare right of a hereditary trustee to administer secular estate of institution or endowment — Cannot be treated as property. AIR 1971 SC 891, Foll.; AIR 1961 Ker 87 (FB), Explained. (Para 5)

Anno: AIR Man. (3rd Edn.) Ibid Art. 19, N. 62.

Cases Referred: Chronological	Paras
AIR 1977 Andh Pra 200	3
AIR 1971 SC 891	3, 4
AIR 1971 SC 2363 : (1969) 2 SCWR 630	3
AIR 1964 SC 1486 : (1964) 7 SCR 32	3
AIR 1963 SC 1638 : (1964) 1 SCR 561	3
AIR 1961 Ker 87 (FB)	3
AIR 1954 SC 282	3
AIR 1954 Mad 385	3
AIR 1943 PC 89	3
AIR 1941 Mad 822 (FB)	3
(1899) ILR 23 Mad 271 (PC)	3
(1872) 9 Beng LR 377 (PC)	3

T. R. Govinda Warrior and K. Rama Kumar, for Petitioners; V. R. Venkitakrishnan (for No. 1), P. N. K. Achan, K. Vijayan and N. N. Sugunapalan (for Nos. 4 & 9) and Govt. Pleader (for No. 10), for Respondents.

ORDER:— A question of court-fee arises for consideration in this Civil Revision Petition. The question is how a relief for a declaration that the 1st defendant, the hereditary trustee of a temple of a Swaroopam has no right to continue in management, for a permanent injunction to restrain him from continuing in the management and for the appointment of the 2nd defendant or the 1st plaintiff as trustee in his place is to be valued for the purposes of court-fee.

Is the relief capable of valuation and is the court-fee to be computed on the market value of the properties held under trust or is the relief incapable of valuation and is the court-fee to be levied under S. 25 (d) (ii) of the Kerala Court-Fees and Suits Valuation Act, 1959 for short the Act. The decision of the question depends upon the fact whether the hereditary trustee has only a bare right to manage or has a personal interest of a beneficial character in the properties of the trust. If a bare right to manage cannot be treated as property under Art. 19 (1) of the Constitution and the custody of the properties will not amount to a beneficial interest in the properties, is the relief prayed for capable of valuation?

2. The plaintiffs in O. S. No. 21 of 1974 on the file of the Subordinate Judge, Ottapalam are the petitioners in this Civil Revision Petition. The averments in the plaint are as follows: The plaintiffs and the defendants are members of a Swaroopam by name Kunnathattu Matampil. Their tarwad was known as Mannarkat Nayar Veedu. They have a temple known as Ubhayarkunnu Bhagavathi temple. Some properties of the tarwad were set apart as a trust for the temple. The seniormost male member, the sthani, used to be in management of the temple and its properties as a trustee. In O. S. No. 65 of 1956, a suit for partition of the sthanam properties, a preliminary decree was passed by the Subordinate Judge, Ottappalam holding that the properties set apart for the maintenance of the temple are not properties of the sthanam liable to be partitioned. Accordingly the movables of the temple were also handed over to the 1st defendant who was managing the temple as trustee. The movable and immovable properties of the temple are included in A and B schedules to the plaint. The 1st defendant is acting against the interest of the Swaroopam. He has entrusted the management to defendants 4 and 7 to 9. This he has no power to do. Defendants 1, 4 and 7 to 9 have sold away valuable gold and silver ornaments of the temple. They have also made collections on behalf of the temple and appropriated the same. On these and other averments contained in the plaint the plaintiffs have prayed for a declaration that the 1st defendant has no right to continue in management of the temple and its properties as trustee and for a permanent injunction restraining him from continuing the management and for appointing the 2nd defendant or the 1st plaintiff as the trustee of the temple and its properties. Other consequential reliefs are also prayed for in the plaint; but they are not relevant for the purposes of this case. In the plaint A relief for the declaration, permanent injunction etc. was valued under S. 28 of the Act and court-fee was paid accordingly. But the defendants raised a contention that the court-fee paid by the plaintiffs was not correct. An issue 'whether S. 28 of the Act is applicable and whether the court-fee paid is correct' was raised and it was heard as a preliminary point. The trial court held that S. 28 of the Act was not applicable and hence the court-fee paid was not correct and the plaintiffs were directed to revise the valuation and to pay the court-fee accordingly. Thereupon, I. A. No. 351 of 1975 was filed for the amendment of the plaint. As per the amendment, the valuation of A relief was sought to be changed as Rs. 4,100. The trial court by its order dated 18-7-1975 dismissed that application. The plaintiff challenged the above order of dismissal in C. R. P. No. 1301 of 1975 before this Court. This Court set aside the order of dismissal and directed the trial court to allow the plaintiffs to carry out the amendment and accordingly the plaint was amended and the plaintiffs paid an amount of Rs. 390 as court-fee on A relief under S. 25 of the Act. Again, issue No. 17 regarding the sufficiency of the court-fee paid was heard as a preliminary point. The trial court rejected the contentions of the plaintiffs that A relief is incapable of valuation and held that the court-fee paid was not correct. The above finding of the trial court on issue 17 is challenged in this Civil Revision Petition.

3. Learned counsel on both sides addressed elaborate arguments and, in support of their contentions, have referred to a number of decisions. In K. A. Samajam v. Commissioner, H. R. & C. E. (AIR 1971 SC 891) the Supreme Court has said in para. 10:

"It was common ground before the High Court and has not been disputed before us that the hereditary trustees of the institutions with which we are concerned have only claimed a bare right to manage and administer the secular estate of the institution or the endowment and in no case any hereditary trustee has claimed proprietary or beneficial

interest either in the corpus or in the usufruct of the estate. The position of a hereditary trustee does not appear to be in any way different from that of a Dharamkartha or a mere manager or custodian of an institution or endowment. There is one exception only. The hereditary trustee succeeds to the office as of right and in accordance with the rules governing succession. But in all other respects his duties and obligations are the same as that of Dharamkartha. No one has ever suggested that a hereditary trustee can be equated to a Shebait of a religious institution or Mathadhipati or the Mahant. The ingredients of both office and property, of duties and personal interest are blended together in the rights of a Mahant as also a Shebait and a Mathadhipati. The position of Dharamkartha, on the other hand, is not that of a Shebait of a religious institution or of the head of a math. These functionaries have a much higher right with large power of disposal and administration and they have a personal interest of beneficial character: (See Srinivasa Chariar v. Evalappa Mudaliar). There would thus be no justification for holding that since the office of the aforesaid functionaries has been consistently held by this Court to be property the office of a hereditary trustee is also property within Art. 19 (1) (f)."

In the above case, the Supreme Court has referred to a number of decisions including Govindalji v. State of Rajasthan (AIR 1963 SC 1638). In the above case, in para. 43 the Supreme Court has observed:

"There can be no doubt that the right to have the custody of the property such as the Custodian has, or the right to manage the property such as the Manager possesses, or the right to administer the trust property for the benefit of the beneficiary which the Trustee can do, cannot be regarded as a right to property under Art. 19 (1) (f) and for the same reason, it does not constitute property under Art. 31 (2). If it is held that the Tilkayat was no more than a Custodian, Manager and Trustee properly so-called, there can be no doubt that he is not entitled to rely either on Art. 19 (1) (f) or on Art. 31 (2)."

In Kandaswami v. Vagheesam (AIR 1941 Mad 822) Lionel Leach C. J., speaking for the Full Bench, has observed:

"The office of a mahant cannot be separated from the properties which form the endowments of the office."

In the above case, the Full Bench further held that the plaintiff who is asking for a declaration of his title to the office of a mahant and who is not in possession of its properties must by reason of S. 42 of the Specific Relief Act, 1877 ask for possession and his failure to do so vitiates his suit. In Gnanasambanda Pandara Sannadhi v. Velu Pandaram, (1899) ILR 23 Mad 271 (PC) the Privy Council had to deal with an alienation effected by a hereditary Manager of his right of management and right in part of the lands which formed the endowment. The question that arose for consideration in that case was one of limitation and the Privy Council held that there was no distinction between the claim to the office and the claim for the property in regard to the application of Art. 124 of Schedule II of the Limitation Act, 1877. As a matter of fact, the question of court-fee as such did not arise in that case. In Sambudamurthi Mudaliar v. State of Madras, (1969) 2 SCWR 630: (AIR 1971 SC 2363) the Supreme Court has said that the office of a hereditary trustee is in the nature of 'property' and this is so whether the trustee has a beneficial interest of some sort or not. But, in K. A. Samajam v. Commr., H. R. & C. E. (AIR 1971 SC 891) the Supreme Court had occasion to consider the above decision. Referring to the observation in Sambudamurthi Mudaliar v. State of Madras, (1969) 2 SCWR 630: (AIR 1971 SC 2363) that the office of a hereditary trustee is in the nature of property, the Supreme Court has said (at p. 897):

"This observation, we apprehend, was not necessary for a decision of that case. There the question was whether the appellant was a hereditary trustee within the meaning of S. 6 (9) of the Madras Act 1961 and there was no discussion or determination of the point that the office of the hereditary trustee was property within Art. 19 (1) (f) or any other Article. Nor do we consider that the various pronouncements of the Privy Council that the rule in the Tagore case, (1872) 9 Beng LR 377 (PC) applies to succession of hereditary trustees can afford much assistance in deciding whether an office holder who has a bare right of management can claim to have any right or interest in the nature of property within the meaning of Art. 19 (1) (f). Following the principles laid down in the Tilkayat, (1964) 1 SCR 561: (AIR 1963 SC 1638) and Raja Birakishore (1964) 7 SCR 32:

(AIR 1964 SC 1486) cases we are unable to endorse the view that the office of hereditary trusteeship is property within Art. 19 (1) (f) or any other Article of the Constitution."

In Narayanan Nambudiripad v. State of Madras (AIR 1954 Mad 385) it is said in para. 19:

"On the same principle, the fact that the trustees have no right to participate in the income from the endowment or its emoluments, is not a ground for holding that it is not property for the purpose of Art. 19 (1) (f). The word 'hold' is wider in its significance than the word 'enjoy' and trustees who are in management of religious endowments can be said to hold office, though they may have no beneficial interest to enjoy. We are accordingly of opinion that hereditary trusteeship is within the protection afforded by Art. 19 (1) (f), even though there was no emoluments attached to the office. We may add that the allegations in the affidavits in support of these petitions disclose that the petitioners have also beneficial interests in the endowments. In the result, we must hold that the provisions in the schemes in so far as they encroach upon the rights of the petitioners as hereditary trustees are void under Art. 19 (1) (f) of the Constitution."

In A. P. S. Electricity Board v. K. R. Reddy (AIR 1977 Andh Pra 200) it is said in para. 6:

"The court is no doubt entitled to value the relief if it is not satisfied with the valuation put by the plaintiff. But essentially the question of court-fee has to be considered only on the allegations made in the plaint."

In Commissioner, H. R. E. v. L. T. Swamiar (AIR 1954 SC 282) the Supreme Court has said in para 11:

"Thus in the conception of Mahantship, as in Shebaitship, both the elements of office and property, of duties and personal interest are blended together and neither can be detached from the other. The personal or beneficial interest of the Mahant in the endowments attached to an institution is manifested in his large powers of disposal and administration and his right to create derivative tenures in respect to endowed properties; and these and other rights of a similar character invest the office of the Mahant with the character of proprietary right which, though anomalous to some extent, is still a genuine legal right".

In the above decision the Supreme Court has further said in para. 12:

"The word 'property' as used in Article 19 (1) (f) of the Constitution, should be given a liberal and wide connotation and so interpreted, should be extended to those well recognised types of interest which have the insignia or characteristics of proprietary right. Thus, Article 19 (1) (f) applies equally to concrete as well as abstract rights of property. The ingredients of both office and property, of duties and personal interest are blended together in the rights of a Mahant. The Mahant has the right to enjoy this property or beneficial interest so long as he is entitled to hold his office. To take away this beneficial interest and leave him merely to the discharge of his duties will be to destroy his character as a Mahant altogether."

In Bhabatarini Devi v. Ashalata Debi (AIR 1943 PC 89) it is said:

"The sebaiti is property. It is not a catena of successive life estates but is heritable — heritable property which in the first instance is vested in the founder."

In Raja of Kozhikode v. Commr. H. R. & C. E. (AIR 1961 Ker 87) (FB) a Full Bench of this Court has said in para. 5:

"..... the rights of the trustees under instruments for religious purposes, cannot be treated differently. In other words, the trustee of a secular trust would be entitled to all the rights of the owner against the rest of the world, and the position of the trustee for the religious purpose, is not different.

It follows, the rights of both would be covered by the word 'property'. We further think that the word 'property' in the written Constitution of the people, accustomed to cherish things other than monetary benefits, cannot be so narrowly construed."

The Full Bench has relied on certain Supreme Court decisions for coming to the above conclusion. But in view of the later decision of the Supreme Court in K. A. Samajam's case (AIR 1971 SC 891) taking a different view, the decisions of the Supreme Court relied on by the Full Bench cannot hold the field. The earlier decisions have been referred to and discussed by the Supreme Court in K. A. Samajam's case. In view of the subtle distinction the Supreme Court has drawn between the nature of the rights of a hereditary trustee who has only a bare right to manage the property of the en-

dowment and that of a Shebait, Mathadhipati or a Mahant who has got a beneficial right of enjoyment of the property, the earlier decisions of the Supreme Court and the High Courts in cases involving the rights of a Shebait, Mathadhipati or a Mahant cannot in any way be relevant here.

4. Section 25 of the Kerala Court-Fees and Suits Valuation Act, 1959 reads:

"25. Suits for declaration.— In a suit for a declaratory decree or order, whether with or without consequential relief, not falling under S. 26—

(a) where the prayer is for a declaration and for possession of the property to which the declaration relates, fee shall be computed on the market value of the property or on rupees three hundred, whichever is higher;

(b) where the prayer is for a declaration and for consequential injunction and the relief sought is with reference to any immovable property, fee shall be computed on one-half of the market value of the property or on rupees three hundred, whichever is higher;

(c) where the prayer relates to the plaintiff's exclusive right to use, sell, print or exhibit any mark, name, book, picture, design or other thing and is based on an infringement of such exclusive right, fee shall be computed on the amount at which the relief sought is valued in the plaint or on rupees four hundred, whichever is higher;

(d) in other cases—

(i) where the subject-matter of the suit is capable of valuation, fee shall be computed on the market value of the property, and

(ii) where the subject-matter of the suit is not capable of valuation, fee shall be computed on the amount at which the relief sought is valued in the plaint or on rupees three hundred, whichever is higher."

The question is whether the relief has to be valued under S. 25 (d) (i) or (ii). This question further depends upon the fact whether the subject-matter of the suit in respect of which the relief is claimed is capable of valuation. The 1st defendant is the hereditary trustee and as hereditary trustee he is in possession of the movable and immovable properties of the temple. It is true that when he ceases to be in management he will also cease to be in possession of the properties. The person who succeeds him will have to be in possession of the properties also, because without the possession of the properties the new trustee cannot continue in management. Then the question is whether the possession of the properties follows automatically on the assumption of office as trustee. It is here where the nature of the rights of the trustee over the properties comes up for consideration. If the trustee has only a bare right to manage and has no beneficial interest in the property, he cannot cling on to the properties when he ceases to be the trustee. In that case, why should one sue for the dispossession of the properties as such. This is all the more so since the Supreme Court has held in K. A. Samajam's case (AIR 1971 SC 891) that a bare right of a hereditary trustee to administer the secular estate of the institution or endowment cannot be treated as property under Art. 19 (1) (f) of the Constitution. A hereditary trustee who has only a bare right of management of the properties of the endowment ceases to be in possession of the properties the moment another succeeds to the office by removing him from office and the possession of the properties automatically passes on to the successor. So, in a suit for a declaration that a hereditary trustee who has only a bare right of management has ceased to have any right to continue in office and for the appointment of another as trustee in his place the market value of the properties of the endowment cannot at all be a relevant factor for the valuation of the suit for the purposes of court-fee. The right involved in the suit is only a bare right of management and not any right in the properties of the trust. So, the relief is not one which is to be valued under S. 25 (d) (i) of the Act as the same is not capable of valuation. On the other hand the relief is one which is to be valued under S. 25 (d) (ii) and the plaintiff is free to put his own valuation. The Court cannot interfere with that valuation. Going by the allegations in the plaint the 1st defendant-trustee has only a bare right of management. It goes without saying that the question of court-fee has to be determined on the basis of the allegations in the plaint. The mere possession of the properties and the fact that the granting of the relief will result in dispossession cannot by themselves be a reason for valuing the relief on the market value of the properties. The court below has gone wrong

because it did not advert to the relevant aspects of the matter.

5. In the result, I hold that the court-fee paid by the plaintiff is the correct court-fee leviable. Issue No. 17 in the case is found accordingly. The order impugned is set aside and the Civil Revision Petition is allowed. No costs.

Revision allowed.

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FULL BENCH

V. BALAKRISHNA ERADI, G. VISWANATHA IYER, K. BHASKARAN, T. CHANDRASEKHARA MENON AND K. K. NARENDRAN, JJ.

Tharamel Krishnan, Petitioner v. Guruvayoor Devaswom Managing Committee and others, Respondents.

Original Petn. No. 314 of 1973, D/- 15-11-1977.

(A) Constitution of India, Arts. 25 and 26 — Object of — Validity of any statute — Question as to — Duty of Court.

The real purpose and intendment of Articles 25 and 26 is to guarantee especially to the religious minorities in this country the freedom to profess, practice and propagate their religion, to establish and maintain institutions for religious and charitable purposes, to manage its own affairs in matters of religion, to own and acquire properties and to administer such properties in accordance with law subject only to the limitations and restrictions indicated in those Articles. No doubt, the freedom guaranteed by these two Articles applies not merely to religious minorities but to all persons (Article 25) and all religious denominations or sections thereof (Article 26). But, in interpreting the scope and content of the guarantee contained in the two Articles the Court will always have to keep in mind the real purpose underlying the incorporation of these provisions in the fundamental rights Chapter. Case law discussed.

When a challenge is raised before a court against the validity of any statute as contravening the fundamental rights guaranteed under Arts. 25 and 26 it is from the above perspective that the court will approach the question and the tests to be applied for adjudging the validity of the statute will be the same irrespective of whether the person or denomination complaining about the infringement of the said fundamental right belongs to a religious minority or not. (Para 36)

Anno: AIR Comm., Constitution of India, 2nd Edn., Art. 25, N. 1; Article 26, N. 1.

(B) Constitution of India, Art. 245 — Validity of statute — Challenge on ground of violation of fundamental right — Test.

In adjudging the validity of a statute which is impugned on the ground that it abridges the fundamental rights of the petitioner the object or purpose of the law is irrelevant. It is the effect brought about by the totality of the provisions of the statute on the concerned fundamental right and its exercise that will have to be examined by the court. The true test is whether the impugned provisions have the effect of taking away or abridging the fundamental rights. AIR 1973 SC 106 (FB), Rel. on. (Para 37)

Anno: AIR Comm., Constitution of India, 2nd Edn., Art. 245, N. 16.

(C) Constitution of India, Art. 26 — Applicability.

If the denomination had lost its right to administer the religious institution and its properties prior to the Constitution by a valid law they cannot regain that right on the plea that that law contravenes the right guaranteed under Art. 26. If the right to administer the religious institution never vested in the denomination or had been validly surrendered by it or had otherwise been effectively lost to it prior to the Constitution, Art. 26 cannot be successfully invoked by the denomination in such a case. Art. 26 (c) and (d) do not operate to create rights in any denomination or its section which it never had; they merely safeguard and guarantee the continuance of rights which such denomi-

nation or section had. AIR 1961 SC 1402; AIR 1975 SC 706, Rel. on. (Para 38)

Held, it could not be said on the facts of this case that the denomination had either surrendered or lost its rights in relation to the administration of the Guruvayoor Temple and its properties by any process known to law prior to the commencement of the Constitution. (Para 39)

Anno: AIR Comm., Constitution of India, 2nd Edn., Art. 26, N. 1.

(D) Kerala Guruvayoor Devaswom Act (6 of 1971), (as amended by Act 28 of 1972), Ss. 3, 4, 11, 12, 14 to 18, 19 (6), 20, 21, 24 (1) and (2) and (3) (f), 29 and 32 — Constitutionality — (Constitution of India, Articles 25 and 26).

Sections 3, 4, 11, 12, 14 to 18, sub-section (6) of Section 19, Section 20, Sections 21, 24 (1), (2) and Cl. (f) of sub-section (3), Section 29 and Section 32 are unconstitutional and void. Since the operative provisions of the Act are mainly contained in the aforementioned provisions which have been held to be invalid and since it is not possible to effectuate the object, purpose and scheme of the Act with the aid of the remaining provisions alone the result is that the entire statute is rendered ineffective and void. (Paras 62 and 66)

Sections 3 and 4 of the Act regarding the constitution and composition of the Managing Committee are violative of Art. 26 of the Constitution. The power of nomination conferred on the Government is naked and arbitrary without any safeguard being provided for ensuring that the Committee will be a body representing the denomination. The right to administer the Temple being vested in the denomination any statutory provision which completely ignores the denomination in the matter of setting up the Committee to administer the religious institution belonging to the denomination will necessarily be violative of Art. 26 of the Constitution. AIR 1963 SC 1638; AIR 1964 SC 1501, Distinguished. (Paras 40, 41, 42)

The provisions contained in S. 11 in so far as they confer arbitrary power on the Government to sanction alienations of Devaswom properties even in the absence of any justifying necessity or benefit and leave the denomination without any remedy to question the order passed by the Government are violative of Art. 26 (a), (b) and (d) of the Constitution. (Para 48)

Section 12 states that the Committee shall have no power to borrow money from or to lend money to any person except with the previous sanction of the Government. Excepting for the aspect that the secular Government is not expected to intimately involve itself in the administration of a religious institution, there is no other objectionable feature in this section. (Para 49)

The power to appoint the Administrative officer is a necessary concomitant of the power of administration, control and management which is conferred on the Committee under Section 3. Section 14 in so far as it deprives the Committee of the crucial power to appoint its own Secretary who is also to be the chief executive officer of the Temple and confers such power on the secular Government undoubtedly makes a serious inroad into the Fundamental right guaranteed to the denomination under Art. 20 (a), (b) and (d). (Para 50)

The Committee is left without any effective control over the Administrator and he is answerable only to the Government by whose order he is appointed and who alone is vested with the power to take disciplinary action against him. The Administrator being an officer of the Devaswom it should be left to the Committee to regulate his conditions of service and to exercise effective control over his work and conduct inclusive of full powers to take disciplinary proceedings for any misconduct. Section 15 (4), interferes with the denomination's right to administer the Temple under Article 26 and has to be declared invalid. (Para 50)

Section 16 in so far as it empowers the Government to appoint a non-Hindu to be in additional charge of the functions of the Administrator of the Temple constitutes a clear

violation of the rights of the denomination under Arts. 25 and 26 (a) and 26 (b) of the Constitution. (Para 51)

The conferment of "extraordinary powers" on the Administrator under Section 18 without making him fully answerable to the Committee constitutes, an infringement of the right of the denomination to manage and administer the institution and its properties under Art. 26 Cls. (b) and (d). (Para 52)

Sub-section (6) of Sec. 19 which states that the creation of any new appointment carrying a salary of not less than Rs. 200/- per mensem shall be subject to the previous sanction of the Government suffers from the infirmity of direct involvement of the Government in the routine administration of a religious institution which is inconsistent with the secular character of the State. (Para 53)

The Board constituted under Section 20 cannot by any stretch of imagination be regarded as a representative of the denomination. In so far as Section 20 confers the power of appointment of officers and employees of the Temple not on the Managing Committee but on a separate and independent body, namely, the Board, it must be held that the Section is violative of Art. 26 (a), (b) and (d) of the Constitution. (Para 54)

Sub-section (1) of Section 24 which purports to vest the Guruvayoor Devaswom Fund in the Committee is unconstitutional and void. Both under the law relating to Hindu religious trusts and also under the custom, usage and tradition governing the institution, the properties of the Guruvayoor Temple and the income derived therefrom are vested in the Deity. The effect of the Section 24 (1) is to divest the idol or Deity of its proprietary right over the income and to transfer it to the Committee constituted under Sec. 3. Under the guise of providing for better administration of the trust it is not permissible for the legislature to divest the Deity of its proprietary interest in the trust properties and transfer it to another body. The movable properties of the Temple include also the jewels used for adorning the Deity as well as the vessels and other paraphernalia that are intimately connected with the performance of the religious rites in the Temple. The transference of the proprietorship over the movable and immovable properties from the Deity to the Committee constitutes a serious interference with the religious practice of the denomination and also with its right to manage its own affairs in matter of religion and to administer its property in accordance with law. (Para 56)

The provision contained in Section 24 (3) (f) empowering a secular authority, namely, the State Government to sanction the diversion of Devaswom funds for purposes unconnected with the Devaswom and its affairs is unconstitutional and void. AIR 1954 SC 388; AIR 1962 SC 853 Rel. on. (Para 58)

In as much as the remedy under Section 92 of the Code of Civil Procedure is made unavailable to the members of the denomination by reason of Section 5 (3) (e) of the Madras Hindu Religious and Charitable Endowments Act the applicability of which to the Guruvayoor Devaswom is kept in force by Section 35 of the Act, the effect of S. 29 is to completely deprive the denomination of any right to approach the civil court for questioning the acts of the Administrator, the Committee or the Government and for safeguarding the interests of the Temple against mismanagement. Therefore it is not possible to uphold the constitutional validity of Section 29 in the setting in which the said Section occurs in the Act. (Para 59)

Section 32 interferes with the freedom of the denomination to practice its religion and to maintain the religious institution and administer its properties in accordance with law and is violative of Articles 25 and 26 (a), (b) and (d) of the Constitution. Under Section 3 the administration and management of the Temple is statutorily vested in the Guruvayoor Devaswom Managing Committee on the assumption that it is a body representative of the denomination. It is difficult to see how it is legally permissible to divest

that body of the important function of deciding what works of renovation and improvement have to be carried out in the Temple and getting the same executed. To invest that function in an independent committee and to empower that committee to collect contributions from the public in the name of the Temple and to expend those amounts in the guise of administering a special fund is certainly highly objectionable.

(Para 60)

Cases Referred: Chronological Paras

AIR 1975 SC 706	38
AIR 1974 SC 1389	36
AIR 1973 SC 106	37
AIR 1973 Ker 106: 1973 Ker LT 106 (FB)	6, 66
AIR 1970 SC 181	34
AIR 1964 SC 1501	43
AIR 1963 SC 1638	43, 44, 46
AIR 1962 SC 853	58
AIR 1961 SC 1402	38
AIR 1954 SC 282	33, 34
AIR 1954 SC 388	34, 35, 58

O. Balanarayanan, S. Easwara Iyer, K. P. Radhakrishna Menon, K. Raveendranath, for Petitioner; Govt. Pleader, for Respondents.

BALAKRISHNA ERADI, J. (for himself and on behalf of K. Bhaskaran, T. Chandrasekhara Menon and K. K. Narendran, JJ.):— Kerala is justly famous for its numerous temples, churches, mosques and synagogues which exist side by side in perfect amity and mutual respect, catering to the spiritual needs of all sections of people belonging to different religious persuasions. Foremost amongst the Hindu Shrines in the State is the Sreekrishna Temple at Guruvayoor to which there is an incessant flow of many thousands of pilgrims from all parts of India throughout the year.

2. In 1971 the Kerala State Legislature enacted the Guruvayoor Devaswom Act, 1971 (Act 6 of 1971), hereinafter called the Act, avowedly to make provision for the proper administration of the Guruvayoor Devaswom. The petitioner, a Hindu, claiming to be a worshipper of the Guruvayoor Temple has filed this petition both in his individual capacity as well as in his capacity as the President of the Malabar Pradesh Kshethra Samrakshana Samithi which is a society registered under Societies Registration Act and having as its objects inter alia the reconstruction and renovation of Hindu temples which are in ruins, the adoption of necessary measures to ensure that temples are managed properly and administered correctly and the reorganisation and rejuvenation of Hindu society so as to enthuse in them proper interest in temple worship, rites and rituals. Permission has also been granted to the petitioner by this Court under Order I Rule 8 of the Code of Civil Procedure to institute and maintain this writ petition in a representative capacity on behalf of the entire denomination consisting of the large section of the Hindu public having faith in temple worship and who are vitally interested in seeing that the affairs of the temple are administered in accordance with its customs and traditions and that its properties and funds are not diverted for purposes unconnected with the temple or with Hindu religious practices. The reliefs prayed for in the writ petition are that this Court should declare the Act and the Guruvayoor Devaswom (Amendment) Act, 1972 (Act 28 of 1972) and more particularly Sections 3, 4, 5 (3) (a), 5 (5), 6, 11, 14, 18, 20, 24 (3) (I) 29 and 32 (1) of the Act and Sections 2, 3 and 4 of Act 28 of 1972 as unconstitutional and void on the ground of contravention of Articles 14 and 26 of the Constitution of India. There is also a prayer in the Original Petition that Resolution No. 31 of the Guruvayoor Devaswom Managing Committee (1st respondent) constituted under Section 3 of the Act — Ext. P-1 — resolving to grant a donation of Rs. 50,000/- from the temple funds to the "one lakh housing scheme" of the State Government is illegal and invalid. A further relief sought in the writ petition is that this Court should declare that the Renovation Executive Committee constituted or recognised under Section 32 of the Act is an illegally constituted body and that it has no legal authority to perform any acts in relation to the temple.

3. Before we proceed to set out in detail the contentions put forward

by the petitioner in support of his challenge against the provisions of the enactments it will be convenient to narrate in brief the prior history relating to the administration of the Guruvayoor Temple. It is admitted on all sides that the Coraims right over the Temple was hereditarily vested jointly in the Zamoria Raja of Calicut and the Karanavan for the time being of the Mallisseri Illam at Guruvayoor. This fact is expressly recognised and specifically mentioned in the Preamble to the Act. That the Ooraimaship was vested jointly in the Zamorin Raja and the Karanavan of the Mallisseri Illam had also been declared by the Madras High Court in its judgment dated 1st November, 1889 in Appeal No. 35 of 1887. In the year 1926 the Madras Legislature passed the Madras Hindu Religious Endowments Act and it came into force on the 8th February, 1927. Shortly thereafter some of the worshippers of the temple filed a petition before the Hindu Religious Endowments Board constituted under the said Act complaining against alleged mismanagement of the affairs of the Temple by the hereditary trustees. On that petition the Board started an enquiry which finally resulted in a scheme of administration being settled for the Temple under Section 63 (1) of the said Act. Under that scheme the Board totally disregarded the rights of the Mallisseri Nambudiri to function as the hereditary trustee of the Temple and entrusted the day-to-day management of the institution solely to the Zamorin Raja as hereditary trustee subject to certain conditions regarding supervision by officers of the Board and other similar safeguards. The Karanavan of the Mallisseri Illam instituted O. S. No. 1 of 1929 in the District Court of South Malabar at Calicut under Section 63 (4) of the Hindu Religious Endowments Act, 1927 to amend the scheme settled by the Board by recognising his due position as joint Ooralan of the Devaswom. The worshippers on whose petition the scheme had been framed by the Board instituted O. S. No. 2 of 1929 in the same Court contending that the Board had not incorporated sufficient safeguards in the scheme for ensuring the proper management of the institution and praying that the scheme should be amended by making provision for the appointment of additional non-hereditary trustees and placing the management in the hands of a Board of five trustees, three of whom were to be nominated by the Board. The District Court upheld the claim of Mallisseri Nambudiri to be a joint hereditary trustee of the Temple along with the Zamorin Raja and certain amendments were made in the scheme of administration settled by the Board, both for the purpose of providing for joint management by the Nambudiri and Zamorin Raja as co-trustees and also for inserting further safeguards to ensure good administration of the institution. Against the said decision of the District Court the Zamorin Raja filed A. S. Nos. 211 and 212 of 1930 before the Madras High Court. Those appeals were disposed of by a Division Bench as per an elaborate judgment dated 21st November, 1930. The learned Judges confirmed the decree of the District Court in so far as it recognised the right of Mallisseri Nambudiri to function as joint Ooralan (hereditary trustee) of the Temple and the modification effected in the scheme in this regard was upheld. Dealing with the provisions contained in the scheme settled by the Board which had been modified in certain respects by the District Court on the basis of the contentions put forward by the worshippers that the public was dissatisfied with the management of the Temple and that there was a considerable body of persons feeling that the administration of the institution should not be left in the hands of the hereditary trustees without adequate and stringent safeguards, the learned Judges of the Division Bench while confirming the decision of the District Judge declining to make provision in the scheme for the appointment of three non-hereditary trustees, incorporated certain additional safeguards in the scheme with intent to enable the worshippers to maintain a close and effective watch on the manner of administration of the Devaswom by the trustees. One of the new provi-

sions so incorporated in the scheme was that a public notice intimating the date and time of opening of the Bhandarams should be put up by the trustees sufficiently in advance so that those amongst the worshippers who cared to be present may attend at the time of the opening and it was also made obligatory that the entries regarding the cash, jewellery etc. found as the contents of the Bhandarams should be attested at least by two of such members of the worshipping public.

4. Thereafter, till 1933 the management of the Temple was being carried on under the provisions of the scheme as finalised by the aforesaid decision of the Madras High Court. Subsequently, a suit — O. S. No. 1 of 1933 — was filed by some of the worshippers for modifying the above-mentioned scheme. As per the decree passed in that suit some slight modifications were effected in the aforesaid scheme by the District Court. Since then the administration of the Temple was being carried on under the scheme as so modified. This position continued even after Madras Act 2 of 1929 was replaced by the Madras Hindu Religious and Charitable Endowments Act, 1951 (Madras Act 19 of 1951) which came into force on 30th September, 1951.

5. In 1965, the Commissioner, Hindu Religious and Charitable Endowments (Administration) Department filed O. P. No. 3 of 1965 in the court of the Subordinate Judge, Trichur under Section 62 (3) (a) of the Madras Hindu Religious and Charitable Endowments Act, 1951 praying that the court should be pleased to amend and modify the existing scheme for the Guruvayoor Temple on the lines indicated in a draft scheme submitted along with the said application. That petition was pending before the Subordinate Judge's Court at the time when the impugned statute was passed by the Kerala Legislature. In the meantime, a fire accident took place in the Temple in November, 1970 and a commission was appointed by the Government to go into the circumstances that led to the fire accident. It would appear that the commission in its report expressed the view that the accident had occurred due to prolonged neglect and indifference on the part of the management in the matter of maintenance and timely repairs. According to the stand taken in the counter-affidavit, the fire accident "brought home the need for immediate effective action" and hence the impugned statute was enacted.

6. The Zamorin Raja and Mallisseri Nambudiri in their capacity as hereditary trustees of the Temple had filed O. P. No. 812 of 1971 challenging the validity of the Act (Act 6 of 1971) on the ground that its provisions infringed their fundamental rights under clauses (b) and (d) of Article 26 of the Constitution of India. That contention was rejected by a Full Bench of three Judges of this Court as per the judgment reported in Kunhettan Thempuran v. State of Kerala, 1973 Ker LT 106: (AIR 1973 Ker 106 (FB)). In that writ petition the main grievance of the petitioners therein was that their rights and privileges as hereditary trustees had been seriously and excessively interfered with by the statute by practically divesting them of any effective part in the management and administration of the religious institution and that this constituted an infringement of clauses (b) and (d) of Article 26 of the Constitution. The writ petition had not been filed by them in a representative capacity on behalf of the denomination consisting of the worshippers of the Temple. The present writ petition originally came up for hearing before the Division Bench consisting of Gopalan Nambiyar, J. (as he then was) and Viswanatha Iyer, J. both of whom were members of the Full Bench that decided the earlier case in 1973 Ker LT 106: (AIR 1973 Ker 106 (FB)). By their order of reference dated 29th June, 1973 the learned Judges referred this case to a Full Bench observing that many of the important aspects that are sought to be urged in this writ petition had not been fully developed and presented before the Full Bench which heard the previous case and that hence it was felt necessary that all those points should be considered by a Full Bench.

Since the present petitioner was not a party to the earlier writ proceeding which, as already observed, was not a representative action, the principle of res judicata is not attracted and there is no legal bar against his urging before this Court all the contentions raised in this writ petition. Pursuant to the aforementioned order of reference by the Division Bench the case was initially posted before a Full Bench of three Judges. Since it was found that a consideration of the contentions raised by the petitioner necessarily involves an examination of the correctness of the decision rendered by the earlier Full Bench (1973 Ker LT 106): (AIR 1973 Ker 106 (FB)), the case was referred to a larger Bench and accordingly it has come up before this Bench of five Judges.

7. To appreciate the points arising for consideration it will be convenient to refer briefly at this stage to the scheme and the salient provisions of the impugned Act. The object of the Act, as stated in the preamble is to reorganise, in the interests of the general public, the scheme of management of the affairs of the Guruvayoor Devaswom and to provide better administration therefor in supersession of the provisions of the scheme framed by the High Court of Madras in Appeals Nos. 211 and 212 of 1930 as subsequently modified by the District Court of South Malabar in O. S. No. 1 of 1933 on the basis of which the administration and management were hitherto being carried on by the hereditary trustees. Section 1 after mentioning the name of the Act states that the Act shall be deemed to have come into force on the 9th of March, 1971. The significance of the said date is that the Guruvayoor Devaswom Ordinance 1971 containing substantially the same provisions had been promulgated by the Governor of Kerala on 9-3-1971 and that Ordinance was being replaced by the Act.

8. Section 3 lays down that the administration, control and management of the Devaswom shall be vested in a committee constituted in the manner specified in the next Section of the Act, that the said committee shall by the name of the "Guruvayoor Devaswom Managing Committee" be a body corporate and it shall have perpetual succession and a common seal and shall by the said name sue and be sued through the Administrator. Section 4 deals with the composition of the Committee. Sub-section (1) thereof lays down that the Committee shall consist of (a) the Zamorin Raja who shall be the Chairman, (b) the Karanavan for the time being of the Mallisseri Illam at Guruvayoor who shall be the Vice-Chairman, (c) the Administrator appointed under Section 14 who is to be an ex-officio member of the Committee, (d) the Chairman of the Guruvayoor Township Committee provided he is a person professing Hindu religion — ex-officio —, (e) the Tantri of the Temple — ex-officio —, (f) a representative of the Employees of the Devaswom nominated by the Government and (g) not more than 11 persons nominated by the Government of whom one shall be a Harijan. Sub-section (2) states that a person shall be disqualified for being nominated under clause (g) of sub-section (1), if (i) he does not profess the Hindu religion or (ii) he is an employee under the Government or the Devaswom or (iii) he is below 30 years of age or more than 70 years of age or (iv) he is engaged in any subsisting contract with the Devaswom or (v) he is subject to any of the disqualifications mentioned in clauses (a), (b) and (c) of sub-section (3) of Section 5.

9. Sub-section (i) of Section 5 provides that a member nominated under clause (f) or clause (g) of sub-section (1) of Section 4 shall hold office for a period of three years from the date of his nomination and shall be eligible for renomination. Sub-section (2) of Section 5 merely recognises the right of any member of the Committee to resign his office by giving notice in writing thereof to the Government and it states that on such resignation being accepted by the Government the person shall cease to be a member. Sub-section (3) is an important provision. It states that the Government may by order remove from office a member nominated under clause (f) or clause (g) of sub-section (1) of Section 4 on

any of the grounds mentioned in clauses (a) to (h) of the said sub-section. Clauses (a) to (c) deal with disqualification by reason of unsoundness of mind declared by a competent court or adjudication as an insolvent or conviction for any offence involving moral turpitude. Clause (f) contains the usual provision for removal on the ground of absence for more than three consecutive meetings of the committee without valid or sufficient explanation. The grounds for removal mentioned in clauses (d), (e), (g) and (h) are respectively as follows :—

"(d) he has been guilty of corruption or misconduct in the administration of the Devaswom;

(e) his presence in the Committee is, in the opinion of the Government, prejudicial to the interests of the Devaswom;

(g) he, being a legal practitioner, has acted or appeared on behalf of any person against the Devaswom in any legal proceeding;

(h) he ceases to profess the Hindu religion."

Sub-section (4) of Section 5 states that a member shall not be removed under sub-section (3) unless he has been given a reasonable opportunity of showing cause against his removal. Sub-section (5) declares that an order of the Government removing from office a member of the committee under sub-section (3) shall be final and shall not be liable to be questioned in any court of law.

10. Section 6 empowers the Government to issue a notification superseding the Committee for such period, not exceeding six months, as it may think fit, if the Government after making such enquiry as may be necessary is of opinion that the Committee is not competent to perform or makes default in performing the duties imposed on it under the Act or exceeds or abuses its powers. Sub-section (2) of Section 6 enjoins that before issuing such a Notification the Government shall communicate to the Committee the grounds on which they propose to take the action for its supersession, fix a reasonable time for the Committee to show cause against the proposal and tions, if any. Sub-section (3) of Section 6 provides that where a Committee is superseded under the said Section the Government shall appoint a person in its service professing the Hindu Religion to exercise the powers and perform the functions of the Committee until the expiry of the period of supersession.

11. The next provision in the Act that is relevant is Section 10, clauses (a) to (g) whereof enumerate the duties of the Committee. Clause (a) states that the Committee shall, subject to the custom and usage in the Temple, arrange for the proper performance of the rites and ceremonies in the Temple and the subordinate temples attached thereto in accordance with the dittam or scale of expenditure fixed in respect of them under the Madras Hindu Religious and Charitable Endowments Act. Clause (b) states that it shall be the Committee's responsibility to provide facilities for the proper performance of worship by the worshippers. Under clause (c) the Committee is invested with the duty to ensure the safe custody of the funds, valuable securities and jewelleries and the preservation and management of the properties vested in the Temple. Clause (d) states that it shall be the duty of the Committee to maintain order and discipline and proper hygienic conditions in the Temple and the subordinate temples attached thereto and of proper standard of cleanliness and purity in the offerings made therein. A duty is cast on the Committee under clause (e) to ensure that the funds of the endowments of the Temple are spent according to the wishes so far as may be known of the donors. Clause (f) states that it shall be the duty of the Committee for payment of suitable emoluments to the salaried staff of the Devaswom. Clause (g) states in general terms that the Committee shall do all such things as may be incidental and conducive to the efficient management of the affairs of the Devaswom and the convenience of the worshippers.

12. Section 11 deals with the alienation of Devaswom properties. Sub-section (i) thereof states that no

nature which is in the possession of the Committee and the value of which is more than five thousand rupees and no jewellery shall be sold, pledged or otherwise alienated without the previous approval of the Government. Sub-section (2) lays down that no immovable property taken possession of by the Committee shall be mortgaged, sold or otherwise alienated except with the previous sanction of the Government. Dealing with the Committee's powers to borrow or lend money Section 12 provides that the Committee shall have no power to borrow money from or to lend money to any person except with the previous sanction of the Government. Thus the only inhibition placed in the way of alienations of movable or immovable properties belonging to the Devaswom and on either borrowing money on the credit of the Devaswom or lending its monies is that the Committee should have obtained either the 'previous approval' or the 'previous sanction' of the Government. No guidelines are contained in Sections 11 and 12 as to what principles or considerations are to weigh with the Government in the matter of granting the 'previous approval' or the 'previous sanction' referred to in those Sections.

13. Section 13 provides that the Committee shall annually submit to the Government through the Commissioner a report on the administration of the affairs of the Devaswom at such time as the Government may prescribe and that such report shall be forthwith published by the Committee in the prescribed manner and that it shall thereafter be also laid before the Legislative Assembly as soon as possible.

14. Chapter III of the Act consisting of Sections 14 to 20 deals with "Administration and Establishment". Section 14 states that the Government shall appoint an officer not below the rank of Deputy Collector or Deputy Commissioner appointed under the Madras Hindu Religious and Charitable Endowments Act and professing Hindu religion to be the Administrator for the Devaswom. It is laid down by Section 15 that the Administrator shall be a full-time officer of the Devaswom and that he should not undertake any work unconnected with his office without the permission of the Committee. He is to be paid out of the Temple Fund such salary and allowances as the Government may fix in that behalf. It is further provided by the said Section that a contribution shall be levied from the Temple Fund towards the leave allowances, pension and provident fund of the Administrator to the extent required by the rules for the time being in force and that the other conditions of service of the Administrator shall be such as may be prescribed by the Governor.

15. Section 16 states that notwithstanding the provisions in Sections 14 and 15 it shall be competent for the Government to appoint an officer of the Government not below the rank of Deputy Collector or Deputy Commissioner appointed under the Madras Hindu Religious and Charitable Endowments Act to be in additional charge of the office of the Administrator, pending appointment of the Administrator under Section 14 or when the office is temporarily vacant. The proviso incorporates a condition that the period of such additional charge shall not exceed one month. It is significant that under this provision it is open to the Government to appoint an officer not professing the Hindu religion to be in additional charge of the office of the Administrator of the Temple and during the period when he holds such charge he is competent to exercise all the powers and functions vested in the Administrator under the Act.

16. The powers and duties of the Administrator are enumerated in Section 17. Sub-section (i) thereof states that the Administrator shall be the Secretary to the Committee and its Chief Executive Officer and shall, subject to the control of the Committee have powers to carry out its decisions in accordance with the provisions of the Act and the Madras Hindu Religious and Charitable Endowments Act so far as they are applicable. Sub-section (2) provides that notwithstanding anything contained in sub-section (i) or in Sec-

tion 3 (which vests the administration, control and the management of the Devaswom in the Committee) the Administrator shall be responsible for the custody of all the records and properties of the Devaswom. He has to arrange for the proper collection of the offerings made in the Temple. He is conferred power under sub-section (4) (a) to grant licences for the use of the lands of the Temple for a period not exceeding one year at a time or to lease out for a period not exceeding one year at a time the buildings of the Temple which are ordinarily let. He is also empowered to call for tenders for works or supplies and to accept such tenders when the amount or value thereof does not exceed five thousand rupees and to order for any emergency repairs the cost of which does not exceed five thousand rupees (clauses (b) and (c) of sub-section (4)). It is further provided by Section 18 that the Administrator may in cases of emergency direct the execution of any work or the doing of any act which is not provided for in the budget for the year the immediate execution or the doing of which is in his opinion necessary for the preservation of the properties of the temple and its endowments or for the service or safety of worshippers resorting to the Temple or for the due performance of the rites and ceremonies therein in accordance with the custom and usage in the Temple and to direct that the expenses of executing such work or doing such act shall be paid from the Temple Fund. Sub-section (2) of Section 18 enjoins that any action taken by the Administrator under sub-section (1) shall be forthwith reported by him to the Committee together with the reasons therefor.

17. Section 19 deals with the preparation of an Establishment Schedule and it states that the Administrator is to prepare and submit to the Committee a schedule setting forth the duties, designations and grades of the officers and employees who are to constitute the establishment of the Temple and embodying his proposals in regard to the salaries and allowances payable to them. The Committee under sub-section (2) is to forward to the Commissioner for his approval the schedule submitted to it by the Administrator with its recommendations thereon. Sub-section (3) states that the Commissioner shall after considering the recommendations of the Committee approve such schedule either without modifications or with such modifications as he deems necessary and thereupon the schedule as approved by the Commissioner shall come into force. Sub-section (6) of Section 19 lays down that the creation of any new appointment carrying a salary of not less than two hundred rupees per mensem shall be subject to the previous sanction of the Government.

18. The topic of appointment of officers and employees of the Temple is dealt with in Section 20. Under that provision appointments of all officers and employees of the Temple are to be made by a Board consisting of (a) the Commissioner who shall be the Chairman, (b) the Administrator, (c) an officer professing Hindu religion authorised by the District Collector, Trichur in that behalf and (d) two persons selected by the Committee from amongst its members. Sub-section (2) states that in exercising its power of appointment the Board shall follow such procedure as may be prescribed by the Government. It is to be noted that while under Section 3 the administration, control and the management of the Devaswom is vested in the Committee, the power of appointment of officers and employees of the Temple is vested in a totally different body, namely the Board referred to in this Section. Out of the five members constituting the Board three are officers of the Government and the remaining two alone are to be elected by the Committee, the composition of the Committee itself being such that there is an overwhelming predominance of the Government nominees.

19. Sections 21 to 23 comprised in Chapter IV deal with budget, accounts and audit. Under Section 21 the Administrator is to prepare every year in such manner and in such form as may be prescribed a budget estimate of the receipts and expenditure of the Devaswom for the fol-

lowing year and place it before the Committee which may approve it without modification or with such modifications as it may deem fit. Thereafter, the budget is to be submitted to the Government through the Commissioner before such date as may be fixed by the Government in that behalf. In so submitting the budget to the Government the Commissioner is to make his recommendations on the proposals. Sub-section (4) lays down that before sanctioning a budget, the Government shall satisfy themselves that adequate provision had been made therein for the maintenance of the prescribed working balance and meeting the liabilities of the Devaswom. The Government is empowered under sub-section (5) to modify any part of the budget so as to ensure that adequate provision is made for the maintenance of the prescribed working balance and for meeting the Devaswom liabilities. Provision is made in Section 22 empowering the Committee to submit in the course of any year a supplementary or revised budget to the Government through the Commissioner. Section 23 makes it obligatory that the Commissioner shall forward to the Government a copy of the audit report relating to the accounts of the Devaswom sent to him by the Auditor under Section 72 of the Madras Hindu Religious and Charitable Endowments Act together with a copy of the order passed by the Commissioner under sub-section (3) of Section 74 of the said Act.

20. Next we come to a very important provision contained in Section 24 which lays down that there shall be constituted a fund to be called "Sree Guruvayoor Temple Fund" and that the said Fund shall be vested in and be administered by the Committee. Sub-section (2) states that the Fund shall consist of (a) the income derived from the movable and immovable properties of the Devaswom, (b) any contributions by the Government either by way of a grant or by way of loan, (c) all fines and penalties imposed under the Act, (d) all recoveries under the Act and (e) any other gifts or contributions made by the public, local authorities or institutions, other than the contributions referred to in sub-section (4) of Section 32, namely, contributions received by the Renovation Executive Committee for the specific purpose of renovation and improvement of the Temple. Sub-section (3) of the Section (Section 24) as originally enacted was in the following terms:—

"The fund may be utilised for any of the purposes prescribed under this Act and for all or any of the following purposes, namely:—

(a) maintenance (including repairs and reconstruction), management and administration of the Temple, its properties and the temples subordinate thereto:

(b) training of archakas to perform the religious worship and ceremonies in the Temple and the temples subordinate thereto;

(c) medical relief, water supply and other sanitary arrangements for the worshippers and the pilgrims and construction of buildings for their accommodation:

(d) culture and propagation of the tenets and philosophy associated with the Temple;

(e) any other work or undertaking for the purposes of the Devaswom authorised by the Government, so long as such authorisation subsits; and

(f) with the previous sanction of the Government, for the establishment and maintenance of, or the making of any grant or contribution to, any poor-home or other similar institution".

In the place of clause (f) which had originally stood as above, the following clause was substituted by Sec. 2 of the Guruvayoor Devaswom (Amendment) Act, 1972:—

"(f) with the previous sanction of the Government,—

(i) for the establishment and maintenance of, or the making of any grant or contribution to, any poor home or other similar institution;

(ii) for the establishment and maintenance of any educational institution owned or managed by the Devaswom or in which the Devaswom has interest;

(iii) for the making of any contribution to any religious institution; and

(iv) for the making of any contribution to any fund instituted by the Government for the amelioration of the poor or for National Defence." Clauses (a) to (e) have been left to remain as originally enacted. This Section brings about a radical departure from the established legal position relating to Hindu Religious Trusts that the properties of the Trust including the income derived therefrom belong to and stand vested in the deity and that the Ooralans or so-called trustees are only in the position of Managers invested with fiduciary functions. The direct consequence of this Section is to divest the deity of its ownership over the income derived from the movable and immovable properties of the Devaswom and also over the donations and offerings made by the worshipping public and to constitute all those into a Fund called the "Temple Fund" and vest the same in the Managing Committee. The Committee is also conferred power to utilise such Fund for any of the purposes enumerated in sub-section (3), irrespective of any question as to the availability of a surplus. Clause (f) of sub-sec. (3) permits the diversion of temple funds for purposes some of which may be totally unconnected with the Temple and its affairs and may be purely secular in nature.

21. Section 25 lays down that the Government may call and examine the records of the Administrator, the Committee or the Commissioner to satisfy themselves about the regularity of such proceedings or the correctness, legality or propriety of any decision or order made therein and in case it appears to the Government that any such decision or order should be modified, annulled, revised or remitted for reconsideration, they may pass orders accordingly. Under this wide and unrestricted power every action taken or order passed by the Administrator, the Committee etc. even in relation to the day-to-day management or administration of the Temple is made subject to active superintendence and control by the Government. Sub-section (2) provides that pending the exercise of the revisional power conferred by sub-s. (1) the Government may stay the execution of any decision or order which is proposed to be revised by it. Section 26 empowers the Government to make rules to carry out the purpose of the Act and enumerates in sub-section (2) thereof the various matters in respect of which such rules may be made.

22. Sec. 27 states that the Committee may, subject to the approval of the Government, make regulations not inconsistent with the provisions of the Act and the Rules made thereunder to provide for the manner in which the duties imposed on it under the Act and its functions thereunder shall be discharged. It is stated in sub-section (2) that such regulations may in particular, provide for (a) conditions of service of the officers and employees of the Devaswom, (b) the observance of the rites and ceremonies and other usages in the Temple and the temples subordinate thereto and (c) any other matter for which regulations are required to be made for the purposes of the Act. It is laid down by Sec. 28 that the Committee shall be entitled to take and be in possession of all movable and immovable properties including jewelleries records, documents and other assets belonging to the Devaswom. Provision is also made by the said Section that the Committee may requisition the assistance of the Collector of the District for the removal of resistance or obstruction in the matter of delivery of possession of Devaswom properties being taken.

23. Section 29 states that no suit, prosecution or other legal proceeding shall lie against the Government, the Commissioner, the Committee or any member thereof, or the Administrator or any person acting under the instructions of the Committee or authorised by it for anything which is in good faith done or intended to be done under the Act or the rules made thereunder. A total ban is thus imposed against the institution of any suits or other legal proceedings for challenging the actions of the Committee or its members as well as of the Commissioner and the State Govern-

ment, the only condition for attracting the bar being that the action concerned should have been taken in good faith.

24. The next section that is relevant is Section 32 which provides for the constitution of a Renovation Executive Committee. Sub-sec. (1) thereof as it now stands after its substitution by the amending Act of 1972 (Act 28 of 1972) states that notwithstanding anything contained in the Act or in the Madras Hindu Religious and Charitable Endowments Act the Government may, if they consider it necessary in the interests of the affairs of the Temple and worshipping public to renovate or improve the Temple, by notification in the gazette, constitute a committee by name the Guruvayoor Devaswom Renovation Executive Committee. It is provided by sub-sections (1A) and (1B) that the Renovation Executive Committee shall consist of such number of members not exceeding thirty as may be appointed by the Government and that the Minister of the State of Kerala in charge of Devaswoms shall be the President of the Renovation Executive Committee. Sub-section (1C) states that the Government may by order nominate one of the members of the Renovation Executive Committee to be the Vice-President and Working Chairman of the Committee. It is stated in sub-section (1F) that a person shall be disqualified for being appointed as a member of the Renovation Executive Committee if he does not profess the Hindu religion or if he is engaged in any subsisting contract with the Devaswom or the Renovation Executive Committee or if he is subject to any of the disqualifications mentioned in Cls. (a) to (c) of sub-sec. (3) of Sec. 5. The Government may appoint one of the members of the Renovation Executive Committee to be its Secretary and his term of office and other conditions of service are to be such as may be prescribed by the Government (sub-sections (1G) and (1H)). Any casual vacancy in the office of the Working Chairman or a member or the Secretary of the Renovation Executive Committee shall be filled by the Government. The term of office of the members is fixed as three years. (Sub-sections (1I) and (1J)). Sub-section (1L) empowers the Government to remove from office the Working Chairman or a member or the Secretary of the Renovation Executive Committee if he is subject to any of the disqualifications mentioned in Cls. (a) to (c) & (h) of sub-s. (3) of S. 5 or has been guilty of corruption or any misconduct in the discharge of his functions or if his presence in the Renovation Executive Committee is, in the opinion of the Government, prejudicial to the interests of the Devaswom or detrimental to its object for which the Committee is constituted. Two other grounds for such removal contained in Cls. (d) and (e) of sub-section (1L) are absence by the concerned member for more than three consecutive meetings without satisfactory explanation and appearance against the Devaswom or the Renovation Executive Committee in any legal proceeding by a member of the Committee who is a legal practitioner. Sub-s. (1M) provides that before action is taken by the Govt. for the removal of the Working Chairman or a member or the Secretary, he should be given a reasonable opportunity of showing cause against the proposed action.

25. Sub-section (2) of Section 32 states that the Renovation Executive Committee shall exercise such powers and discharge such functions in connection with the renovation and improvement of the Temple and shall follow such procedure as may be specified by the Government by notification in the gazette. Sub-section (3) provides that the Renovation Executive Committee shall constitute a fund to be called the "Sree Guruvayoor Renovation Fund" which shall be administered by the Renovation Executive Committee subject to such directions as the Government may from time to time issue. That Fund is to consist of all contributions received by the Renovation Executive Committee for the specific purpose of renovation and improvement of the Temple. (Sub-section (4)). It is laid down by sub-section (5) that the fund shall be utilised for the renovation and im-

provement of the Temple and for incidental purposes including the maintenance of the necessary establishments and that any unspent amount of the fund shall be transferred to the Temple Fund. Sub-sections (6) to (8) state that the Government shall every year appoint an auditor to audit the accounts of the Renovation Executive Committee, that the remuneration of the auditor shall be paid from the Sree Guruvayoor Renovation Fund, that the Auditor shall submit his report to the Renovation Executive Committee and send a copy of it to the Government and that the Government may issue such directions thereon as they deem fit and the Committee shall comply with those directions. Sub-section (9) provides that the report of the auditor and the directions issued by the Government thereon shall be published in the prescribed manner.

26. Section 33 is a saving provision and it is in the following terms:—

"Nothing in this Act shall, save as otherwise expressly provided in this Act or the rules made thereunder, affect any honour, emolument or perquisite to which any person is entitled by custom or otherwise from or in the Devaswom, or its established usage in regard to any other matter."

27. Section 34 confers power on the Government to issue any order or to take such other action as may be found necessary for the purposes of removal of difficulties in giving effect to the provisions of the Act. It is laid down by Section 35 that the provisions of the Madras Hindu Religious and Charitable Endowments Act shall apply to the Devaswom except in respect of matters for which provisions have been made in the Act. By Section 36 it is declared that the scheme framed for the Temple by the High Court of Madras in Appeals Nos. 211 and 212 of 1930 or modified by the District Court, South Malabar in O. S. No. 1 of 1933 shall cease to apply to the Temple. That closes this brief survey of the various sections contained in the Act.

28. The petitioner contends that Ss. 3, 4, 5 (3) (c), 5 (5), 11, 14, 15, 20, 24 (3), 29 and 32 of the Act are violative of Arts. 25 (1) and 26 of the Constitution of India on the ground that they abridge and interfere with the right of the denomination consisting of the vast section of Hindus believing in temple worship to freely practice their religion and to maintain their religious institution, namely, the Guruvayoor Temple, and administer its properties in accordance with their beliefs and religious practices. According to the petitioner, the cumulative effect of the totality of the provisions contained in the Act is to completely take away the management and control of the institution and the administration of its properties and funds from the hands of the denomination and to vest it in the executive Government of the State. It is contended by the petitioner that it becomes evident on an examination of the scheme of the Act as disclosed by its provisions that under the guise of legislating for the better management of the Devaswom what the legislature has really done is to invest the Government with full and absolute control over the Devaswom and its religious as well as secular affairs with no right whatever to the denomination to call in question the acts of the Government and its officers and nominees. Elaborating this contention it is pointed out that though under the Act the administration of the Temple and all its properties is nominally to vest in a managing committee, in the context of the provisions contained in the Act conferring arbitrary powers on the Government to nominate all except three out of the seventeen members constituting the Committee, and to remove at the Government's pleasure any of the members so nominated or even to supersede the entire Committee, the said Committee can never be expected to function in an independent manner but only as an agency subservient to the Government. It is further urged on behalf of the petitioner that since the Section does not provide any guidelines as to the manner in which the persons are to

be chosen by Government for nomination to the Committee the Government, which in the present democratic set up will necessarily be that of the political party that is in power for the time being, is left free to arbitrarily nominate as members of the Committee even persons whose political creed or personal belief may be such as is completely opposed to temple worship or even faith in God. It is pointed out that even amongst Hindus there are sections who have no faith in rituals and idol worship and who regard rituals and temple worship as based only on mere superstition and ignorance and as constituting an obstacle in the path of true spiritual progress. The petitioner urges that under Section 4 of the Act it is open to the Government to fill up the Committee with persons belonging to either of the aforementioned two categories and that nothing can be more dangerous and fatal for the continued existence of the institution itself. Another point taken by the petitioners is that the denomination which is vitally concerned with the maintenance and administration of the Temple and its properties is completely left out of account in the matter of constituting the Managing Committee as no provision whatever is made for ascertaining the wishes of the denomination in regard to the choice of the members to be nominated to the Committee. Unlike in the case of other similar temples in the State governed by the provisions of the Madras Hindu Religious and Charitable Endowments Act 1951 or by the Travancore-Cochin Hindu Religious Institutions Act which contain adequate provisions enabling the members of the worshipping public to take prompt action by suit, appeal or application to check and correct any act of maladministration on the part of the persons in management, the denomination is completely deprived of the said valuable right which it had all along possessed in relation to the Guruvayoor Temple until the passing of the impugned Act. The Committee is not answerable in any manner to the denomination and none of its Acts can be called in question by members of the denomination by any process either before a civil court or before any other authority. According to the petitioner it is therefore futile to contend that the Committee is a body representing the denomination. Nowhere in the Act is any provision made for members of religious denomination to be consulted or heard by the Committee, the Administrator or the Govt. at least before important decisions are taken in respect of the most vital matters concerning the religious or temporal affairs of the Devaswom. The petitioner urges that such total deprivation of the rights of the denomination in the matter of maintaining and administering the Temple and its properties amounts to a flagrant violation of the fundamental rights guaranteed under Arts. 25 and 26 of the Constitution. The petitioner submits that the impugned Act has the effect of transferring the administration of the Temple and its properties to the direct and active control of the executive Government in manifest violation of the guarantee enshrined in Art. 26 of the Constitution and also of the principle of secularism which has been declared to be a basic feature of the Constitution in its preamble as recently amended. Another contention urged by the petitioner is that even though it is stated in Section 3 of the Act that the administration, control and management of the Devaswom is vested in a Committee an examination of the provisions contained in Chapter III of the Act would show that all the powers are really vested in the Administrator appointed by the Government over whom the Committee has no effective control. If the Committee is really intended to be in charge of the administration of the Devaswom the power to appoint the Administrator should have been vested in it but neither the said power nor any disciplinary control over the Administrator is conferred on the Committee. It is further pointed out by the petitioner that even the power to appoint the officers and employees of the Temple is not given to the Committee but,

instead, it is vested in a separate body, namely, the Board constituted under S. 20. Of the five members of that Board three are full-time officers of the State Government and only two members are to be elected by the Committee. The petitioner contends that the aforementioned provisions of the Act clearly go to show that the constitution of the Committee is only an extensible facade to camouflage the investiture of all the effective powers in the controlling hands of the executive Government.

29. Serious objection is taken by the petitioner to the provision contained in Section 24 of the Act regarding the constitution of the fund called "Sree Guruvayoor Temple Fund" and the declaration that the said fund shall be vested in the managing Committee. It is urged that both under custom as well as under the law governing Hindu Religious Trusts the properties and funds of the Guruvayoor Temple inclusive of the recurring income from its immovable properties and the offerings made by the worshipping public belong to the deity and any attempt to divest the deity of such proprietary right constitutes a serious interference with the fundamental rights of the denomination under Arts. 25 and 26 of the Constitution. The petitioner submits that it is an essential part of the religious practice of the denomination that the immovable and movable properties belonging to the Temple and also the offerings made by the devotees in cash and kind shall be vested in the deity and that those assets shall be preserved and utilised as such for the purposes of the Devaswom as sanctioned by usage. Very serious objection is taken by the petitioner to the provision contained in Clause (f) of sub-sec. (3) of Section 24 which authorises the Committee to effect a diversion of the trust funds with the sanction of the Government for the purposes mentioned therein, some of which are totally unconnected with the Temple. Such diversion of trust funds for secular purposes unconnected with the Temple is contended to be wholly contrary to the established custom, traditions and usage of the Temple. It is also pointed out that under the aforesaid provision a diversion of the trust fund is permitted irrespective of whether or not any surplus is available after meeting all the requirements of the Devaswom and that this is completely opposed to the well-established principle of cy pres which has all along been considered to be applicable in respect of such trusts. On this ground also it is contended that Section 24 (3) (f) in so far as it empowers the State Government to sanction the diversion of trust funds for secular purposes unrelated to the Temple is violative of Articles 25 (1), 26 (b) and (d) of the Constitution.

30. Strong attack is also levelled by the petitioner against Sec. 32 of the Act which provides for the constitution of a Renovation Executive Committee as a separate body wholly independent of the Guruvayoor Devaswom Managing Committee and not answerable to the latter in any manner. Against the provisions of Section 32 laying down the mode of constitution of the Renovation Executive Committee and prescribing the precarious nature of its tenure, depending as it does on the pleasure of the executive Government, the petitioner has urged the same contentions as have been put forward against the provisions of Sections 3 and 4 relating to the Managing Committee. In addition, it is urged that unlike in respect of the Managing Committee where there is at least an attempted camouflage of the real seat of all control, in the case of the Renovation Executive Committee the controlling hand of the Government emerges into the open in the provision contained in sub-section (1B) of Sec. 32 that the Minister of the State of Kerala in charge of Devaswom shall be the President of the Renovation Executive Committee. That committee may consist of as many as thirty members all of whom are to be appointed by the Government. Neither of the two hereditary trustees nor the Tantri of the Temple need be on this committee. Except for stating that a person shall be disqualified for being a member of the

committee if he does not profess the Hindu religion or if he is engaged in any subsisting contract with the Devaswom or is subject to any of the disqualifications mentioned in Clauses (a), (b) and (c) of Section 5 (3), no guidelines whatever are contained in the Section as to how the members of the Renovation Executive Committee are to be chosen by the Government. It is pointed out by the petitioner that like in the case of the Managing Committee there is no provision whatever for ascertaining the wishes of the denomination in the matter of choice of members to the Renovation Executive Committee also and the denomination is left without any remedy to check and correct any maladministration of funds by the Renovation Executive Committee. Another point urged by the petitioner is that the work of renovation and improvement of the Temple is an integral part of administration and management of the Devaswom and hence there is no justification to set up an independent committee for the said purpose and to authorise it to collect funds on behalf of the Devaswom and to expend such funds without even any reference to the Managing Committee which is the body statutorily vested with the duty of administering and managing the trust. The petitioner further contends that all contributions received from the members of the public for the purposes of renovation and improvement of the Temple constitute part of the trust fund belonging to the deity and Section 32 in so far as it empowers such funds to be collected and expended by a boody other than the Committee which is purported to be placed in charge of the administration of the trust is clearly violative of religious freedom guaranteed to the denomination under Arts. 25 and 26 of the Constitution. Finally it was urged that in singling out the Guruvayoor Devaswom and the worshipping public who are devotees of Lord Guruvayoorappan for discriminatory and hostile treatment by denying to the denomination the elementary right to participate in the administration of the Temple and to take proceedings before court whenever found necessary for ensuring that there is no mismanagement of the institution, by placing the institution and its properties virtually under the arbitrary control of the executive Government by a process of nationalisation of the Temple as it were in contravention of the principle of secularism enshrined in the preamble to the Constitution, by divesting the deity of its proprietary right over the temple funds and transferring such right to the Managing Committee, by empowering the Government to divert the temple funds for secular purposes unconnected with the temple in total disregard of the usage and custom obtaining in the institution and the wishes of the donors and by abrogating the principle of cy pres by permitting the diversion of funds irrespective of the availability of any surplus there has been a clear violation of the principle of equality enshrined in Art. 14 of the Constitution. Refuting the stand of the State that Guruvayoor Devaswom being a unique institution there is justification for a classification it is submitted by the petitioner that there are other equally unique and rich temples in Kerala like Sree Dharma Sastha Temple at Sabari Mala and the Bhagavathy Temple at Chottanikkara which also attract large numbers of pilgrims from all over India. According to the petitioner if the true purpose was to safeguard the Devaswom against mismanagement by the hereditary trustees, adequate provisions are contained in the Madras Hindu Religious and Charitable Endowments Act to deal with such situations. It is further contended by the petitioner that the impugned provisions of the Act which deprive the denomination of all its valuable rights in relation to the maintenance and administration of the Temple and which authorise the diversion of temple funds for secular purposes after divesting the deity of the proprietary right over such funds have no rational nexus whatever with the avowed object and purpose of the enactment and those provisions are therefore bad on the ground of arbitrary discrimination. The petitioner submits that even if

a classification of the Guruvayoor Temple can be said to be justified on the ground of its uniqueness for purposes of making special provisions for its management, the said ground of classification has no rational nexus whatever with the real object and purpose effectively achieved by the impugned provisions of the statute namely to take over to Government control the management of the Devaswom and its properties. There is also an allegation in the petition that the Act is a colourable piece of legislation and that under the ostensible purpose of better management of the Devaswom what has been done by the legislature is to enable the Govt. to get absolute and unfettered control over the Devaswom and its funds with authority to utilise the funds of the Temple for secular purposes, which, though considered laudable by the State, may be totally unconnected with the Temple.

31. The respondents have sought to sustain the validity of the impugned provisions of the Act by contending that they are reasonable provisions enacted with the sole object and purpose of ensuring the proper administration of the Temple and its properties in the larger interests of the general public. It is stated that the Sree Krishna Temple at Guruvayoor is a unique institution having all India importance and that on account of various factors the management of the Devaswom was in a most unsatisfactory state and there were persistent demands from among the public that Government should put an end to the mismanagement of the Temple and its properties by the trustees. A high level committee appointed by the Government to go into the affairs of the Temples in Kerala had also recommended that some special provisions for effective supervision of the management of the famous Temple in Guruvayoor were badly needed and that necessary steps in that regard should be taken by the Govt. There was a fire accident in the Temple in November, 1970 and a Commission appointed by the Government to go into the circumstances that led to the fire accident had submitted a finding that the occurrence of the fire was almost entirely due to the prolonged neglect and indifference on the part of the management in the matter of maintenance and timely repairs of the Temple buildings. According to the respondents, the provisions contained in the Madras Hindu Religious and Charitable Endowments Act, 1951 and the scheme of management framed for the temple were found to be inadequate to ensure proper management of the institution. The Commissioner, Hindu Religious and Charitable Endowments Department had filed O. P. No. 3 of 1965 in the Sub-Court, Trichur praying for an amendment of the scheme settled in A. S. Nos. 211 and 212 of 1930 of the Madras High Court as modified by the District Court, South Malabar in O. S. No. 1 of 1933 but final orders in that matter had not been passed by the Court even by March, 1971. It is averred in the counter affidavit of the respondents that the fire accident of the Devaswom in 1970 brought home the need for immediate effective action and hence the Guruvayoor Devaswom Ordinance, 1971 was promulgated by the Governor of Kerala on 9th March, 1971 and that was subsequently replaced by the Act. It is submitted by the respondents that having regard to the unique nature of the Temple which attracts pilgrims in thousands from all parts of India there was need to enact special provisions for its proper administration and this classification is fully justified. The petitioner's allegation that the Temple and its worshippers have been arbitrarily singled out in violation of Article 14 of the Constitution is stoutly denied by the respondents. According to the submission of respondents none of the provisions of the Act has interfered with the religious freedom guranteed to the denomination under Arts. 25 and 26 of the Constitution. It is said that the provisions of the Act provide only for the management of the secular affairs of the Temple and do not interfere with the religious affairs thereof which are enjoined to be

continued to be performed in accordance with the custom and usage obtaining in the Temple. The further case of the respondents is that the provisions of the Act far from interfering with the rights of the denomination, safeguard their interests by providing for proper management of the Temple and its properties. The contention of the petitioner that the Act confers on the Government absolute powers of management over the Temple is denied in the counter-affidavit. It is submitted by the respondents that simply because some of the members of the managing Committee are nominated by the Government it cannot be said that the Temple has been taken under Government control. The counter affidavit proceeds to state that the Managing Committee constituted under Section 3 is not subject to influence by the Government and that the Administrator appointed under Section 14 is subject to the supervision and control of the Managing Committee. The petitioner's contention that the Managing Committee is a limb of Government and that it is impossible for the Committee to resist a direction from the Government is refuted in the counter-affidavit as incorrect. A further plea taken by the respondents is that the Managing Committee constituted under the Act is a body representing the denomination and hence there is no substance in the petitioner's contention that the denomination has been completely deprived of its right to administer the institution and that the management of the temple is vested by the statute in a different secular authority. It is also said that the provisions of the Act only regulate the administration. management and control of the properties of the Devaswom in consonance with the provisions contained in Article 26 (d) of the Constitution. In answer to the challenge raised by the petitioner against the validity of Section 24 of the Act it is stated in the counter-affidavit that the utilisation of the temple funds for the purposes enumerated in cl. (f) of sub-s. (3) of the said Section cannot be said to be opposed to the custom and usage of the institution and it will not constitute any breach of trust. Dealing with the attack made by the petitioner against the resolution Ext. P-1 sanctioning a donation of Rs. 50,000/- towards the one lakh housing scheme of the State Government, it was submitted on behalf of the respondents that the Government has not granted and does not also hereafter propose to grant sanction for implementing the said resolution passed by the Managing Committee and that hence it is unnecessary to go into the question of validity of the said resolution. Regarding Section 32 which provides for the constitution of the Renovation Executive Committee it is stated by the respondents that the creation of such a separate body was felt by the legislature to be necessary in view of the fact that very substantial works of renovation and reconstruction of the Temple buildings had to be undertaken at enormous expense for repairing the damage caused by the fire accident and for prevention of recurrence of such mishaps in future. Finally it is submitted on behalf of the respondents that the provisions of the impugned Act are modelled on the lines of those enacted by the Orissa Legislature in the Shri Jagannath Temple Act 1955 (Orissa Act 11 of 1956) and the Rajasthan Legislature is the Nathdwara Temple Act, 1959 (Rajasthan Act 13 of 1959) and since the validity of both these enactments has been tested and upheld by the Supreme Court the challenge raised by the petitioner that the impugned Act violates Articles 25 and 26 of the Constitution is devoid of any merit.

32. The scope and extent of the rights conferred by Articles 25 and 26 of the Constitution are now well settled by the decisions of the Supreme Court. Article 25, as its language indicates, secures to every person, subject to public order. health and morality, a freedom not only to entertain such religious belief, as may be approved of by his judgment and conscience, but also to exhibit his belief in such outward acts as he thinks proper and to propagate and disseminate his ideas for the edification of others. Sub-clause (a) of clause (2), however, saves the

power of the State to make laws regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; and sub-clause (b) reserves the State's power to make laws providing for social reform and social welfare even though they might interfere with religious practices. The fundamental right conferred by this Article is subject only to the above restrictions which the Article itself has imposed.

33. The free exercise of religion by which is meant the performance of outward acts in pursuance of religious belief, is thus subject to State regulation imposed to secure order, public health and morals of the people. What sub-clause (a) of clause (2) of Article 25 contemplates is not State regulation of the religious practices as such which, unless they run counter to public health or morality, are protected. but of activities which are really of an economic, commercial or political character though they may be associated with religious practices. Though a religion undoubtedly has its basis in a system of beliefs or doctrines which are regarded by those who profess that religion as conducive to their spiritual well-being, it would not be correct to say that religion is nothing else but a doctrine or belief. A religion may not only lay down a code of ethical rules for its followers to accept, it might prescribe rituals and observances, ceremonies and modes of worship which are regarded as integral parts of religion, and these forms and observances might extend even to matters of food and dress. The guarantee under Article 25 protects not only the freedom of religious opinion but also acts done in pursuance of a religion and this is made clear by the use of the expression 'practice of religion' in the said Article. It is not correct to state that under clause (2) (a) of Article 25 all secular activities which may be associated with religion but do not really constitute an essential part of it are amenable to State regulation. If the tenets of any particular religious sect prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or oblations to the sacred fire etc. all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as 'matters of religion' within the meaning of Article 26 (b). That Article 25 (2) (a) contemplates is not regulation by State of religious practices as such, the freedom of which is guaranteed by the Constitution except when they run counter to public order, health and morality, but regulation of activities which are economic, commercial or political in their character though they are associated with religious practices. (see The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282 at pages 289 and 290).

34. Under Article 26 every religious denomination or section thereof has the guaranteed right to establish and maintain institutions for religious and charitable purpose and to manage in its own way all affairs in matters of religion. Rights are also given to such denomination or a section of it to acquire and own movable and immovable properties and to administer such properties in accordance with law. In regard to affairs in matters of religion the right of management given to religious denomination is a guaranteed fundamental right which no legislation can take away. However, as regards administration of property which a religious denomination is entitled to own and acquire, it has the right to administer such property only 'in accordance with law' meaning thereby that the State can regulate the administration of trust properties by means of laws validly enacted. But it is important to remember that under Article 26 (d) it is the religious denomination itself

which has been given the right to administer its property in accordance with any law which the State may validly impose. Hence a law which takes away the right of administration altogether from the religious denomination and vests it in any other secular authority would amount to violation of the right guaranteed by Article 26 (d). (See Ratilal Panachand Gandhi v. State of Bombay, AIR 1954 SC 388 at pages 391 and 392). As already noticed, religious practices or performances of acts in pursuance of religious belief are as much a part of religion as faith or belief in particular doctrines. Under Article 26 (b) a religious denomination enjoys complete autonomy in the matter of deciding as to what rights and ceremonies are essential according to the tenets of the religion and no outside authority has any jurisdiction to interfere in such matters — See The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, AIR 1954 SC 282 and Digyadarsan Rajendra Ramdassji Varu v. State of Andhra Pradesh, AIR 1970 SC 181, at page 187. Hence it is not open to restrict or prohibit the performance of such rites or ceremonies under the guise of regulating the administration of the trust estate. The scale of expense to be incurred in connection with such religious observances is a matter of administration of property belonging to the religious institutions and if the expenses under these heads are likely to deplete the endowed properties or affect the stability of the institution, proper conrol can be exercised by the statutory agencies as the law may provide. The distinction between matters of religion and those of secular administration of religious properties may at times appear to be very thin; but in cases of doubt the court should take a commonsense view and be actuated by considerations of practical necessity. (Ratilal Panachand Gandhi v. State of Bombay, AIR 1954 SC 388 at page 392).

35. A religious sect or denomination has the undoubted right guaranteed by the Constitution to manage its own affairs in matters of religion and this includes the right to spend the trust property or its income for the religious purposes and objects indicated by the founder of the trust or established by the usage obtaining in a particular institution. To divert the trust properties or funds for purposes which a statutory authority or official or even a court considers expedient or proper, although the original objects of the founder can still be carried out, is an unwarrantable encroachment on the freedom of religious institutions in regard to the management of their religious affairs. A statute cannot therefore empower any secular authority to divert the trust money for purposes other than those for which the trust was created as that would constitute a violation of the right which a religious denomination has under Articles 25 and 26 of the Constitution to practice its religion and to manage its own affairs in matters of religion. The State can step in only when the trust fails or is incapable of being carried out either in whole or in part — See AIR 1954 SC 388.

36. In this context it is relevant to bear in mind the historical background which led to the inclusion of Articles 25 to 30 in the Chapter on fundamental rights in the Constitution. The said background has been most succinctly explained by Khanna J. in para. 75 of the judgment of the Supreme Court in The Ahmedabad St. Xaviers College Society v. State of Gujarat (AIR 1974 SC 1389) at page 1413 which we shall extract:

"Before we deal with the contentions advanced before us and the scope and ambit of Article 30 of the Constitution, it may be pertinent to refer to the historical background. India is the second most populous country of the world. The people inhabiting this vast land profess different religions and speak different languages. Despite the diversity of religion and language, there runs through the fabric of the nation the golden thread of a basic inmate unity. It is a mosaic of different religions, languages and cultures. Each of them has made a mark on

the Indian polity and India today represents a synthesis of them all. The closing years of the British rule were marked by communal riots and dissensions. There was also a feeling of distrust and the demand was made by a section of the Muslims for a separate homeland. This ultimately resulted in the partition of the country. Those who led the fight for independence in India always laid great stress on communal amity and accord. They wanted the establishment of a secular State wherein people belonging to the different religions should all have a feeling of equality and nondiscrimination. Demand has also been made before the partition by sections of people belonging to the minorities for reservation of seats and separate electorates. In order to bring about integration and fusion of the different sections of the population the framers of the Constitution did away with separate electorates and introduced the system of joint electorates, so that every candidate in an election should have to look for support of all sections of the citizens. Special safeguards were guaranteed for the minorities and they were made a part of the fundamental rights with a view to instil a sense of confidence and security in the minorities. Those provisions were a kind of a charter of rights for the minorities so that none might have the feeling that any section of the population consisted of first-class citizens and the others of second-class citizens. The result was that minorities gave up their claims for reservation of seats. Sardar Patel, who was the Chairman of the Advisory Committee dealing with the question of minorities, said in the course of his speech delivered on February 27, 1947:

'This Committee forms one of the most vital parts of the Constituent Assembly and one of the most difficult tasks that has to be done by us is the work of this committee. Often you must have heard in various debates in British Parliament that have been held on this question recently and before when it has been claimed on behalf of the British Government that they have a special responsibility—a special obligation—for protection of the interests of the minorities. They claim to have more special interest than we have. It is for us to prove that it is a bogus claim, a false claim. and that nobody can be more interested than us in India in the protection of our minorities. Our mission is to satisfy every interest and safeguard the interests of all the minorities to their satisfaction. (The Framing of India's Constitution, B. Shiva Rao, Select Documents, Vol. II, P. 66).'

It is in the context of that background that we should view the provisions of the Constitution contained in Articles 25 to 30. The object of Articles 25 to 30 was to preserve the rights of religious and linguistic minorities, to place them on a secure pedestal and withdraw them from the vicissitudes of political controversy. These provisions enshrined a befitting pledge to the minorities in the Constitution of the country whose greatest son had laid down his life for the protection of the minorities. As long as the Constitution stands as it is today, no tampering with those rights can be countenanced. Any attempt to do so would be not only an act of breach of faith, it would be constitutionally impermissible and liable to be struck down by the courts. Although the words secular state are not expressly mentioned in the Constitution, there can be no doubt that our Constitution-makers wanted establishment of such a state. The provisions of the Constitution were designed accordingly. There is no mysticism in the secular character of the State. Secularism is neither anti-God, nor pro-God; it treats alike the devout, the agnostic and the atheist. It eliminates God from the matters of the state and ensures that no one shall be discriminated against on the ground of religion. The Constitution at the same time expressly guarantees freedom of conscience and the right freely to profess, practise and propagate religion. The Constitution-makers were conscious of the deep attachment the vast masses of our country had towards religion, the sway it had on their minds and the significant role it played in their

lives. To allay all apprehensions of interference by the legislature and the executive in matters of religion, the rights mentioned in Articles 25 to 30 were made a part of the fundamental rights and religious freedom contained in those Articles was guaranteed by the Constitution."

Thus the real purpose and intendment of Articles 25 and 26 is to guarantee especially to the religious minorities in this country the freedom to profess, practise and propagate their religion, to establish and maintain institutions for religious and charitable purposes, to manage its own affairs in matters of religion, to own and acquire properties and to administer such properties in accordance with law subject only to the limitations and restrictions indicated in those Articles. No doubt, the freedom guaranteed by these two Articles applies not merely to religious minorities but to all persons (Article 25) and all religious denominations or sections thereof (Article 26). But, in interpreting the scope and content of the guarantee contained in the two Articles the court will always have to keep in mind the real purpose underlying the incorporation of these provisions in the fundamental rights chapter. When a challenge is raised before a court against the validity of any statute as contravening the fundamental rights guaranteed under Articles 25 and 26 it is from the above perspective that the court will approach the question and the tests to be applied for adjudging the validity of the statute will be the same irrespective of whether the person or denomination complaining about the infringement of the said fundamental right belongs to a religious minority or not.

37. In adjudging the validity of a statute which is impugned on the ground that it abridges the fundamental rights of the petitioner the object or purpose of the law is irrelevant. It is the effect brought about by the totality of the provisions of the Statute on the concerned fundamental right and its exercise that will have to be examined by the court. The true test is whether the impugned provisions have the effect of taking away or abridging the fundamental rights. As observed by the Supreme Court in Bennett Coleman and Co. Ltd. v. Union of India, AIR 1973 SC 106 at pages 119 and 120, it is the effect of the law upon the right which attracts the jurisdiction of the court to grant relief.

38. It is also well settled that if the denomination had lost its right to administer the religious institution and its properties prior to the Constitution by a valid law they cannot regain that right on the plea that that law contravenes the right guaranteed under Article 26 of the Constitution. If the right to administer the religious institution never vested in the denomination or had been validly surrendered by it or had otherwise been effectively lost to it prior to the Constitution, Article 26 cannot be successfully invoked by the denomination in such a case. Article 26 (c) and (d) do not operate to create rights in any denomination or its section which it never had: they merely safeguard and guarantee the continuance of rights which such denomination or section had. (See Durgah Committee, Ajmer v. Syed Hussain Ali, AIR 1961 SC 1402 at page 1406 and State of Rajasthan v. Sajjanlal Panjawat, AIR 1975 SC 706 at page 715).

39. In the case before us a contention was urged by the learned Advocate appearing for the Ist respondent — The Managing Committee of the Devaswom represented by the Administrator — that the denomination consisting of the general body of worshippers was not having any right in relation to the administration of the Guruvayoor Temple as on the date of the coming into force of the Constitution. We see no force at all in this contention. At the time when the Constitution came into force the management of the Temple was being carried on by the hereditary trustees in accordance with the provisions of the scheme settled by the High Court of Madras in Appeal Nos. 211 and 212 of 1930 as later modified by the District Court of South Malabar in O. S. No. 1 of 1933 and also in conformity with the relevant provisions contained in the Madras Hindu Religious

and Charitable Endowments Act. We have already adverted to the fact that the aforementioned scheme itself came to be framed as a result of proceedings initiated by certain worshippers on whose petition the Madras Hindu Religious Endowments Board started the enquiry which culminated in the framing of the scheme. Further, in the scheme that was finally settled by the Madras High Court, sufficient safeguards were incorporated at the instance of the worshippers to ensure that there would be no maladministration of the Temple and its funds by the trustees and it was even provided that the 'Bhandarams' of the temple should be opened only after previous public notice to the worshippers and only in the presence of the worshippers who cared to be present and that at least two of the worshippers should attest the formal entries relating to the actual receipts in cash and kind obtained from the 'Bhandarams'. The provisions of the Madras Hindu Religious Endowments Act, 1926 which governed the Temple at the time of the commencement of the Constitution fully recognised the rights of the worshippers to intervene for the purposes of preventing mismanagement. Section 9 (9) of that Act defined the expression "person having interest" in the case of a temple as a person who is entitled to attend at the performance of worship or service in the temple and who is in the habit of attending such performance. It was mandatory under the provisions of that Act to give notice to 'persons interested' (worshipping public) and to hear their representations before any action of consequence, such as the framing of a scheme, the sanctioning of alienations of temple properties etc. was taken by the Board in relation to the temple and its properties. (See Sections 57, 67, 76 etc.) Right was also specifically reserved to 'persons interested' to move the court for modifying a scheme already settled in respect of a temple (Section 65) and also to institute suits in the competent court praying for reliefs of the nature mentioned in Section 92, C.P.C. (Section 73). In the case of the Guruvayoor Temple it has already been seen that the worshipping public had been asserting and exercising their rights under the Madras Hindu Religious Endowments Act and the scheme itself was originally framed by the Board on the petition filed by some worshippers. Not being satisfied with the provisions contained in the scheme framed by the Board, certain worshippers, 24 in number, instituted O. S. 2 of 1929 in the District Court of South Malabar to amend the said scheme. A. S. No. 212 of 1930 was an appeal filed in the Madras High Court by the hereditary trustee Zamorin Raja against the decree passed in that suit. It cannot therefore be said on the facts of this case that the denomination had either surrendered or lost its rights in relation to the administration of the Temple and its properties by any process known to law prior to the commencement of the Constitution.

40. We shall now proceed to examine the consequences brought about by the provisions of the impugned Act either severally or cumulatively in relation to the rights of the denomination falling within the scope of Articles 25 and 26 of the Constitution. Section 3 which states that the administration, control and management of the devaswom shall be vested in a Committee called "The Guruvayoor Devaswom Managing Committee" constituted in the manner provided in Section 4 is by itself unobjectionable provided that the Committee constituted under Section 4 can reasonably be regarded as a body representative of the denomination. But, as per sec. 4, the committee is to consist of (a) the two hereditary trustees, namely, the Zamorin Raja and the Karanavan of the Mellisseri Illam (b) three ex-officio members, namely, the Administrator appointed under Section 14, the Chairman of the Guruvayoor Township Committee. in case he is a person professing the Hindu religion, and the Tantri of the Temple (c) a representative of the employees of the Devaswom, nominated by the Government and (d) not more than eleven persons nominated by the Government of whom one shall be a Harijan. Thus, out of

the seventeen members who may constitute the Committee as many as twelve members are persons nominated by the Government and even out of the remaining five persons two are Government officers because it is the District Collector, Trichur who is ex-officio Chairman of the Guruvayoor Township Committee. The section does not provide any guidelines as to how the eleven persons mentioned in clause (g) of sub-section (1) are to be chosen for nomination by the Government. Sub-section (2) merely enumerates the grounds of disqualification for nomination. Under clause (i) of that sub-section a person who does not profess the Hindu religion is disqualified for nomination. In other words, the persons to be nominated must be persons professing the Hindu religion. We find there is considerable force in the contention of the petitioner that a person who 'professes' Hindu religion need not be believer in temple worship and that on the other hand he may be completely opposed to the practice of idol worship. It is well known that there are sections of Hindus whose schools of thought and philosophy do not consider idol worship, rituals and ceremonials as necessary or even conducive to the spiritual progress of men. There are also political creeds or social theories which openly condemn such forms of worship as being based on mere superstition and ignorance. Many persons, who are born Hindus and who may be said to profess Hinduism solely because they have not openly renounced the Hindu faith by any recognised process, may ardently believe in such political or social ideologies which do not view temple worship with favour. There is nothing in Section 4 which precludes the Government from nominating such persons to be members of the Managing Committee under clause (g) of sub-section (1) of Section 4. Quite apart from the serious prejudice and peril that will be caused to the interests of the institution by reason of such a step, it will not be possible to say that such a Committee constituted with members belonging to the aforementioned types of philosophical or political persuasion represents the religious denomination consisting of the Section of the Hindu public having faith in temple worship. We have already referred to the definition of the expression 'person having interest' contained in Section 9 (9) of the Madras Hindu Religious Endowments Act, 1926. The identical definition is also contained in Section 6 (ii) of the Madras Hindu Religious and Charitable Endowments Act, 1951 and it furnishes a useful guideline as to who alone can be considered as a member of the religious denominations in relation to a temple.

41. Though it was contended by the petitioner that the power of nomination of the members of the Managing Committee who will virtually be functioning as the trustees of the Temple should not be vested in the executive Government we are not prepared to go to the extent of holding that the conferment of the power of nomination on the Government is by itself illegal. We may, however, observe that in the light of the recent amendment of the preamble to the Constitution emphasising the secular character of the State it is desirable that the legislature should consider whether the power to nominate the members of the Committee should not be conferred on an independent statutory body other than the State Government with sufficient guidelines furnished to it for ensuring that the nominations will be effected in such a way as to be truly representative of the denomination consisting of the worshipping public.

42. Under Section 4 (1) of the Act the legislature has conferred on the State Government the power of nomination of the members of the Managing Committee without sufficient guidelines, thereby rendering it possible for the Government to completely by-pass the denomination and appoint a Committee consisting largely or even wholly of persons who may not have any faith at all in temple worship. It is also difficult to understand why in respect of the management of a single Temple it has been considered necessary or expedient to constitute such a large

Committee consisting of as many as seventeen members. Under the Travancore-Cochin Hindu Religious Institutions Act the Travancore Devaswom Board and the Cochin Devaswom Board which are entrusted with the task of administering all the temples in the erstwhile Travancore and Cochin territories respectively are to consist only three members each. Even in the draft scheme which was filed on behalf of the Department in O. P. No. 3 of 1965 of the Sub-Court, Trichur the proposal was only for the appointment of a Board consisting of the two hereditary trustees and three non-hereditary trustees. The purpose of ensuring efficient and proper administration of the Devaswom would undoubtedly be better served by a compact committee consisting of persons having faith in the deity and real interest in the affairs of the institution. However that may be, we are of opinion that the provisions of Section 4 (1) of the Act must be held to be bad for the reason that the power of nomination conferred on the Government is naked and arbitrary without any safeguard being provided for ensuring that the Committee will be a body representing the denomination. The right to administer the Temple being vested in the denomination any statutory provision which completely ignores the denomination in the matter of setting up the Committee to administer the religious institution belonging to the denomination will necessarily be violative of Article 26 of the Constitution.

43. Strong reliance was placed by the learned Additional Advocate General appearing on behalf of the respondents on the decisions of the Supreme Court in Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan, AIR 1963 SC 1638. and Raja Bira Kishore Deb v. The State of Orissa, AIR 1964 SC 1501, and it was contended that in both these decisions the Supreme Court has upheld the validity of similar provisions contained in the Rajasthan Nathdwara Temple Act and in the Shri Jagannath Temple Act empowering the concerned State Government to constitute committees of management for the administration of Hindu Temples. In AIR 1964 SC 1501 the challenge was directed against the provisions of the Shri Jagannath Temple Act, 1954 (Orissa Act 11 of 1955) on the ground that they were violative of fundamental rights of Raja of Puri under Articles 14, 19 (1) (f) and 31 of the Constitution. The appeal which came up for decision before the Supreme Court arose out of a writ petition filed by the Raja of Puri in the High Court of Orissa. The case put forward by the petitioner therein was that the Shri Jagannath Temple was his private property and that the impugned Act which deprived him of his property was unconstitutional in view of Article 19 of the Constitution. In the alternative, it was contended that the petitioner had sole right of the superintendence and management of the temple, that the said right could not be taken away without payment of compensation and in as much as the Act took away that right without any compensation it was hit by Article 31 of the Constitution. A further plea put forward by the petitioner was that the right of superintendence was 'property' within the meaning of Article 19 (1) (f) and the impugned provisions of the statute which deprived him of his property constituted unreasonable restrictions which were not saved under Article 19 (5). The Act was further attacked on the ground that it was discriminatory and that therefore hit by Article 14 of the Constitution in as much as the temple had been singled out for special legislation even though there was a general law in force in the State of Orissa with respect to Hindu religious endowments, namely, the Orissa Hindu Religious Endowments Act. Reliance was also vaguely placed by the petitioner on Arts. 25, 26, 27 and 28 of the Constitution to invalidate the Act. The High Court repelled almost all the contentions of the petitioner and held that the Act was valid and constitutional except for the provision contained in Section 28 (2) (f) thereof which was held to be invalid. Against the said decision the Raja of Puri had filed the appeal before the Supreme Court

reiterating his contention that the entire Act was unconstitutional as violating Arts. 14, 19, 25, 26 and 31 of the Constitution. Dealing with the contention put forward by the appellant based on Art. 26 the Supreme Court observed as follows (at p. 1510):—

"In the first place besides saying in the petition that the Act was hit by Art. 26 there was no indication anywhere therein as to which was the denomination which was concerned with the Temple and whose rights to administer the Temple have been taken away. As a matter of fact the petition was filed on the basis that the appellant was the owner of the Temple which was his private property. There was no claim put forward on behalf of any denomination in the petition. Under these circumstances we are of opinion that it is not open to the appellant to argue that the Act is bad as it is hit by Art. 26 (d)."

The High Court had gone into the merits of the contention based on Arts. 25 and 26 and repelled it on the ground that since the temple was meant for all Hindus and the entire Hindu community had therefore to be treated as the denomination for the purpose of Article 26 and since the committee constituted under the Act consisted entirely of Hindus the management still remained with the denomination and hence Arts. 25 and 26 of the Constitution could not be said to have been infringed. The correctness of the said view was canvassed before the Supreme Court but their Lordships observed that in as much as no foundation has been laid in pleadings for any contention based on Art. 26 (d) it was wholly unnecessary for the High Court to consider the said question. The Supreme Court therefore declined to go into the question and observed as follows:—

"In view of the defective state of pleadings however we are not prepared to allow the argument under Art. 26 (d) to be raised before us and must reject it on the sole ground that no such contention was properly raised in the High Court." The question having been thus specifically excluded from consideration by the Supreme Court it is not possible to regard the above decision as an authority holding that the provision contained in the statute impugned therein relating to the constitution of the committee of management did not infringe Article 26 (d) of the Constitution. As already noticed, the writ petition which gave rise to the appeal before the Supreme Court was not a proceeding filed on behalf of the denomination but, on the other hand, it was instituted by the Raja of Puri asserting that the Temple was his private property. There was therefore no scope at all in that case for considering the question whether the fundamental rights of the denomination had been infringed by the provisions contained in the impugned enactment for the constitution of the committee of management. It is also worthy of mention that unlike in Section 4 of the Guruvayoor Devaswom Act, Section 5 of the Shri Jagannath Temple Act contained clear guidelines as to how the members of the managing committee were to be selected for nomination by the State Government from amongst the different categories of the sevaks or worshippers.

44. The decision in Tilkayat Shri Govindlalji Maharaj v. State of Rajasthan, AIR 1963 SC 1638, is also clearly distinguishable. The challenge in that case was against the provisions of the Rajasthan Nathdwara Temple Act, 1959 (Act 13 of 1959). Tilkayat Govindlalji who was the main appellant before the Supreme Court contended that the idol of Shri Shrinathji in the Nathdwara Temple and all the property pertaining to it were his private properties and as such the State Legislature was not competent to pass the Act. In the alternative, it was urged that even if the Nathdwara Temple was to be held to be a public temple and the Tilkayat the Mahant or Shebait in charge of it, as such Mahant or Shebait he had a beneficial interest in the office of the high priest as well as in the properties of the temple and the provisions of the

impugned Act were violative of Art. 19 (1) (f) of the Constitution. In addition, it was contended that even if the temple was held to be a public temple the Act would be invalid because it contravened the fundamental rights guaranteed to the denomination under Arts. 25 (1) and 26 (b) and (c) of the Constitution. The denomination supported the Tilkayat's case that he was the proprietor of the temple who was solely entitled to manage the temple and its properties. The Supreme Court elaborately went into the historical background of the temple and the course of events in relation to the management of its properties which ultimately led to the passing of the Act. Their Lordships found that even if the Tilkayat had originally any absolute rights of management, those rights had been taken away by a Firman issued by the Rana of Udaipur on 31st December, 1934 which laid down that the Shrine of Shrinathji was a public temple, that the Tilkayat Maharaj was merely a custodian, manager and trustee of the property of the Shrine and that the Udaipur Darbar had absolute rights to supervise the administration of the temple and ensure that the property dedicated to the Shrine was only used for the legitimate purposes of the institution. It was further found that under the said Firman the Udaipur Darbar had reserved to itself the right to depose any Tilkayat Maharaj for the time being in office if in its absolute discretion such Maharaj was considered unfit. Their Lordships pointed out that at the relevant time when the Firman was issued, the Maharana of Udaipur was an absolute monarch in whom vested all the legislative, judicial and executive powers of the State and that hence any order issued by such a Ruler had the force of law and it would govern the rights of the parties affected thereby. The rights of the Udaipur Darbar had devolved on the State of Mewar and subsequently on the State of Rajasthan as its successor State. It was against the background of this factual and legal position that obtained in relation to the temple that the Supreme Court proceeded to examine the constitutionality of the impugned provision of that Act. The situation that prevailed in relation to the Shri Nathdwara Temple on the date of coming into force of the Constitution was that the Government of the United State of Rajasthan had the absolute right to supervise the administration of the temple and to determine who should be in charge of its administration and management and no rights were recognised as existing in the denomination in regard to the said matter. Even in the appeal before the Supreme Court the denomination did not put forward any case that it had the right to maintain or administer the temple nor was there any complaint about the infringement of any such right belonging to it. On the other hand, the sole plea put forward by the denomination was that the right of the Tilkayat to manage the temple had been unlawfully taken away by the Act. This is clear from the following observations contained in paragraph 61 of the judgment of the Supreme Court at page 1661:—

"The only right, which according to the denomination, has been contravened is the right of the Tilkayat to manage the property belonging to the temple. It is urged that throughout the history of this temple, its properties have been managed by the Tilkayat and so, such management by the Tilkayat amounts to a religious practice under Art. 25 (1) and constitutes the denomination's right to manage the affairs of its religion under Article 26 (b)."

The Supreme Court rejected that contention pointing out that after the Firman of 1934 the Tilkayat did not have any absolute right of management over the temple and that he was only in the position of a custodian or trustee subject to the supervision and control of the Darbar. On this ground it was further held that the mere right of management of properties possessed by the Raja of Puri was a purely secular matter and it cannot be regarded as a religious practice so as to fall under Art. 25 (1) or as amounting to

affairs in matter of religion within the meaning of Art. 26. Their Lordships accordingly rejected the contention put forward by the denomination that the Act infringed the rights guaranteed to it by Articles 25 (1) and 26 (b) of the Constitution.

45. The factual and legal position occupied by the denomination in relation to the Guruvayoor Temple is entirely different. The denomination has all along been recognised as being the body in whom ultimately rests the right to maintain and administer the Temple and the hereditary trustees have been functioning only as its representatives, their actions being liable to be called in question by the denomination either by proceedings before the statutory authorities constituted under the Madras Hindu Religious Endowments Act or before the civil court by the institution of suits as provided in the said Act.

46. Further, Section 5 of the Nathdwara Temple Act which provided for the constitution of the Nathdwara Temple Board contained guidelines as to how the members of the Board should be nominated by the Government. Referring to this matter the Supreme Court observed as follows in paragraph 64 at page 1662:—

"It is, however, argued that by the constitution of the Board in which the administration of the property now vests is not the denomination, and since the administration is now left to the Board, the denomination has been wholly deprived of its right to administer the property. It is remarkable that this plea should be made by the representatives of the denomination who in their writ petition were prepared to support the Tilkayat in his case that the temple and the properties of the temple were his private property. That apart, we think that the constitution of the Board has been deliberately so prescribed by the legislature as to ensure that the denomination should be adequately and fairly represented on the Board. We have already construed Sec. 5 and we have held that Sec. 5 (2) (g) requires that the members of the Board other than the Collector of Udaipur District should not only profess Hindu Religion but must also belong to the Pushti-Margiya Vallabhi Sampradaya. It is true that these members are nominated by the State Government, but we have not been told how else this could have been effectively arranged in the interests of the temple itself. The number of the devotees visiting the temple runs into lacs, there is no organisation which comprehensively represents the devotees as a class; there is no register of the devotees and in the very nature of things, it is impossible to keep such a register. Therefore, the very large mass of Vallabh's followers who constitute the denomination can be represented on the Board of management only by a proper nomination made by the State Government, and so, we are not impressed by the plea that the management by the Board constituted under the Act will not be the management of the denomination. In this connection, we may refer to Clause (1) of the Firman which vested in the Darbar absolute right to supervise the management of the property. 'As a successor-in-interest of the Darbar, the State of Rajasthan can be trusted to nominate members on the Board who would fairly represent the denomination. Having regard to all relevant circumstances of this case, we do not think that the legislature could have adopted any other alternative for the purpose of constituting the Board. Therefore, we must hold that the challenge to the validity of the Act on the ground that it contravenes Arts. 25 (1), 26 (b) and 26 (d) must be repelled."

The facts of the present case are materially different from those which the Supreme Court had to consider in the Tilkayat's case. In respect of the Nathdwara Temple the State of Rajasthan as the successor-in-interest of the Udaipur Darbar was already vested with absolute rights of supervisions and control over the administration of the institution as on the date of the coming into force of the Constitution and the denomination had no subsisting rights in

regard to the said matter. Secondly, Section 5 of the Nathdwara Temple Act contained sufficient guidelines to ensure that the committee to be constituted thereunder by the State Government would be a body truly representative of the members of the denomination consisting of Hindus belonging to the Pushti-Margiya Vallabhai Sampradaya belonging to all parts of India. Any such guidelines are totally absent in Sections 3 and 4 of the impugned Act. The decision of the Supreme Court in Tilkayat's case (AIR 1963 SC 1638) being therefore clearly distinguishable it is of little assistance to the Advocate-General in the matter of sustaining the constitutionality of Section 4 of the Act now under challenge before us.

47. In view of our conclusion that the provisions contained in Sections 3 and 4 of the Act regarding the constitution and composition of the Managing Committee are violative of Article 26 of the Constitution it is really unnecessary for us to consider the attack levelled by the petitioner against Sec. 5 which deals inter alia with the subject of removal from office of the members of the Committee. It was strongly urged on behalf of the petitioner that even if it is constitutionally permissible to empower the Government to constitute the Committee of management for a religious institution it is not contemplated by Arts. 25 and 26 that the executive Government should retain and exercise active control over the administration of a religious institution. According to the petitioner, once the Committee is constituted by the Government it should thereafter be left to some other competent authority, Tribunal or Court to exercise necessary supervision and control over the functioning of the Committee and there should be no direct or indirect involvement by the Government in regard to the said matter. It is pointed out that the position that obtains under Sec. 5 of the Act is that the members of the Committee are to hold office only during the arbitrary pleasure of the Government since the Government is empowered to remove a member from office if, in its subjective opinion, the presence of such member in the Committee is prejudicial to the interest of the Devaswom. Sub-section (5) also lays down that such an order of removal of a member passed by the Government is final and shall not be liable to be questioned in any court of law. Section 6 of the Act which provides for dissolution and supersession of the Committee is also challenged by the petitioner on identical grounds. Here too, the Government is empowered to supersede the Committee for a period not exceeding six months if, in its opinion, the Committee is not competent to perform or makes default in performing the duties imposed on it by the Act or exceeds or abuses its powers. It is, however, provided by sub-section (2) of Section 6 that before issuing a notification superseding the Committee the Government shall communicate to the Committee the grounds on which they propose to take the action, fix a reasonable time to show cause against the proposal and consider its explanations and objections, if any. No remedy is provided by the Act against the order of supersession passed by the Government. We are of opinion that there is force in the petitioner's contention that the aforementioned provisions contained in Secs. 5 and 6 have the undoubted effect of curbing the independence of the Committee and converting it into a body subservient to the executive Government. The powers of removal and supersession conferred on the Government are naked and absolute in character and the member who is removed or the superseded Committee is left without any remedy since even a suit is barred by Section 29 of the Act. Had it been necessary to consider the constitutionality of these provisions (Sec. 5 (3) and Section 6) we would have been inclined to uphold the petitioner's contention that these provisions offend the principle of secularism that is now firmly enshrined in the preamble to the Constitution as forming a basic feature of our constitutional structure by the recent amendment effected in the pre-

amble by the Constitution (Forty-second Amendment) Act. But, as already pointed out, since we have held Sec. 4 to be invalid it is unnecessary for us to pronounce upon the validity of the impugned provisions contained in Ss. 5 and 6.

48. Then we come to Ss. 11 and 12 which deal with the subject of alienation of Devaswom property and borrowing and lending powers of the Committee. Section 11 states that no movable property of a non-perishable nature which is in the possession of the Committee and the value of which is more than five thousand rupees and no jewellery shall be sold or pledged without the previous approval of the Government. It is further provided by sub-section (2) thereof that no immovable property taken possession of by the Committee shall be mortgaged, sold or otherwise alienated except with the previous sanction of the Government. Under the law governing Hindu religious trusts the properties of the temple, whether moveable or immovable can be alienated only if the proposal to alienate is supported by Devaswom necessity or by manifest benefit to the institution. The complaint of the petitioner against the provision in Section 11 is two-fold. Firstly, it is contended that the Section confers power on the Government to grant previous approval authorising the Committee to alienate the movable or immovable properties of the Devaswom irrespective of the existence of any justifying necessity or benefit. Secondly, the petitioner submits that it is not permissible for the executive Government of a secular State to directly involve itself in matters of routine administration of a religious institution. We have no reason to think that the impugned provision has been enacted by the legislature otherwise than actuated by a genuine desire to ensure that the properties of the Devaswom are not improperly alienated by the Committee. But the provision as actually enacted does suffer from the vice of leaving it to the absolute and unguided discretion of the Government to sanction alienations of movable and immovable properties belonging to the Temple without even insisting on any prerequisite condition regarding the existence of supporting necessity or benefit. This is clearly prejudicial to the interests of the denomination which has the right to mtaintain and preserve the institution and its properties in accordance with the doctrines of law and the usages applicable to institution in relation to the alienation of trust properties. If the properties of the institution are to be alienated without any justifying necessity or benefit the very continued existence of the institution will itself be imperilled and in that sense it has an intimate bearing on the right to maintain the institution conferred on the denomination by Article 26 (a) of the Constitution. More important in relation to the right of the denomination is the circumstance that an order passed by the Government sanctioning an alienation of Devaswom properties is not amenable to any kind of challenge before any forum at the instance of the denomination, even a suit being barred under Section 29 of the Act. We have to uphold the petitioner's contention that the provisions contained in Section 11 in so far as they confer arbitrary power on the Government to sanction alienations of Devaswom properties even in the absence of any justifying necessity or benefit and leave the denomination without any remedy to question the order passed by the Government are violative of Art. 26 (a), (b) and (d) of the Constitution.

49. Section 12 states that the Committee shall have no power to borrow money from or to lend money to any person except with the previous sanction of the Govt. Excepting for the aspect already pointed out by us, namely, that the secular Govt. is not expected to intimately involve itself in the administration of a religious institution we do not see any other objectionable feature in this Section.

50. Then we pass on to Secs. 14 and 15 which may be considered together. Section 14 lays down that

the Government shall appoint an officer not below the rank of Deputy Collector or Deputy Commissioner appointed under the Madras Hindu Religious and Charitable Endowments Act to be the Administrator for the Devaswom. Section 15 states that the Administrator shall be a full-time officer of the Devaswom, that he shall be paid out of the Temple Fund such salary and allowances as the Government may fix and the conditions of the service of the Administrator shall be such as may be prescribed by the Government. When under the scheme of the Act the administration, control and the management of the Devaswom are to vest in the Managing Committee constituted under Section 3 and the underlying assumption is that the Committee represents the denomination which is possessed of the fundamental right to maintain and administer the Temple the power to appoint the Administrator who is to be the Secretary of the Committee and its chief executive officer should ordinarily vest in the Committee. The power to appoint the Administrative officer is a necessary concomitant of the power of administration, control and management which is conferred on the Committee under Section 3. Section 14 in so far as it deprives the Committee of the crucial power to appoint its own Secretary who is also to be the chief executive officer of the Temple and confers such power on the secular Government undoubtedly makes a serious inroad into the fundamental right guaranteed to the denomination under Art. 26 (a), (b) and (d) (for the purposes of this discussion we are assuming that the Committee constituted under S. 3 represents the denomination). It may also be mentioned in this connection that even though Section 17 mentions that the Administrator shall be subject to the control of the Committee, Section 26 (2) (a) empowers the Government to make rules providing for the manner of exercise of control by the Committee over the actions of the Administrator. Rules 3 and 4 of the Guruvayoor Devaswom Rules, 1971 are the relevant rules framed by the Government in this regard. They are in the following terms:—

"3. Power of the Committee over the actions of the Administrator:— It shall be competent for the Committee to call for and examine any papers connected with any action of the Administrator and give such directions to the Administrator, in accordance with the provisions of the Act and these rules, as the Committee may consider necessary.

4. Administrator to carry out the decision of the Committee:— The Administrator shall take steps to implement the decisions of the Committee and in the event of failure without adequate reasons, the Committee may bring the matter to the notice of the Government and the Government shall take such action as it deems necessary against the Administrator."

It is obvious from a mere reading of the above rules that the Committee is left without any effective control over the Administrator and he is answerable only to the Government by whose order he is appointed and who alone is vested with the power to take disciplinary action against him. The Administrator being an officer of the Devaswom it should be left to the Committee to regulate his conditions of service and to exercise effective control over his work and conduct inclusive of full powers to take disciplinary proceedings for any misconduct. In so far as Section 15 (4) violates the above principle it interferes with the denomination's right to administer the Temple under Article 26 and has to be declared invalid.

51. Section 16 provides that when the office of the Aministrator is temporarily vacant it shall be competent for the Government, notwithstanding the provisions of Sections 14 and 15, to appoint an officer of the Government not below the rank of Deputy Collector or Deputy Commissioner appointed under the Madras Hindu Religious and Charitable Endowments Act to be in additional charge of the office of the Administrator, provided that the period of such additional charge shall not ex-

ceed one month. By reason of the non obstante clause contained in this Section which excludes the applicability of even the qualification mentioned in Section 14 that the person to be appointed as Administrator of the Devaswom should profess the Hindu religion, it is rendered possible for the Government to place a non-Hindu officer in additional charge of the office of the Administrator temporarily for a period not exceeding one month. When we look into the provisions of Section 17 wherein the powers and duties of the Administrator are enumerated it will be seen that he is the chief executive officer of the Devaswom who is charged inter alia with the duties to arrange for the proper performance of the rites and ceremonies in the Temple, to provide facilities for the proper performance of the worship by the worshippers, to ensure the safe custody of all funds and properties including jewelleries and to arrange for the proper collection of offerings made in the Temple. His functions cannot be said to be merely secular in as much as he is to arrange for the performance of the rites and ceremonies in the Temple in accordance with the custom and usage obtaining in the Temple as per the directions of the Committee. We feel no doubt that Section 16 in so far as it empowers the Government to appoint a non-Hindu to be in additional charge of the functions of the Administrator of the Temple constitutes a clear violation of the rights of the denomination under Arts. 25 and 26 (a) and 26 (b) of the Constitution.

52. Sections 17 to 19 are relevant only to show that even though a Committee is constituted under Section 3 in whom the administration and control of the Devaswom is purported to be vested, it is really the Administrator appointed and controlled by the Government who wields and exercises all the powers of administration. Sub-s. (2) of Section 17 says that notwithstanding the provisions of Section 3 (1) vesting the administration and management of the Devaswom in the Committee the Administrator shall be responsible for the custody of all records and properties of the Devaswom. By sub-section (4) he is vested with the power to grant licences in respect of Temple lands and leases of Temple buildings for periods not exceeding one year and to call for and accept tenders for works or supplies the value whereof does not exceed five thousand rupees. He is also empowered to order for any emergency repairs the cost of which does not exceed five thousand rupees. Further Sec. 18 states that the Administrator may in cases of emergency direct the execution of any work or the doing of any act which is not provided for in the budget and the immediate execution or the doing of which is in his opinion necessary for the preservation of the properties or safety of worshippers or for the due performance of the rites and ceremonies in the Temple irrespective of the amount of cost that such work may involve. The only duty that is cast on the Administrator is to make a report to the Committee about the action so taken by him with the reasons therefor. We have already referred to the fact that under the rules promulgated by the Government the Committee is not vested with any effective control over the Administrator and he is virtually to function only under the control of the Government. The conferment of "extraordinary powers" on the Administrator under Section 18 without making him fully answerable to the Committee constitutes, in our opinion, an infringement of the right of the denomination to manage and administer the institution and its properties under Art. 26 Cls. (b) and (d).

53. No objection can be taken to the provisions of Section 19 in so far as they provide for the preparation of the establishment schedule by the Administrator and its submission to the Committee and later to the Commissioner for the latter's approval. But, sub-sec. (6) of that Section which states that the creation of any new appointment carrying a salary of not less than Rs. 200/- per mensem shall be subject to the previous sanction of the Government suffers from the in-

firmity already referred to by us, namely, the direct involvement of the Government in the routine administration of a religious institution which is inconsistent with the secular character of the State.

54. Very strong objection was taken by the petitioner to the provisions of Section 20 which deal with subject of appointment of officers and employees of the Temple. Sub-section (1) of the Section lays down that appointments of all officers and employees of the Temple are to be made by a Board consisting of (a) the Commissioner, Hindu Religious and Charitable Endowments Department (b) the Administrator (c) an officer professing the Hindu religion authorised in that behalf by the District Collector and (d) two persons elected by the Managing Committee from among its members. Sub-section (2) provides that in exercising the power of appointment conferred by subsection (1) the Board shall follow such procedure as may be prescribed by the Government. It will be seen that the constitution of the Board is such that three out of its five members are full-time officers of the State Government and the remaining two members are to be elected by the Managing Committee. When under the scheme of the Act the administration, control and management of the Devaswom is to vest in the Managing Committee constituted under S. 3 which, we may assume for the purpose of this discussion, is intended to function as a representative of the denomination, it passes one's comprehension as to why the power to appoint the officers and employees of the Temple which is basically an essential component of the right of administration and management of the Temple should be taken out of the hands of the Managing Committee and vested in a totally distinct and independent body, namely, the Board over whose functioning the Managing Committee has absolutely no control. In this connection it was rightly stressed by the petitioner that the employees of the Temple referred to in Section 20 will include also the Melsanthi (the Head Priest) and his assistants who are in charge of the performance of the daily rituals and ceremonies inside the sanctum sanctorum. The choice of the Melsanthi and other employees who are to be in charge of the performance of the rituals and ceremonies will necessarily have to be made on the basis of considerations having an intimate bearing on the religious practice, usage and tradition obtaining in respect of the Temple. Hence there is force in the contention of the petitioner that it will be highly detrimental to the interests of the institution and the denomination to which it belongs to entrust the power of appointment of such employees in the Temple to the Board comprised mainly of officers of the secular Government. Further, the right to make appointments of the officers and employees of the Temple being an important ingredient of the right of administration and management, it should vest in the body which represents the denomination and not in any other agency. The Board constituted under Section 20 cannot by any stretch of imagination be regarded as a representative of the denomination. In fact, even according to the respondents, it is only the Managing Committee constituted under Section 3 which is to be regarded as the representative of the denomination. In so far as Section 20 confers the power of appointment of officers and employees of the Temple not on the Managing Committee but on a separate and independent body, namely, the Board, it must be held that the Section is violative of Article 26 (a), (b) and (d) of the Constitution.

55. While dealing with this subject of control and involvement by Government we may also refer to the provisions of Section 21 which provides that the budget is to be prepared annually for the Devaswom by the Administrator and after its approval by the Committee it is to be submitted to the Government and it is to become operative only on its being sanctioned by the Government. Power is given to the Government to modify any part of the budget so as to satisfy itself that adequate provision has been made for the maintenance of the prescribed working balance and for meeting the liabilities of the Devaswom. It is further provided by Section 22 that if, in the course of any year, the Committee considers it necessary to modify the figures shown in the budget with regard to its receipts or expenditure a supplementary budget should be submitted by it to the Government through the Commissioner. To crown everything there is

a revisional power conferred on the Government under S. 25 in the widest possible terms. Under that Section the Government is empowered to call for and examine the records of the Administrator or the Committee or the Commissioner to satisfy themselves as to the regularity, correctness, legality or propriety of any decision taken or order passed by those authorities and to pass such orders as the Government considers fit in supersession of the action taken by the Administrator or the Committee etc. In short, the scheme of the Act as emerging from a combined reading of its provisions is as follows: — Though the administration, control and management of the Devaswom is purported to be vested in the Committee constituted under Section 3 that Committee is to consist overwhelmingly of members nominated by the Government who are to hold office at the arbitrary pleasure of the Government with a Damocleus sword of threat of removal or supersession constantly hanging above their heads. The real powers of administration including even the right to be in custody of all records and properties of the Devaswom are vested in an Administrator who is to be a Government officer of the rank of a Deputy Collector or Deputy Commissioner (Hindu Religious and Charitable Endowments. The power of appointment of the Administrator is vested in the Government as also the power to take disciplinary action against him. Though he is to function as the Secretary of the Committee the Committee is left without any effective control over his work or conduct and the Administrator is really answerable only to the Government. Even the power to appoint the other officers and servants of the Devaswom is not given to the Committee but is conferred on a separate body, namely, the Board appointed by the Government under Section 20. The power to sanction alienations of moveable or immovable properties of the Devaswom is vested in the Government. If the Committee is to lend money to any person or to borrow money on behalf of the Devaswom and it should obtain previous sanction of the Government. The Committee is only to submit to the Government a report on the Administration of the affairs of the Devaswom (Section 13). The annual budget is to be submitted to the Government and it becomes operative only when sanctioned by the Government, power being reserved with the Government to make modifications in the budget proposals. Section 24 (3) (e) to which we shall be presently referring, empowers the Government to authorise the execution of any work or undertaking for the purpose of the Devaswom by expending the temple funds and clause (f) thereof confers a further power on the Government to sanction the diversion of Temple funds for any of the purposes enumerated therein, some of which are totally unconnected with the Temple and its affairs. Any action or decision taken or order passed by the Administrator or the Committee irrespective of whether it relates to the performance and conduct of the rites and ceremonies inside the Temple or the management of the properties, is liable to be scrutinised and revised by the Government in the exercise of the power conferred by Section 25, thereby making it possible for the Government to interfere even with the day-to-day administration of the Temple in relation to both its religious as well as secular matters. The orders passed by the Government are expressly declared by Section 29 to be immune from challenge before any court of law, thereby leaving the denomination completely powerless to question before any forum the action taken by the Government. The resultant position is that even though the Act has by Section 3 provided for the constitution of a Managing Committee it is the executive Government that is vested under the Act with the effective control and superintendence of even the day-to-day administration of all the religious and temporal affairs of the Temple. As already indicated by us, such active involvement by Government in the administration of a religious institution is not consistent with the secular character of the State. The State can undoubtedly make laws to regulate the administration of the trust properties and other secular activities connected with a religious institution. Such laws may provide necessary safeguards to ensure that the properties are administered by the denomination in accordance with the law; but the actual administration must be left to the denomination itself and cannot be taken over by the State either directly or even indirectly. In so far as the aforementioned provisions of the Act virtually vest the administration and control over the institution and its funds in the State Government we must hold that these provisions offend the religious freedom guaranteed to the denomination

under Article 26 (a), (b) and (d) of the Constitution.

56. Next we come to the attack levelled by the petitioner against Section 24 which states that there shall be constituted a fund called "Sree Guruvayoor Temple Fund" and that it should be vested in and administered by the Committee. Among other things that fund is to consist of the income derived from the movable and immovable properties of the Devaswom and all gifts or contributions made by the worshipping public other than the contributions collected by the Renovation Executive Committee referred to in Section 32. Both under the law relating to Hindu religious trusts and also under the custom, usage and tradition governing the institution, the properties of the Guruvayoor Temple and the income derived therefrom are vested in the Deity. The effect of the impugned Section is to divest the idol or Deity of its proprietary right over the income and to transfer it to the Committee constituted under Section 3. Under the guise of providing for better administration of the trust it is not permissible for the legislature to divest the Deity of its proprietary interest in the trust properties and transfer it to another body. The movable properties of the Temple include also the jewels used for adorning the Deity as well as the vessels and other paraphernalia that are intimately connected with the performance of the religious rites in the Temple. The transference of the proprietorship over the movable and immovable properties from the Deity to the Committee constitutes a serious interference with the religious practice of the denomination and also with its right to manage its own affairs in matter of religion and to administer its property in accordance with law. We have no hesitation to strike down subsection (1) of Section 24 which purports to vest the Guruvayoor Devaswom Fund in the Committee as unconstitutional and void.

57. Strong objection was taken by the petitioner to the provisions of clause (f) of sub-section (3) of the Section (Section 24) which states that the Committee may with the previous sanction of the Government utilise the Devaswom Fund for any of the following purposes:—

"(i) for the establishment and maintenance of, or the making of any grant by contribution to, any poor home or other similar institution;

(ii) for the establishment and maintenance of any educational institution or the maintenance of any educational institution owned or managed by the Devaswom or in which the Devaswom has interest;

(iii) for the making of any contribution to any religious institution; and

(iv) for the making of any contribution to any fund instituted by the Government for the amelioration of the poor or for National Defence."

There is force in the objection raised by the petitioner that the Section empowers the Committee to make such diversion of Devaswom funds even without the prerequisite condition that a diversion is to be effected only in the event of there being a surplus left after meeting all the purposes of the trust.

58. The next ground of objection raised by the petitioner is even more formidable and it is that none of the purposes mentioned in clauses (i) to (iv) can be said to be connected with the Devaswom or related to the purposes for which the trust was founded. In Ratilal Panachand Gandhi v. State of Bombay A. I. R. 1954 S. C. 388, the validity of Sections 55 and 56 of the Bombay Public Trusts Act, 1950 (29 of 1950) which inter alia empowered the Charity Commissioner and the court to divert the trust funds for purposes which the Charity Commissioner or the court considers expedient or proper came up for consideration before the Supreme Court. Dealing with the said question their Lordships observed in paragraph 19 at page 394:

"The provisions of sections 55 and 56, however, have extended the doctrine much beyond its recognised limits and have further introduced certain principles which run counter to well-established rules of law regarding the administration of charitable trusts. When the particular purpose for which a charitable trust is created fails or by reason of certain circumstances the trust cannot be carried into effect either in whole or in part, or where there is a surplus left after exhausting the purposes specified by the settlor, the court would not, when there is a general charitable intention expressed by the settlor, allow the trust to fail but would execute it 'cy pres', that is to say, in some way as nearly as possible to that which the author of the trust intended. In such cases, it cannot be disputed that the court can frame a scheme and give suitable directions re-

garding the objects upon which the trust money can be spent.

It is well established, however, that where the donors' intention can be given effect to, the court has no authority to sanction any deviation from the intentions expressed by the settlor on the grounds of expediency and the court cannot exercise the power of applying the trust property or its income to other purposes simply because it considers them to be more expedient or more beneficial than what the settlor had directed. — Vide Halsbury, 2nd Edn. Vol. IV, p. 228. But this is exactly what has been done by the provision of S. 55 (c) read with S. 56 of the Act. These provisions allow a diversion of property belonging to a public trust or the income thereof to objects other than those intended by the donors if the Charity Commissioner is of opinion, and the court confirms its opinion and decides, that carrying out wholly or partially the original intentions of the author of the trust or the object for which the trust was created is not wholly or partially expedient, practicable, desirable or necessary; and that the property or income of the public trust or any portion thereof should be applied to any other charitable or religious object.

Whether a provision like this is reasonable or not is not pertinent to our enquiry and we may assume that the legislature, which is competent to legislate on the subject of charitable and religious trust, is at liberty to make any provision which may not be in consonance with the existing law; but the question before us is, whether such provision invades any fundamental right guaranteed by our Constitution, and we have no hesitation in holding that it does so in the case of religious trusts. A religious sect or denomination has the undoubted right guaranteed by the Constitution to manage its own affairs in matter of religion and this includes the right to spend the trust property or its income for the religious purpose and objects indicated by the founder of the trust or established by usage obtaining in a particular institution. To divert the trust property or funds for purposes which the Charity Commissioner or the court considers expedient or proper, although the original objects of the founder can still be carried out of their religious affairs. It is perfectly true, as has been stated by the learned counsel for the appellants, that it is an established maxim of the Jain religion that 'Devadravya' or religious property cannot be diverted to purposes other than those which are considered sacred in the Jain scriptures.

But apart from the tenets of the Jain religion, we consider it to be a violation of the freedom of religion and of the right which a religious denomination has under our Constitution to manage its own affairs in matters of religion, to allow any secular authority to divert the trust money for purposes other than those for which the trust was created. The State can step in only when the trust fails or is incapable of being carried out either in whole or in part. We hold, therefore, that Cl. (3) of S. 55, which contains the offending provision and the corresponding provision relating to the powers of the court occurring in the latter part of S. 56 (1), must be held to be void."

To the same effect are the following observations of Rajagopala Ayyangar, J. in Sardar Syedna Taher Saifuddin Saheb v. State of Bombay, A. I. R. 1962 S. C. 853 at page 873:—

"Article 26 confers on every religious denomination two rights which are relevant in the present context, by cl. (b) — 'to manage its own affairs in matters of religion' — and by the last clause — cl. (d) —, 'to administer such property' which the denomination owns or has acquired (vide cl. (c)) 'in accordance with law'. In considering the scope of Art. 26 one has to bear in mind two basic postulates; First that a religious denomination is possessed of property which is dedicated for definite uses and which under Art. 26 (d) the religious denomination has the right to administer. From this it would follow that subject to any law grounded on public order, morality or health the limitations with which Art. 26 opens, the denomination has a right to have the property used for the purposes for which it was dedicated. So far as the present case is concerned, the management of the property and the right and the duty to ensure the proper application of that property is admittedly vested in the Dai as the religious head of the denomination. Article 26 (d) speaks

a valid law could be enacted which would permit the diversion of those funds to purposes which the legislature in its wisdom thought it fit to appropriate. I feel wholly unable to accept this argument."

In the light of the aforesaid pronouncements it has to be held that the provision contained in Section 24 (3) (f) empowering a secular authority, namely, the State Government to sanction the diversion of Devaswom funds for purposes unconnected with the Devaswom and its affairs is unconstitutional and void.

59. The next Section to be noticed is Section 29 which bars suits, prosecution or other legal proceedings against the Government, the Commissioner, the Committee or any members thereof or the Administrator in respect of anything which is in good faith done or intended to be done under the Act or the Rules made thereunder. In as much as the remedy under Section 92 of the Code of Civil Procedure is made unavailable to the members of the denomination by reason of Section 5 (3) (e) of the Madras Hindu Religious and Charitable Endowments Act the applicability of which to the Guruvayoor Devaswom is kept in force by Section 35 of the Act, the effect of this Section (Section 29) is to completely deprive the denomination of any right to approach the civil court for questioning the acts of the Administrator, the Committee or the Government and for safeguarding the interests of the Temple against mismanagement. In fact this provision drives the last nail on the coffin so far as the denomination is concerned and it imposes a total restraint on the denomination from discharging its legitimate role in protecting the interests of the religious institution in respect of the maintenance and administration of which it has a guaranteed fundamental right. We do not find it possible to uphold the constitutional validity of Section 29 in the setting in which the said Section occurs in this Act.

60. Lastly, we come to Section 32 which provides for the constitution of the Renovation Executive Committee. The said committee is to consist of such number of members not exceeding thirty as may be appointed by the Government and the Minister of the State of Kerala in charge of Devaswom is to be the President of the committee. The Government is empowered to nominate one of the members of the committee to be its Vice-President and Working Chairman. The Section does not prescribe any qualifications as such for membership of the committee. But sub-section (1F) enumerates certain disqualifications for membership, namely, (a) not professing the Hindu religion (b) being engaged in any subsisting contract with the Devaswom of the committee or (c) being subject to any of the disqualifications mentioned in clauses (a) to (c) of Section 5 (3) to which reference has already been made. The members of the committee are to hold office for a period of three years. As in the case of the members of the Managing Committee, the Government is empowered to remove from office any member of the Renovation Executive Committee for the reason inter alia that his presence in the committee is, in the opinion of the Government, prejudicial to the interests of the Devaswom or detrimental to the object for which the Committee is constituted. This Committee is to exercise such powers and discharge such functions in connection with the renovation and improvement of the Temple as may be specified by the Government. The Committee is empowered to receive contributions from the public for the specific purpose of renovation and improvement of the Temple. All such contributions are to go into a fund called the "Sree Guruvayoor Renovation Fund" and it is to be administered by the Renovation Executive Committee subject to such directions as the Government may from time to time issue. The fund is to be utilised for the renovation and improvement of the Temple and for incidental purposes including the manitenance of necessary establishments and any unspent amount of the fund is to be transferred to the Temple Fund. It is to be noted that the Renovation Executive Committee is a body wholly independent of the Managing Committee constituted under S. 3 and it is not in any manner answerable or accountable to the Managing Committee. The responsibility to carry out necessary works of renovation and improvement of the Temple is essentially an integral part of the function of administration and management of the Temple. Under S. 3 the administration and management of the Temple is statutorily vested in the Guruvayoor Devaswom Managing Committee on the assumption that it is a body representative of the denomination. It is difficult to see how it is legally permissible to divest that body of the

important function of deciding what works of renovation and improvement have to be carried out in the Temple and getting the same executed. To invest that function in an independent Committee and to empower that Committee to collect contributions from the public in the name of the Temple and to expend those amounts in the guise of administering a special fund is certainly highly objectionable. All amounts contributed by the devotees and the general public for the purpose of renovation and improvement of the Temple automatically become part of the trust fund belonging to the Devaswom and it is only the body legally charged with the duty of administering the trust that can deal with the said funds. To permit any other agency which can in no way be regarded as the duly constituted representative of the denomination, to collect funds in the name of the Devaswom and to administer such fund in accordance with such direction as may be issued by the secular Government is totally opposed to all fundamental principles of law governing the administration of religious trusts. We have no hesitation to hold that, S. 32 interferes with the freedom of the denomination to practice its religion and to maintain the religious institution and administer its properties in accordance with law and is hence violative of Arts. 25 and 26 (a), (b) and (d) of the Constitution. For the reasons already indicated by us it is also not permissible for the Government to involve itself directly in the matter of renovation and reconstruction of a religious institution like the Temple by providing that a Minister of the State Government shall be the President of the Renovation Executive Committee. This is another defect fatal to the validity of the Section.

61. What remains is only to consider the contentions urged by the petitioner based on Art. 14 of the Constitution. Firstly, it was argued that in singling out the Guruvayoor Devaswom for special treatment without including in the scope of the Act many other important temples in respect of which also there is need for ensuring proper administration, there has been an arbitrary discrimination resulting in violation of Art. 14. We see no merit in this contention. The Sree Krishna Temple at Guruvayoor is unique in many respects. If the legislature considered that there was necessity to make special provisions for ensuring the proper administration of this Temple which attracts lakhs of devotees from all parts of the country it was perfectly open for it to enact a special legislation for regulating the administration of the affairs of this institution alone. The uniqueness of the institution affords sufficient basis and justification for a classification. Article 14 cannot therefore be said to be violated merely on account of the fact that the legislation is in respect of the Guruvayoor Devaswom alone. It was however further contended by the petitioner that even if there is justification for a classification of the Temple for purposes of enacting a special legislation for regulating its administration, the provisions of the impugned Act are such that their underlying purpose has no reasonable nexus with the basis of the classification. Elaborate arguments were addressed before us with respect to the different provisions of the Act which have the effect of completely depriving the denomination of its rights in relation to the administration of the Temple and its properties, of vesting in the Managing Committee 'the Temple Fund' which really forms the property of the Deity and of authorising the Managing Committee, with the sanction of the Government, to divert the temple funds for secular purposes unconnected with the Temple even in the absence of any surplus etc., the contention being that there is no rational nexus whatever between the ground of classification referred to above and the purpose underlying these impugned provisions. We feel that there is prima facie force in this ground of attack raised by the petitioner based on Art. 14 of the Constitution. But, since the arguments urged in support of this contention substantially overlap those which have been already considered by us in detail while dealing with the challenge raised by the petitioner against the same provisions of the Act on the ground of violation of Arts. 25 and 26 of the Constitution, and especially in view of the conclusion recorded by us that these provisions are liable to be struck down as violative of Arts. 25 and 26, we do not think it necessary to pronounce upon the merits of this plea based on Art. 14 of the Constitution.

62. To sum up, we hold that for the reasons mentioned in the foregoing paragraphs Ss. 3, 4, 11, 12, 14 to 18, sub-sec. (6) of S. 19, S. 20, S. 21, S. 24 (1), (2) and cl. (f) of sub-s. (3), S. 29 and S. 32 are unconstitutional and void. Since the operative provisions of the Act are

mainly contained in the aforementioned provisions which we have held to be invalid and since it is not possible to effectuate the object, purpose and scheme of the Act with the aid of the remaining provisions alone the result is that the entire statute is rendered ineffective and void.

63. In the light of our conclusion that S. 24 (3) (f) is invalid and unconstitutional it must automatically follow that the impugned resolution Ext. P-1 passed by the Managing Committee is illegal and void. Ext. P-1 will therefore stand quashed.

64. Before parting with the case we wish to place on record our grateful appreciation of the very valuable assistance that we have derived from the exhaustive and learned arguments advanced before us by the counsel appearing on both sides.

65. The original petition is allowed to the extent indicated above. We direct the parties to bear their respective costs.

A carbon copy of this judgment will be furnished to the learned Additional Advocate-General free of charge forthwith. Like copies will be furnished to the other counsel appearing in the case on payment of the requisite charges.

VISWANATHA IYER, J.: — 66. I am a party to the decision in Kunhettan Thampuran v. State of Kerala, (1973) Ker LT 106 : (AIR 1973 Ker 106) (FB). In that case though many sections of the Guruvayoor Devaswom Act, 1971 were challenged, it was expressly made clear by the counsel appearing for the petitioners that the attack is confined to Cls. (a), (b) and (g) of S. 10 and cl. (b) of S. 27 (2) of the Act and in the first paragraph of the judgment pronounced by Raghavan, C. J. (for himself and on my behalf) this fact is specifically referred to. In the light of that submission limiting the attack to certain Sections only, the validity of the other provisions of the Act were not considered in that case. Gopalan Nambiyar, J. (as he then was) agreed with that judgment. In the present petition which is being considered by a larger Bench the entire Act 6 of 1971 as amended by the Guruvayoor Devaswom (Amendment) Act 28 of 1972 is challenged and a fuller and detailed examination of the provisions of the Act as amended shows that the administration of the Guruvayoor Devaswom and properties is completely taken out of the Hindu denomination and hence the Act violates Art. 26 of the Constitution. I agree with the leading judgment delivered by V. Balakrishna Eradi, J.

ORDER OF FULL BENCH

67. Since it will not be in the public interest to create a hiatus in the matter of the administration of the Devaswom even for any short period, we consider it appropriate in the interests of justice to direct that the operation of this judgment will stand stayed for a period of two weeks from to-day in order to allow reasonable time to the State to take such steps as it may deem fit in the light of this pronouncement by this Court.

Order accordingly.

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FULL BENCH

V. P. GOPALAN NAMBIYAR, C. J., P. SUBRAMONIAN POTI AND KUMARI P. JANAKI AMMA, JJ.

State of Kerala, Appellant v. K. V. Haridas and others, Respondents.

Writ Appeal No. 370 of 1975, decided in Feb. 1978.

Kerala Public Services Act (19 of 1968), Ss. 2 (1) and 3 — Special Rules for Kerala Revenue Service issued in Notification D/- 25-5-1974 — Retrospective operation of — Only from 17-9-1968 and not from 25-9-1962 or from 23-6-1965.

Kerala Government issued Special Rules for Kerala Revenue Service in Notification D/- 25-5-1974 in exercise of its powers under S. 2 (1) read with S. 3. These Rules which were issued in supersession of rules issued in Notification No. G. O. (P) 481, D/- 23-6-1965 provided that they shall be deemed to have come into force on 25-9-1962. The Act came into force on 17-9-1968. The State contended that the Rules had retrospective operation from 25-9-1962. The Single Judge of the High Court held that they were retrospective from 23-6-1965. The petitioners who were holding the posts of Tahsildars continuously from 25-6-1966 appealed against decision of Single Judge.

Held, that the Legislative power cannot be fettered except by express words of the Constitution and that retrospectivity is ancillary or subsidiary to the legislative power are propositions well settled. Rules under an enactment could

be made from time to time and in respect of such rules if they are to be operative from earlier dates the power of retrospectivity has to be conferred. Prior to the commencement of the Kerala Public Services Act the conditions of services of persons appointed to public service and posts in connection with the affairs of the State of Kerala were regulated by rules made by the Governor under the Proviso to Art. 309 of the Constitution. These rules were deemed under S. 3 of the Act to have been made under the Act by projecting the Act back to the dates on which such rules were made. Consequence would be that even though the rules were made by the Governor in exercise of the power under the Proviso to Art. 309 of the Constitution, by reason of S. 3 those rules are deemed to be made under the Kerala Public Services Act. Though the Act actually commenced its operation only on 17-9-1968 the Act is deemed to have been in existence on earlier dates, dates on which the rules under Art. 309 of the Constitution came into force and thereby such rules get validity from the Kerala Public Services Act. If this be the scheme, without anything more, the retrospectivity for rule making contemplated in S. 2 cannot be extended to a period when the Act had not commenced operation. Retrospectivity conceived in S. 2 (1) of the Act is on its plain language, retrospectivity enabling operation from the date of commencement of the Act and not from a date prior to its commencement. On a construction of S. 2 (1) of the Act the authority conferred on the Government under that Sub-Section is to make rules prospectively as also retrospectively but such retrospectivity does not extend to any period prior to the commencement of the Act. (Para 7)

The Rules in Notification D/- 25-5-1974 do not purport to amend the rules of 1965 made under Art. 309. They purport to be in supersession of the rules of 1965. The rules which so superseded the existing rules are therefore those made under S. 2 (1) of the Kerala Public Services Act. They retrospectively operate from the date of the commencement of the Act, namely 17-9-1968. As the contention of the State that the rules where retrospective from 25-9-1962 was rejected and as the view expressed by Single Judge that they were valid from 23-6-1965 was not challenged, the appeal was dismissed.

Per Gopalan Nambiyar, C. J. concurring: — As a rule cannot survive the death of the Act (except in respect of actions taken under it, rights or privileges accrued under it etc.), it cannot perhaps project back prior to its birth. Rules issued in Notification D/- 25-5-1974 purport to be fresh rules under S. 2 (1) of the Act. In that view the rules should have validity only from 17-9-1968. (Para 10)

Cases Referred: Chronological Paras
AIR 1970 SC 385 7

Advocate-General, for Appellant; Easwaran and Moni, for Respondents.

P. SUBRAMONIAN POTI, J. (on behalf of Full Bench): — This is an appeal against the judgment of our learned brother Bhaskaran, J. holding that Ext. P-2 notification issued by the Government of Kerala in exercise of the powers conferred by sub-s. (1) of S. 2 of the Kerala Public Services Act, 1968 had retrospective operation only from 23-6-1965 though the notification purported to be retrospective from 25-9-1962. The appeal is by the State of Kerala and the Board of Revenue of the State who were the respondents in the original petition.

2. Government, by Ext. P-2 order dated 25-5-1974 issued special rules for the Kerala Revenue Service. This was in exercise of the powers conferred by sub-s. (1) of S. 2 of the Kerala Public Services Act read with S. 3 thereof. Kerala Revenue Service consists of Tahsildars in the Revenue Department. The rules which were issued in supersession of the rules issued in Notification No. G.O.(P) 481 dated 23-6-1965 provided that the rules shall be deemed to have come into force on the 25th Sept., 1962.

3. The petitioners who were Tahsildars were promoted to that post on 14-6-1962 and 21-5-1962 respectively. They were reverted later, but they were continuously holding that post from 25-6-1966 and 1-4-1965 respectively. They seek to quash a provisional seniority list prepared by the Board of Revenue said to be without advertence to R. 27 of the Kerala State and Subordinate Services Rules. They also seek the issue of a writ of mandamus directing the respondents not to post officers to the post of Deputy Collectors without reference to the seniority of the petitioners considered on the basis of their date of first appointment to the post of Tahsildars on 14-6-1962 and 21-5-1962 respectively. They

also seek to quash Ext. P-2 special rules to the extent they purport to be retrospective from 25-9-1962. Under Government Order dated 23-6-1965 the State of Kerala was treated as in 3 Zones and the recruitment by transfer and promotions were treated on a Zonal basis. Under Ext. P-2 this was altered and that order contemplated the preparation of a combined seniority list of Tahsildars treating the State as one unit for that purpose with retrospective effect from 25-9-1962. In that event the fact that petitioners had been appointed even in 1962 as Tahsildars may not give them the benefit of seniority which they seek. They apprehend that in the matter of selection of candidates for promotion to the cadre of Deputy Collectors they would not get due consideration since their dates of first appointment to the cadre of Tahsildars cannot be taken into account in view of the State being treated as one unit retrospectively from 25-9-1962. They have succeeded in their plea since the learned Single Judge has found that the rules would be retrospective only from 23-6-1965 prior to which date they had been appointed as Tahsildars.

4. The Kerala Public Services Act, 1968 came into force on 17-9-1968. It was enacted to provide for rules of recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the State of Kerala. It is a short enactment of three sections. Section 2 thereof empowered the Government to make rules to regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the State of Kerala and also laid down the procedure concerning the framing of the rules. Section 3 validated rules made under the Proviso to Art. 309 of the Constitution of India before the commencement of the Act. Sections 2 and 3 of the Act read as follows:

"2. Regulation of recruitment and conditions of service —

(1) The Government may make rules (either prospectively or retrospectively) to regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the State of Kerala.

(2) Every rule made under this section shall be laid as soon as may be after it is made before the Legislative Assembly while it is in session for a total period of 14 days which may be comprised in one session or in two successive sessions, and if before the expiry of the session in which it is so laid or the session immediately following, the Legislative Assembly agrees that the rule should be either modified or annulled, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

3. Continuance of existing rules.— All rules made under the Proviso to Art. 309 of the Constitution of India, regulating the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the State of Kerala and in force immediately before the commencement of this Act, shall be deemed to have been made under this Act as if this Act had been in force on the date on which such rules were made and shall continue to be in force unless and until they are superseded by any rules made under this Act."

The words "either prospectively or retrospectively" were inserted in S. 2 of the Act by amendment Act 5 of 1970.

5. Section 2 evidently enables rules to be made by the Government with prospective or retrospective operation. Section 3 is intended to serve another purpose. Prior to the commencement of the Kerala Public Services Act the conditions of service of civil servants were governed by rules made by the Governor under Art. 309 of the Constitution of India. Section 3 provided that such rules as were in force immediately before the commencement of the Kerala Public Services Act were to be deemed as made under the Public Services Act. The Kerala Public Services Act was not in operation on the dates of coming into force of such rules but S. 3 provided that the deeming provision would operate as if the Act was in force on the date on which such rules were made. Such rules were to be in force unless and until they were superseded by the rules made under the Kerala Public Services Act. Ext. P-2 purported to be rules made in supersession of the rules issued in G. O. P. 481 dated 23-6-1965. Rule 1 of the rules provided that the rules shall be deemed to have come into force on the 25th Sept., 1962. The case of the petitioners is that in so far as the rules in Ext. P-2 purport to be substitute for

the rules which they sought to supersede the rules cannot be retrospective beyond 23-6-1965, the date on which such superseded rules had come into force. It was said that the power to frame rules retrospectively conferred by S. 2 (1) of the Kerala Public Services Act cannot enable the framing of rules so as to operate retrospectively beyond the date on which the corresponding rules under S. 3 had come into force. Evidently this plea appealed to the learned Single Judge.

6. Two questions that arise for decision in this case are (1) Has the legislature power to confer on the Government authority to make rules with retrospectivity extending to a period when the Act itself was not in operation? (2) Assuming the answer is yes whether S. 2 (1) of the Kerala Public Services Act confers power to make rules to operate prior to the commencement of the said Act.

7. That the legislative power cannot be fettered except by express words of the Constitution and that retrospectivity is ancillary or subsidiary to the legislative power are propositions well settled. Hence we need not particularly refer to the decisions on the question cited by the learned Advocate-General. Rules under an enactment could be made from time to time and in respect of such rules if they are to be operative from earlier dates the power of retrospectivity has to be conferred. The Supreme Court in I.-T. Officer, Alleppy v. M. C. Ponnose, AIR 1970 SC 385 said at page 387 thus:

"The Parliament can delegate its legislative power within the recognised limits. Where any rule or regulation is made by any person or authority to whom such powers have been delegated by the legislature it may or may not be possible to make the same so as to give retrospective operation. It will depend on the language employed in the statutory provision which may in express terms or by necessary implication empower the authority concerned to make a rule or regulation with retrospective effect. But where no such language is to be found it has been held by the Courts that the person or authority exercising subordinate legislative functions cannot make a rule, regulation or bye-law which can operate with retrospective effect."

We shall now consider the second of the two questions posed. To understand the scope of S. 2 (1) of the Act it is necessary to refer to the scheme of the Act and in particular to S. 3 of the Act. Prior to the commencement of the Kerala Public Services Act the conditions of services of persons appointed to public services and posts in connection with the affairs of the State of Kerala were regulated by rules made by the Governor under the Proviso to Art. 309 of the Constitution. These rules were deemed under S. 3 of the Act to have been made under the Act and to enable such deeming to be made the Section provided "as if this Act had been in force on the date on which such rules were made....." The rules so deemed to be made under the Act though not actually made under the Act are to continue in force until they are superseded by rules made under S. 2 (1) of the Act. When rules are made under S. 2 (1) to supersede the rules made earlier under Art. 309 of the Constitution it is not as if the earlier rules are thereby amended. They are superseded in accordance with S. 3 by rules which get their validity because of S. 2 (1) of the Act. The rules under the Proviso to Art. 309 of the Constitution are deemed to be made under the Public Services Act by projecting the Act back to the dates on which such rules were made. Consequence would be that even though the rules were made by the Governor in exercise of the power under the Proviso to Art. 309 of the Constitution, by reason of S. 3 those rules are deemed to be made under the Kerala Public Services Act. Though the Act actually commenced its operation only on 17-9-1968 the Act is deemed to have been in existence on earlier dates, dates on which the rules under Art. 309 of the Constitution came into force and thereby such rules get validity from the Kerala Public Services Act. Hence even in the case of valid rules made under Art. 309 the device envisaged is one of deeming them as made under the Kerala Public Services Act by projecting back the Act to the respective dates on which the rules were so made. If this be the scheme, without anything more, the retrospectivity for rule making contemplated in S. 2 cannot be extended to a period when the Act had not commenced operation. The language of the rule also does not complement (contemplate such?) a construction. Rules are always not made as soon as the Act comes into force. They may be made from time to time and unless power of retrospectivity is conferred on the rule making authority whenever

it makes such rules they could operate only prospectively and not from the date of commencement of the Act itself. Hence the need for conferring retrospective rule making power. Retrospectivity conceived in S. 2 (1) of the Act is on its plain language, retrospectivity enabling operation from the date of commencement of the Act and not from a date prior to its commencement. If retrospectivity of the rules so as to operate prior to the commencement of the Act was contemplated under the Act there was no need to provide in S. 3 of the Act "as if this Act had been in force on the date on which such rules were made." In the circumstances we hold, on a construction of S. 2 (1) of the Act that the authority conferred on the Government under that sub-section is to make rules prospectively as also retrospectively but such retrospectivity does not extend to any period prior to the commencement of the Act. In this view it may not be necessary to pronounce in this case on the larger question whether rules could be made to operate prior to the commencement of the enactment.

8. In the case before us Ext. P2 rules do not purport to amend the rules of 1965 made under Art. 309. Ext. P 2 purports to be in supersession of the rules of 1965. The rules which so superseded the existing rules are therefore those made under S. 2 (1) of the Kerala Public Services Act. They retrospectively operate from the date of the commencement of the Act, namely 17-9-1968. Since the view expressed by the learned single Judge that the rules are valid from 23-6-1962 has not been challenged and the case of the State being that it should be further pushed back to 25-9-1962 we are not called upon to alter the decision reached by the learned single Judge.

In the circumstances we find that the State cannot succeed in its plea that the rules must be held to be retrospective from 25-9-1962. The appeal fails. It is dismissed. No costs.

V. P. GOPALAN NAMBIYAR, C. J.:—

9. In view of the important and novel question raised, I add a few words of my own to the judgment delivered on behalf of the Full Bench by my learned brother Poti J., which I have myself signed.

10. S. 2 cl. (1) of the Public Services Act confers on the Government the power to make Rules prospectively or retrospectively. This power of rule-making is conterminous with the power of legislation by a statute. But whereas a statutory provision can operate on its own, a subordinate legislation (like a statutory rule) requires the supporting cast of a statute to rest and to sustain it. It appears just and logical that if the supporting cast is not available the Rule or the subordinate legislation lacks foundation, and must, for that reason, fail. Therefore it appears that just, as a rule cannot survive the death of the Act (except in respect of actions taken under it, rights or privileges accrued under it etc.), it cannot perhaps project back prior to its birth. As stated in the judgment on behalf of the Bench, a pronouncement on this vexed question is unnecessary, as, on the scope and content of Ex. P2 Rules, they purport to be fresh Rules under S. 2 (1) of the Act. In that view Ext. P. 2 rules should have validity only from 17-9-68. But the learned Judge's view pushing back its validity to 23-6-1965 has not been challenged; the only complaint in the appeal being that it should have been pushed back still further to 25-9-1962. Interference with the learned Judge's view is therefore foreclosed, although in the light of the view expressed by us, the learned Judg's conclusion is unsustainable.

Appeal dismissed.

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FULL BENCH

V. P. GOPALAN NAMBIYAR, C. J.,
P. SUBRAMONIAN POTI AND KUMARI P. JANAKI AMMA, JJ.

T. Subramanya Bhatta, Appellant
v. A. Krishna Bhatta, Respondent.

A. S. No. 356 of 1972, D/- 8-2-1978.

Tort — Malicious prosecution — Ingredients to be proved — Held on facts defendant liable for malicious prosecution.

The ingredients to be proved by the plaintiff in an action for malicious prosecution are: (1) that he was prosecuted by the defendant; (2) that the prosecution terminated in favour of the plaintiff; (3) that the prosecution was malicious; and (4) that it was without reasonable and probable cause. (Para 4)

Held on facts that there was a criminal prosecution of the plaintiff, followed by

an acquittal and a termination of the criminal proceedings in his favour.

(Para 5)

Held further that on filing complaint against the plaintiff, the defendant was not quiescent. He moved the Sessions Judge in revision and got himself impleaded in the criminal revision before the High Court and examined himself as a witness in the Sessions trial. Therefore, the defendant was the real prosecutor even if judged by the rigorous standard of active association with the prosecution. The defendant knew that the charge was false and there was no reasonable or probable cause for filing the complaint. The defendant was therefore liable for malicious prosecution.

(Para 9)

(The question as to how far the judgment of the criminal court can be looked into as a piece of evidence by the Civil Court while recording its findings on the essential elements to be made out in a suit for malicious prosecution and the judicial conflict in 1965 Ker. L. T. 1054 and 1970 Ker LJ 1023 on the quesion of burden of proof in regard to the absence of reasonable and probable cause in an action for malicious prosecution left open as found unnecessary to decide on the facts of the instant case.—Ed).

Cases Refered: Chronological	Paras
1971 Ker LT 798	4, 7
1970 Ker LJ 1023	4, 5, 6, 13
1969 Ker LJ 760	5
1967 Ker LJ 967	5
AIR 1966 And Pra 292	6
1965 Ker LJ 1054	13
AIR 1960 Ker 264 : 1959 Ker LJ 1172	4
AIR 1953 Orissa 56	6
AIR 1933 Mad 429	5
AIR 1926 PC 46	4
AIR 1920 Mad 789 : (1920) 12 Mad LW 170	4
AIR 1919 Mad 229 : ILR 42 Mad 880	4
(1908) ILR 30 All 525 (PC)	4, 8, 10, 12
(1903) ILR 26 Mad 362	4

K. George Varghese, Thomas V. Jocob and P. S. Joseph, for Appellant; S. Easwara Iyer and E. Subramani, for Respondent.

V. P. GOPALAN NAMBIYAR C. J.:— This is a plaintiff's appeal against the dismissal of his suit for damages for malicious prosecution. The plaintiff and defendant owned adjacent properties at Aramanadka in Karadka village, Kasaragod Taluk. Some of the plaintiff's properties were in possession of the defendant's father Shankara Narayana Bhatta on arwar (usufructuary mortgage) right. In O. S. No. 300 of 1949 of the Munsiff's Court, Kasaragod the plaintiff had obtained a decree for redemption of the arwar. Exts. A57 and A58 are certified copies of the plaint and written statement. O. S. No. 484 of 1949 was by the defendant's brother against his father (Ist defendant) and the present plaintiff (2nd defendant). Ext. A59 is the plaint and Exts. A60 & A61 are the written statements therein. Ext. B12 is the certified copy of the judgment in A. S. No. 286 of 1957, Sub-Court, Kasaragod, against the judgment in the said suit O. S. 484 of 1949, and the order in R.I.A. 1091 of 1963 moved by the defendant's father to file a complaint against the plaintiff herein under S. 193, of the I. P. C. etc. The appeal and the R. I. A. were dismissed. O. P. No. 43 of 1950, Munsiff's Court, Kasaragod, was filed by Shankara Narayana Bhatta, allegedly, at the instance of the defendant and his brothers for sanction to prosecute the plaintiff. That was dismissed (Ext. A72).

An application for contempt was moved by the defendant in the High Court against the plaintiff and another, which was dismissed by Ext. B-9 order, C. C. No. 54 of 1961 before the I Class Magistrate's Court, Hosdrug, was filed by the plaintiff against the defendant and his brothers for threatening the plaintiff with dangerous weapons. C. C. No. 55 of 1961 was by the defendant and his brothers against the plaintiff apparently as a counter-blast to C. C. No. 54 of 1961. C. C. No. 54 of 1961 ended in a conviction of the defendant's brother Keshava Bhatta. (vide Ext. B-26). C. C. No. 55 of 1961 ended in the discharge of the accused (Ext. A75). On 2-8-1962 the defendant filed a complaint before the Adhur Police that at 6 p. m. the plaintiff and his tenants obstructed the defendant and wrongfully restrained him and attempted to murder him. This, it was alleged, was with full knowledge that the complaint implicating the plaintiff was false, was done maliciously, and without reasonable and probable cause. After protracted proceedings, the case was committed to the Sessions Court, and tried by the Assistant Sessions Judge, Tellicherry as Sessions Case No. 52 of 1964. The plaintiff and two others were acquitted on 27-1-1965. It is in respect of this prosecution that malice and absence of reasonable and probable

cause is alleged and damages for malicious prosecution are claimed.

2. The defence was one of denial of malice and of reasonable and probable cause and of the very foundation of the action, namely, that the defendant was the prosecutor.

3. The learned Sub Judge, Kasaragod, in a very unsatisfactory judgment, which hardly does justice either to the facts disclosed, or the law involved, found, that the defendant was not actively participating in the prosecution of the plaintiff (para 31 of the judgment); that the plaintiff had not established either malice on the part of the defendant or absence of reasonable and probable cause (para 32); that the plaintiff was not entitled to any amount as damages for loss of reputation (paras 33 and 34); and that the plaintiff was not entitled to any amount as damages for malicious prosecution.

4. The ingredients to be proved by the plaintiff in an action for malicious prosecution are: (1) that he was prosecuted by the defendant; (2) that the prosecution terminated in favour of the plaintiff; (3) that the prosecution was malicious; and (4) that it was without reasonable and probable cause. We shall address ourselves to the first of these ingredients, whether the plaintiff had been prosecuted, and if so, whether the defendant was the prosecutor. Ext. A-1 dated 2-8-1962 is a certified copy of the First Information Report by the defendant in Crime No. 118 of 1962 on the file of the Adhur Police Station. On the said complaint an offence under Ss. 341 and 307 of the I. P. C. read with S. 34 was registered as Case No. 118 of 1962 by the Sub-Inspector, Adhur. The Magistrate converted the Preliminary Register Case into a Calendar Case to be enquired into by himself, charging the accused under Ss. 341, and 324 read with Ss. 511 and 34 (Ext. A-3). Against that, the State preferred Criminal Revision No. 29 of 1962 to the Sessions Judge, Tellicherry, which was allowed and the case was directed to be proceeded with as a Sessions Case. The defendant preferred criminal revision 24 of 1962 which was dismissed on 21-6-1963 by the Sessions Judge (vide Ext. A4).

Against the order, in the State's revision, the plaintiff preferred Criminal R. P. No. 323 of 1963 to the High Court which was dismissed (vide Ext. B7). In the said revision, the defendant filed an application to implead himself, (Ext. A5), in the course of which it was stated in paragraph 2 that he is the de-facto complainant, and had moved in revision before the Sessions Judge. The petition was dismissed with the observation that the petitioner's advocate may assist the Public Prosecutor and can be heard. Ext. A-80 is the certified copy of the judgment in S C 52 of 1964, Asst. Sessions Court, Kasaragod, which will show that the Criminal Case ended in the acquittal of the plaintiff. Ext. A81 is the certified copy of the deposition of the defendant in the Sessions Case. Exts. A1 and A80—not to mention the others—show that there was a complaint which resulted in a criminal prosecution of the plaintiff and ended in his acquittal. But could it be said that the defendant was the prosecutor?

The judicial decisions on this aspect of the question have been exhaustively surveyed, by Vaidialingam J. of this Court (as he then was) in Kunhutty Sahib v. Veeramkutty (1959 Ker LJ 1172) : (AIR 1960 Ker. 264) and by Krishna Iyer J. of this Court (as he then was) in two decisions, viz., Chamu v. Valayanat Tharavil Chirutha (1970 Ker. LJ 1023), and Kunhammad v. Kunheen (1971 Ker LT 798). It seems enough to trace briefly the evolution of the law. In an early decision (1903) of the Madras High Court in Narasinga Row v. Muthaya Pillai (I. L. R. (1903) 26 Mad 362), it was observed by a Division Bench that if the defendant merely filed a complaint before the Police and the Police, after investigation, thought fit to prosecute the plaintiff (in the action for malicious prosecution), it could not be said that the defendant was a prosecutor; nor could he be held responsible for the action of the police; and no action can lie against him for malicious prosecution. This decision was considered by the Privy Council five years later in Gaya Prasad v. Bharat Singh (ILR (1908) 30 All 525 (PC)) and it was observed:

"The principle here laid down is sound enough if properly understood, and its application to the particular case was no doubt justified; but in the opinion of their Lordships, it is not of universal application. In India, the Police have special powers in regard to the investigation of criminal charges, and it depends very much on the result of their investigation whether or not further proceedings are taken against the person accused. If, therefore, a complainant does not go beyond giving what he believes to be cor-

rect information to the Police, and the Police without further interference on his part (except giving such honest assistance as they may require), think fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But if the charge is false to the knowledge of the complainant; if he misleads the Police by bringing suborned witnesses to support it; if he influences the Police to assist him in sending an innocent man for trial before the Magistrate — it would be equally improper to allow him to escape liability because the prosecution has not, technically, been conducted by him. The question in all cases of this kind must be — Who was the prosecutor? — and the answer must depend upon the whole circumstances of the case. The setting of the law in motion is not the criterion; the conduct of the complainant before and after making the charge, must also be taken into consideration. Nor is it enough to say the prosecution was instituted and conducted by the Police. That again is a question of fact. Theoretically all prosecutions are conducted in the name and on behalf of the Crown, but in practice this duty is often left in the hands of the person immediately aggrieved by the offence, who pro hac vice represents the Crown."

x x x x

The charge was a false one to the knowledge of the respondents, and they must abide the consequences of their misconduct."

x x x x

In the opinion of their Lordships, it would be a scandal if the remedy provided by this form of action were not available to innocent persons aggrieved by such unfounded charges ....."

Subsequent to the Privy Council decision, a Division Bench of the Madras High Court itself held in 1919, in Periya Goundan v. Kuppa Goundan (I. L. R. 42 Mad. 880) : (AIR 1919 Mad 229 (2)) that the earlier Division Bench ruling in I. L. R. (1903) 26 Mad. 362 could no longer be sustained. It referred to the three ways in which a person desirous of setting the criminal law in motion against another, in respect of an act amounting to a cognizable offence, may proceed to act. These three ways were: (1) by presenting a complaint to a Magistrate having jurisdiction to take action under Chapter XVII of the Cr. P. C.; (2) by giving information to an officer in charge of a Police Station to take action under Chapter XIV; and (3) by giving information to the village headman (in case of all non-bailable and certain other offences), for being forwarded under S. 45 of the Cr. P. C. to the nearest Magistrate and to the Officer in charge of the Police Station. It was observed, after analysing these modes, that in each case, if any false information was given, the prosecution arose out of the said information, and it made no difference whether the person led astray in the first instance is the police officer or the magistrate. This latter Division Bench ruling of the Madras High Court was followed by another Division Bench in Shanmuga Udayar v. Kandasami Asary (1920) 12 Mad LW 170) : (AIR 1920 Mad 789). In Balbhaddar v. Badri Sah (AIR 1926 PC 46) it was observed by the Privy Council:

"But giving information to the authorities which naturally leads to prosecution is just the same thing. And if that is done and trouble caused an action will lie."

The principles laid down in the above decisions have been elaborately noticed in 1959 Ker LJ 1172 : (AIR 1960 Ker 264).

5. In Chamu v. Valayanat Tharayil Chirutha (1970 Ker LJ 1023) Krishna Iyer J. stated that the Civil Court can, and has a duty to, decide the issues independently of the judgment of the criminal court, while recording its findings on the essential elements to be made out in a suit for malicious prosecution. The learned Judge stressed that, properly speaking, the judgment of the criminal court is evidence merely to show that the person prosecuted is "out of the criminal woods"; that it was conclusive that the prosecution had terminated in favour of the plaintiff; and that this was the only use to which the judgment of the criminal court can be put. As regards the findings and the reasonings of the criminal court, those were mere opinion evidence, and the Civil Court had to reach its findings on the evidence produced before it. The learned Judge referred to an earlier decision of a learned Judge of this Court in Sekharan Nair v. Krishnan Nair (1967 Ker LJ 967) where the learned Judge had examined the judgment of the criminal court and concluded that the acquittal was based on the benefit of doubt. This was after a fairly close study of the evidence of the criminal case as disclosed by the judgment. Krishna Iyer J. pointed out that this

was against the mandate of S. 43 of the Indian Evidence Act, and that the correct view of the law on this aspect of the matter had been taken in Venkatapathi v. Balappa (AIR 1933 Mad. 429), following earlier precedents. We are inclined to agree with this view of the scope and purpose for which alone the judgment in the criminal case can be looked into as evidence in a suit for damages for malicious prosecution. We need not express our final and concluded opinion as, in this case, our conclusions can well be rested on material de hors the judgment of the criminal Court. The learned Judge further examined the effect of the acquittal by the criminal Court, and stated that it cannot be regarded as a sure index of innocence, but only as the expression of a reasonable apprehension that by convicting, the Court runs the risk of punishing the innocent. The learned Judge referred to the decision of Mathew, J. in J. Spadigam v. State of Kerala (1969 Ker LJ 760) explaining how, despite acquittal by a criminal Court, a delinquent officer may still be punished, and noticed that a number of decisions had taken a contrary view. It is not necessary for us to enter into these thickets of judicial controversy or to express our view on the question, as, on the facts of this case, we are satisfied that there was a criminal prosecution of the plaintiff, followed by an acquittal and a termination of the criminal proceedings in his favour, which are sufficient to establish a part of the first, and the second, of the ingredients in an action for malicious prosecution.

6. To resume our discussion on the question as to who is a prosecutor, Krishna Iyer, J., in 1970 Ker LJ 1023, after referring to many of the cases, observed:

"I am not too sure whether a party who gives false information to the police but thereafter takes no interest and renders no assistance in the course of the investigation or in the conduct of the case can be said to be a prosecutor. (True it is that even one who is screened off from view by the formal presence on the record of the State as prosecutor may be the real prosecutor provided the organisers, sub rosa, the criminal action or rather he ropes in the accused by information and assistance. They also serve as prosecutors who only pull strings and operate from behind, if the project is the outcome of their active contribution. But something more than merely laying information, be it true or false, is necessary to make him an active instrument and it is only if he is actively instrumental in setting the law in motion can he be designated the prosecutor. In a ruling reported in AIR 1953 Orissa 56, the learned Judge, Mohapatra, J., observed that the mere giving of information "even though it was false, to the police cannot give cause of action to the plaintiff in a suit for malicious prosecution if he (the defendant) is not proved to be the real prosecutor by establishing that he was taking active interest in the prosecution and that he was primarily and directly responsible for the prosecution." Vaidialingam, J. observed with reference to this decision, that the proposition so stated was too broadly expressed. In AIR 1966 Andh Pra 292 Manohar Pershad, J. took the view:

"I am not prepared to agree with the contention of the learned counsel that merely if it is shown that the complainant had made a false complaint he would be made liable for damage. In order to make him liable apart from that fact, the further facts namely that he assisted the police in sending an innocent man for trial and that he misled the police by bringing suborned witnesses have to be proved.

While I am inclined to agree with the latter view, I do not wish to pronounce definitely on the conflict as, perhaps, it is not necessary for an effective disposal of this case." (Para 12)

7. In Kunhahammed Haji v. Kunheen (1971 Ker LT 798), the same Judge (Krishna Iyer, J.) had to consider the question whether and when a witness can be said to be a prosecutor. We leave out that part of the discussion as unnecessary for the purposes of this case, and would quote only the following passage:

".....I have said all this only to emphasise that the Court has vigilently to scrutinise whether the requirements of the law that only the real prosecutor,— not every one who has lent a helping hand in the project or and supported it at some stage — can be used and even he, only if the prosecution has been launched with an oblique motive and without reasonable and probable cause, have been clearly made out. Either is insufficient without the other." (Para 4)

8. We would have thought it unnecessary to multiply citation of authorities

on the question as to who is the real prosecutor. But we feel it our duty to take note of the following statement of the position in Winfield on Tort Seventh Edition (1963) by J. A. Jolowicz, M.A., and T. Ellis Lewis, B.A., LL. B., Ph. D, where, at page 706 occurs the following:

"A prosecutor has been described as 'a man actively instrumental in putting the law in force'."

x x x x

Similarly, if a man does no more than tell the story of his loss to a judicial officer, such as a Magistrate, leaving him to determine whether the facts amount to a felony, he does not maliciously procure the Magistrate to issue his warrant for arrest. Much less can perversion of such a story by the clerk who frames the warrant into a charge of felony be imputed to the complainant. But where the story told is known by the teller to be false, the Judicial Committee has held in an Indian appeal that the teller is liable. The peculiar frequency of such lying charges in India was a special ground for this decision, but its general reasonableness adds to its persuasive authority here." (underlining ours).

The reference is to the decision in Gaya Prasad v. Bharat Singh (ILR (1908) 30 All 525 (PC)). We wish to dissociate ourselves from the stigmatisation of our country involved in the passage underlined. We refrain from comment on the said passage as we happily note that the same does not find repetition in the latest (1975) edition of the Book, by W. V. H. Rogers (see pages 478, 479).

9. On the facts, we have little difficulty in holding that the defendant was the prosecutor even judged by the rigorous standard of active association with the prosecution. He had filed Ext. A-1 complaint. He was not quiescent thereafter. He moved the Sessions Judge in revision against Ext. A-3 order treating the case as a crime case; he sought to get himself impleaded in the criminal revision before the High Court and to intervene in the hearing; and examined himself as a witness in the Sessions trial. These, in our view, are sufficient to make out that he was the real prosecutor in this case.

10. On the liberal view, the defendant satisfies the test of being the prosecutor. In Gaya Prasad v. Bharat Singh (ILR (1908) 30 All 525 (PC)), the passage we have quoted earlier enumerated the categories of cases where it should be unjust to allow a person to escape liability because the prosecution has not, technically, been conducted by him; and the first of these categories is: "if the charge is false to the knowledge of the complainant". (underlining ours). It was this ground of decision which provoked the comment from Winfield in his 1963 Edition of Torts, with the slant in which, we have dissociated, but the general reasonableness of which, was commended by the author himself, as adding to its persuasive authority even in English soil. For reasons which we will presently show, we are of the opinion, that this requirement stands satisfied in this case. The complaint was in respect of incidents that took place on the evening of 2-8-1962. The plaintiff's case was that he was in Ernakulam on that date and that with the knowledge of his absence from Karadka, the defendant had falsely implicated him in the criminal complaint. To show his absence in Ernakulam from 31-7-1962 to 2-8-1962, the plaintiff had examined P. W. 6, the Proprietor of the Modern Hotel, Ernakulam, where he was staying, and summoned Ext. X-1 Lodger's Register of the Hotel. Ext. A-79 dated 2-8-1962 is a Bill for payment of Rs. 4/- for room rent and Rs. 4.63 for food expenses. There was also the evidence of P. W. 7, an Advocate of this Court (Shri R. Krishna Swami) to the effect that the plaintiff had executed Ext. X-2 vakalath on the evening of 2-8-1962 in Advocate Shri T. S. Venkiteswara Iyer's office in Ernakulam. There was further, the evidence of P. W. 5, Dr. Paul, who had met the plaintiff when he boarded the train at Cannanore on the morning of the 3rd, to proceed to take charge as Veterinary Surgeon at Kumbla (next stattion after Kasaragod). The plaintiff was also travelling by the same train. In addition to these, there is the evidence of the plaintiff himself as P. W. 1, that he was in Ernakulam from 31-7-1962 to the night of 2-8-1962. We have scanned the evidence carefully, and in detail, and we are of the view that the evidence is acceptable and has been discarded by the learned Judge on flimsy and frivolous grounds. We may briefly refer to the evidence. Ext. X-1 is the Lodger's Register of the Modern Hotel, Ernakulam, a Hotel of repute and standing in this city. P. W. 6 is the Proprietor of the Hotel. Entry 434 in the Register shows that the plaintiff was in Room No. 5 in the Hotel from 8.15 p.m. on

31-7-1962 and left at 8 p.m. on 2-8-1962 (vide X-1 (a)). We see no ground at all either to discard the evidence of P. W. 6 or the entry in Ext. X-1. We think the reasons given by the learned Judge for discarding these are quite unsubstantial, and indeed, frivolous. The learned Judge discarded Ext. A-79 on account of its late production when the trial of the suit had advanced to a great extent, and on the ground that the cashier who wrote and signed the bill had not been examined. The reasons do not appeal to us. We see that many other documents were marked on the plaintiff's side even after Ext. A-79 — plaintiff's documents go up to Ext. A-92. P. W. 6 had deposed to the Cashier's signature, and had stated that the bill was written up in his presence. We are inclined to accept Ext. A-79. Even in its absence, we think the links have been clearly forged to establish the plaintiff's presence at Ernakulam on the evening of 2-8-1962. The entry in Ext. X-1 is that the plaintiff occupied Room No. 5 in the Modern Hotel, Ernakulam, from 8.15 p.m. on 31-7-1962 to 8 p.m. on 2-8-1962. The learned Judge has made a point that the name of the plaintiff is T. Subramania Bhatta whereas the entry in Ext. X-1 (Ext. X-1 (a)) shows the name as T. Subramania Bhat (the last two letters being omitted). We do not wish to take the Judge seriously in this part of his reasoning.

Equally trivial, and unworthy of notice appear the points made about the letter "T" being written in a different ink, and showing some corrections, or about P. W. 1 not having personally seen the register being written up, or the entries in the relevant columns therein being filled up. These betray either a lamentable lack of practicability and commonsense to human conduct and the regulation of human affairs, or a wilfully perverse approach, neither of which can do credit to the learned Judge. The learned Judge's conclusion in para 8 that it cannot be found that Ext. X-1 (a) relates to the plaintiff, and that at any rate the entries are not properly proved, is very unsatisfactory and unacceptable. The learned Judge made a point that P. W. 6 had been acquainted with the plaintiff for the last 8 or 9 years, and that whenever the plaintiff was in Ernakulam he used to stay in P. W. 6's hotel. From this, the learned Judge inferred that P. W. 6 was interested in the plaintiff- a rather strange comment to be made of a hotel proprietor in relation to his regular customer! We would expect our Judges of the subordinate judiciary to betray a better sense of appreciation of evidence and a better awareness to the conditions of this work-a-day world. A point is made that serial No. 421 in Ext. X-1, who occupied Room No. 10 left the Hotel on 29-7-1962 at 3 p.m. and that in the entry relating to serial No. 424, the same room is found to be occupied by another person at 9.35 a.m. on the same day. A few such so called discrepancies have been picked out and mentioned by the learned Judge in para 9, apparently to discredit Ext. X-1. We have examined these. We only wish to repeat that these exhibit the lack of a human and practical approach on the part of the Judge, unless they are to be taken as a determined attempt to close his mind to the truth. We see no ground to discard the evidence of P. W. 6 as interested, or the entries in Ext. X-1 as unacceptable.

11. Equally clear and strong is the evidence afforded by Ext. X-2 and of P. W. 7, namely, Advocate Shri R. Krishna Swamy of this Court. His evidence was that Ext. X-2 vakalath in C. R. P. No. 465 of 1962 of this Court, was executed by the plaintiff on the evening of 2-8-1962 in his presence in the office of Shri T. S. Venkiteswara Iyer, a well-known and leading Advocate of this Court. We see no ground at all to reject the evidence of P. W. 7 on the grounds stated by the learned Judge, that Shri Venkiteswara Iyer and the attestors to the vakalath have not been examined, that Shri Venkiteswara Iyer's accounts had not been produced, or that P. W. 7 himself was not maintaining accounts as required by the Bar Council Rules, or that Ext. X-2 though executed on 2-8-1962 was produced in Court only on 18-9-1962, and stamps thereon were affixed only on 14-9-1962. It has distressed us to observe that the learned Judge chose to discard the evidence of P. W. 7 and that afforded by Ext. X-2 on highly superficial and unsupportable grounds. We have no hesitation to accept the evidence of P. Ws. 6 and 7 and that afforded by Exts. X-1 and X-2.

12. The evidence of P. W. 5, Dr. Paul, a Veterinary Surgeon, who joined duty at Kumbla Veterinary Hospital on 3-8-1962 is the third link in the chain of the plaintiff's evidence as to his absence at Ernakulam from 31-7-1962 to 2-8-1962. P. W. 5's evidence is that on 3-8-1962 he met the plaintiff on the train between

Cannanore and Kasaragod. The time was between 8 a.m. and 10 a.m. Ext. X-4 Register proves that P. W. 5 joined duty at Kumbla on 3-8-1962. The learned Judge commented that he travelled with the plaintiff only from Cannanore to Kasaragod, and that if the plaintiff had examined someone who travelled with him from Ernakulam on the night of 2-8-1962 that would have been helpful to find the plaintiff's presence in Ernakulam at the time of the incident. He thus dismissed the evidence of P. W. 5 as not conclusive enough to show that the plaintiff was in Ernakulam on the date of the incident. We believe we shall be doing no disservice to the learned Judge, if we comment that his approach marks a total and callous disregard of the relevance of the facts proved. Was the testimony of P. W. 5 acceptable? If he met the plaintiff in the train between Cannanore and Kasaragod on the morning of 3-8-1962, between 8 and 10 a.m., was it consistent with the defendant's case of the plaintiff's presence in Karadka on 2-8-1962 evening at the time of Ext. A-1, or with the plaintiff's case that he had left Ernakulam by the night train on 2-8-1962 to Kasaragod? Exts. X-1, X-2 and X-4, read with the evidence of P. Ws. 1, 5, 6 and 7 forge the links in the chain of the plaintiff's case regarding his absence in Ernakulam from 31-7-1962 to 2-8-1962. The learned Judge was wrong in rejecting this evidence. We accept the same. On the evidence thus discussed, we are of the opinion that it has been satisfactorily established that at the time of the offence complained of in Ext. A-1, the plaintiff was in Ernakulam. We have no doubt that the complaint was filed with knowledge of the plaintiff's absence, and falsely implicating him in the offence.

Thus, in our view, on the principle of the Privy Council decision in ILR (1908) 30 All 525 (PC) there is enough to find that the defendant is the real prosecutor. The facts noticed are sufficient, in our view, to establish absence of any reasonable and probable cause. The defendant should not have implicated the plaintiff in Ext. A-1 complaint with knowledge, which we are sure he had, of the plaintiff's absence in Ernakulam at the relevant time. Malice, we think, is sufficiently proved, by the strained relationship between the parties and the long record of litigations, civil and criminal, waged between them, which we have referred to at the outset of this judgment. (Vide Exts. A-1, A-4, A-5, B-26, A-57, A-58, A-59, A-60, A-61, B-12, A-72, B-9, A-75 etc.). We think all the essential ingredients of an action for malicious prosecution have been made out, and we hold accordingly.

13. The reference in this case to the Full Bench was occasioned as it was felt that there was a conflict of judicial decisions on the question of burden of proof in regard to the absence of reasonable and probable cause in an action for malicious prosecution. The Division Bench which made the reference referred to the ruling in Appukuttan v. Makkappan (1965 Ker LT 1054) and to Chamu v. Valayanat Tharayil Chirutha (1970 Ker LJ 1023), as decisions where, inter alia, this conflict is reflected. We have felt it unnecessary to enter into this academic region, as, on the facts of the present case, we have little difficulty to hold that the absence of reasonable and probable cause has been satisfactorily established.

14. We would therefore allow the appeal, and set aside the judgment of the learned Judge. We would have straightway granted a decree to the plaintiff. But there is difficulty, as the learned Judge, in view of his findings against the plaintiff on the ingredients of the action, has chosen not to discuss or find the quantum of damages to which the plaintiff would be entitled. For the purpose of assessing damages, to which the plaintiff is entitled, we are constrained to send the matter back to the learned Judge.

15. In the result, we allow this appeal and set aside the judgment of the learned Judge. We hold that the plaintiff has satisfactorily established the ingredients to be proved for an action for malicious prosecution. But we remit the proceedings back to the learned Judge to assess and to enter his findings on the quantum of damages to which the plaintiff would be entitled. The remand is for the limited purpose and no more. The plaintiff-appellant would be entitled to his costs, and also to a refund of the Court-fee paid on the Memorandum of Appeal.

16. There is a Memorandum of cross-objections by the defendant against the denial of compensatory costs. There is no merit or substance in the same which we dismiss with costs.

Order accordingly.

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FULL BENCH

V. P. GOPALAN NAMBIYAR, C. J., P. SUBRAMONIAN POTI AND KUMARI P. JANAKI AMMA, JJ.

Arakkal Rohini and another, Appellants v. Arakkal Koottappanakkal A. K. Sethumadhavan, Kozhikode and others, Respondents.

A. S. No. 344 of 1973, D/- 31-1-1978.

(A) Hindu Law — Necessity — Loan for business, whether loan for necessity.

Where there was no proof that the business was the family business and not a new or independent business of the Karta, the loan taken for such business could not be said to be for the binding necessities or for the benefit of the family. AIR 1932 PC 182 Foll. (Para 4)

(B) Hindu Law — Alienation — Necessity — Proof as to.

Necessity cannot be inferred from the mere recitals in the documents conveying family properties which have themselves been attacked by the heirs as not valid and binding. (Para 5)

(C) Hindu Law — Custom — Burden of proof.

The burden is on the party setting up any particular rule of custom to prove the same. In the absence of proof of custom the Hindu Mithakshar Law will be presumed to apply. (Para 7)

(D) Hindu Law — Doctrine of pious obligation — Applicability of, to Thiyyas of Calicut. 1962 Ker. L. T. 712 held obiter and Overruled.

In the absence of any rule of custom. Hindu Law doctrine of pious obligation must be presumed to apply to the Thiyyas of Calicut. This would be so even if it is assumed that the custom of polyandry was prevalent among the Thiyyas. Contrary view in 1962 Ker LT 712 held obiter and overruled. Case law discussed. (Paras 8, 15)

Cases Referred:	Chronological	Paras
AIR 1970 SC 223		1, 14
1969 Ker LJ 620		13
1962 Ker LT 712		1, 7, 14
AIR 1961 Ker 161		10, 14
AIR 1957 Andh Pra 557		5
AIR 1957 Andh Pra 744		5
AIR 1940 Mad 67		7
AIR 1936 Mad 937		10, 12. 14
AIR 1933 All 235		10
AIR 1932 PC 182		4
AIR 1927 Mad 877		7
(1915) ILR 38 Mad 527		10
(1899) ILR 22 Mad 297		10
(1896) ILR 19 Mad 1		7
(1896) ILR 19 Mad 440		7
(1894) ILR 17 Mad 184		7, 10
(1892) ILR 15 Mad 231		7
31 Cochin 247		10, 12
10 Cochin LR 135		11, 13
12 Cochin 213=12 Cochin LR 382		10, 11

T. S. Venkiteswara Iyer, C. M. Devan and P. E. Narayana Swamy, for Appellants; T. L. Viswanatha Iyer and E. R. Venkiteswaran, for Respondents.

GOPALAN NAMBIYAR, C. J.:— This reference to a Full Bench was occasioned to consider the applicability of the Hindu Law Doctrine of pious obligation to the Thiyyas of Calicut. The court below ruled that the doctrine has no application to them, relying on a Division Bench ruling of this Court in Dharmodayam Company v. Balakrishnan (1962 Ker LT 712). The Division Bench which made the reference found force in the contention that the decision in Dharmodayam Company's Case required reconsideration in view of the observations in the Supreme Court decision in Anthonyswamy v. M. R. Chinnaswamy (AIR 1970 SC 223).

2. The appeal arises out of a suit for partition. Defendants 2 and 3 who have filed this appeal may be described as the alinees of certain items, the 2nd defendant being the mortgagee of items 1 to 5 and the 3rd defendant, the vendee (claimed also to be the lessee) of item 6. The plaintiffs 1 to 5 were the children of the 1st defendant who died pending suit, and the 6th plaintiff is their mother and the wife of the 1st defendant. Items 1 to 5 were hypothecated by Ext. B-5 dated 26-12-1958 for a sum of Rs. 6,850/- to the 2nd defendant. A portion of item 6 was sold by Ext. B-13 dated 13-6-1958 to one M. G. Thomas for Rs. 5,000/-, and the rights became vested in the 1st defendant under Ext. B-14 dated 26-3-1960 for Rs. 4,000/-. The other portion of item 6 was sold under Ext. B-17 dated 26-3-1960 for Rs. 4,750/-. These two alienations were attacked as not supported by family necessity or benefit and therefore not valid and binding. For defendants 2 and 3 they were sought to be justified on the ground of necessity or benefit, and also on the doctrine of the pious obligation of the sons to defray their father's debts. By amendment of plaint it was pleaded that the parties, being Thiyyas of Calicut, are governed by the customary law and that the said custom does not attract the doctrine of pious obligation as

known to the Hindu Law. This was in answer to the plea raised by defendants 2 and 3 in their written statement that the Hindu Law doctrine of pious obligation applied to the Thiyyas of Calicut. From the amendment of the plaint and the additional written statement filed by defendants 2 and 3 we are satisfied that the contention raised in the appeal had been squarely reflected in the pleadings and no objection on the ground of want of pleading can be raised against it.

3. The court below held that Exts. B-5 and B-13 cannot be supported on the ground of necessity or benefit; and that as far as the doctrine of pious obligation is concerned, it had no application to the plaintiffs and the 1st defendant, as it had not been proved to be part of the customary law of Thiyyas of Calicut. In the result, it passed a preliminary decree for partition directing the plaint properties to be partitioned into 4 equal shares and allotment of 3 such shares to plaintiffs 1 to 3, one such share in items 1 to 5 to 2nd defendant, and one such share in item No. 6 to the 3rd defendant. It was stated that the share to which the 1st defendant was entitled at the time of the suit was thus given to his alienees, namely, defendants 2 and 3 by way of equity.

4. We have been taken fully through the evidence in the case to show whether the impugned transactions can be justified by necessity or benefit. We are satisfied that the finding of the court below that they cannot be said to be supported by necessity or benefit is correct and has to be affirmed. Briefly stated the position disclosed is as follows: Ext. B-5 is the hypothecation deed for Rs. 6,850/- in respect of items 1 to 5. Out of the said consideration, Rs. 4,500/- was to discharge a prior hypothecation, Ext. B-4 dated 12-9-1950, and Rs. 2,350/- was stated to be borrowed for house construction. There is no proof of any house having been constructed. The prior hypothecation. Ext. B-4 for Rs. 4,500/- recites that the consideration for it was Rs. 2,000/- to discharge a prior loan, and Rs. 2,500/- borrowed for the contract work of the 1st defendant. Ext. B-3 dated 5-2-1950 is an unregistered agreement between the 1st defendant and one Raman for Rs. 2,000/-. It is difficult to find necessity or benefit for this prior loan. In respect of the contract work, there is no proof that the business was a family business of the parties. and not a new or independent business of the 1st defendant. (Vide Benares Bank v. Harinarayan, AIR 1932 PC 182). In the circumstances it cannot be said that this part of the consideration again, has been established to be for binding necessities or for the benefit of the family.

5. Turning now to item 6, Ext. B-13 dated 13-6-1958 is the sale of a portion of item 6 to M. G. Thomas for Rs. 5,000/-. One of the items of consideration is to discharge a prior mortgage for Rs. 1,500/- evidenced by Ext. B-11 dated 2-2-1957. The balance Rs. 3,500/- is to discharge the decree debt in O. S. No. 254 of 1952, Sub Court, Coimbatore, stated to be pending in execution. The document recites that steps had been taken for arrest of the 1st defendant in pursuance of the decree. Ext. B-15 is the receipt for discharge of Ext. B-11. Ext. B-11 is stated to be for the marriage of a daughter. Connecting evidence is wanting as to the details, particulars or date of the marriage and the need for the loan. Nor do we have details as to the nature of the decree in O. S. 254 of 1952, and whether it was binding on the family. The remaining portion of item 6 was sold to the 3rd defendant by Ext. B-17 dated 26-3-1960 for Rs. 4,750/-. Out of this, Rs. 3,345/- was to discharge the decree debt in O. S. 254 of 1952. The balance is stated to be for the treatment of a son. There are no details as to the ailment of the son or the treatment accorded. We have already stated that there is nothing to show that the decree in O. S. 254 of 1952 was valid and binding. We have scanned the evidence of D. W. 1 (the 3rd defendant) which is the only evidence in support of the validity of these transactions. It is quite insufficient to establish necessity or benefit. We are not prepared to infer any necessity from the mere recitals in the documents which have themselves been attacked by the plaintiffs as not valid and binding. (See for instance the decisions in AIR 1957 Andh Pra 557 and AIR 1957 Andh Pra 744). In these circumstances we endorse the conclusion of the court below that the transactions cannot be justified by necessity or benefit.

6. In paragraphs 20 to 32 of its judgment the court below has discussed the relevant evidence and found against the oral lease set up in regard to item 6. The matter was but feebly canvassed before us; and we have no hesitation to affirm this part of the finding.

7. The main question is whether the transactions Exts. B-5 and B-13 can be said to be binding on the plaintiffs on the basis of the Hindu Law Doctrine of pious obligation. The law applicable to the Thiyyas of Calicut is essentially customary law. The

burden is on the party setting up any particular rule of custom to prove the same. In the absence of proof of custom the Hindu Mithakshara Law will be presumed to apply. This was laid down in several decisions of the Madras High Court, of which it would be enough to notice the decision in Pattukkayal Chakutti v. Kothembra Chandukutty (AIR 1927 Mad 877). There it is observed (at p. 878):

"We think the Makkathayam Thiyyas are governed by, what is called the customary law and that when a question arises as to what is the rule of law governing them on any particular matter, what we have to see is what is the rule of customary law obtaining amongst them in that matter and in cases which are not sufficiently governed by prior decisions, the question will have to be determined with reference to the evidence in case. Vide Rarichan v. Parachi (1892) ILR 15 Mad 281, Raman Menon v. Chatunni (1894) ILR 17 Mad 184, Kunhi Pennu v. Chiruda (1896) ILR 19 Mad 440 in each of which a specific issue was raised as to what is the rule of the customary law on the particular question at issue and the Lower Court was asked to submit a finding after taking fresh evidence on it. See also Imbichi Kandan v. Imbachi Pennu (1896) ILR 19 Mad 1 where the learned Judges observe that the Sub ordinate Judge was right in laying down that the question for decision was whether according to the law and custom followed by Makkathayam Thiyyas of Calicut, property of a deceased person.

In the absence of any satisfactory evidence to show what exactly is the rule of the customary law on any particular point, the rule of Hindu Law on that point must, we think, be presumed and adopted to be the rule of the customary law obtaining amongst the community on that point. The presumption is not that the Hindu Law as such is the law governing them in all matters; if that be the presumption a person who alleges a rule of customary law at variance with it will have to prove it as a custom in derogation of the law. The presumption is simply that the rule of the Hindu Law is also the rule of the customary law obtaining amongst them, so that if any person alleges that the rule of the customary law on any particular point is something different, the evidence that he adduces in support of his allegation ought not to be subjected to those well known tests which are applied to the case of an alleged custom contrary to or in derogation of the law, but should be viewed simply as evidence adduced to show what is the rule of the customary law itself. The presumption therefore will be useful and will hold good only if satisfactory evidence is not forthcoming as to what is the rule of the customary law".

The position was restated by the Madras High Court in Krishnan v. Ramanatha Iyer & Co. (AIR 1940 Mad 67). In Dharmodayam Company v. Balakrishnan (1962 Ker LT 712) a Division Bench of this Court approved the principle in AIR 1927 Mad 877 and AIR 1940 Mad 67 and held that the evidence did not justify that the custom of impartibility had been proved to exist in the community. Discussing the applicability of the doctrine of pious obligation, the Division Bench recorded its entire agreement with the conclusion of the trial Judge that the applicability of the doctrine to Thiyyas as a matter of custom had not been proved. Having endorsed this finding, the learned Judges observed:

"12 There is no doubt that polyandry was prevalent among the Thiyyas of Calicut. It is very doubtful indeed whether a doctrine like the doctrine of pious obligation will ever gain currency in a community that recognised more husbands than one".

The above observation is purely obiter; and we cannot accept the same as negativing the applicability of the doctrine of pious obligation on the ground that polyandry was prevalent among the Thiyyas of Calicut. That was a matter which was not pleaded, nor put in issue in this case. Such treatises as we have been referred to in support of the prevalence of polyandry among the Thiyyas of Calicut, as Edgar Thurston (Volume 7) 'Castes and Tribes', Page 48. and Legan's 'Malabar Manual' Page 144, would not justify our unreserved endorsement of a general statement that polyandry prevailed among the Thiyyas of Calicut. It is of significance that neither Moore nor Sundara Iyer in their treatises on Malabar Law, refers to this aspect of the matter.

8. Even assuming that polyandry was prevalent among the Thiyyas, we doubt whether, on that ground, we can exclude the applicability of the doctrine of pious obligation altogether, or merely hold that the identity of the father whose liability is sought to be fastened on the son, cannot be established, and that, for that reason, the son cannot be made liable. However, we need not pursue the matter further.

9. We have adverted to the pleadings in the case which had squarely raised the con-

troversy as to the rule of customary law applicable to the parties, which, it was said, included the Hindu Law Doctrine of pious obligation. The decisions are clear that in the absence of any proof on any particular aspect, the Rule of Hindu Mithakshara Law must be presumed to be applicable to the Thiyyas. This should therefore attract the doctrine of pious obligation. On that ground we feel that the appellants are well founded in their contention that the doctrine of pious obligation must be presumed to be applicable as the rule of Hindu Law in the absence of any proof of any custom to the contrary, to the parties in this case.

10. The judicial decisions to which our attention has been drawn support our conclusion as to the applicability of the doctrine of pious obligation to Thiyyas of Calicut. In Balakrishnan v. Chittoor Bank (AIR 1936 Mad 937) a Division Bench of the Madras High Court, dealing with the question and speaking through Varadachariar, J., observed (at p. 938):

"It has now been argued before us that the Ezhava community of Palghat to which the appellants belong should not be held to be wholly governed by the Hindu Law though they follow the Makatayam and not the Marumakathayam system. Reliance has been placed in this connexion upon the decisions in (1894) ILR 17 Mad 184 as recognising that the mere adoption of the Makatayam system of inheritance by a particular family does not involve the conclusion that the family has adopted all the rules of the Hindu Law. Mr. Krishna Iyer admitted that it has been held by this Court that unlike the Nambudhiries of Malabar the Ezhavas have adopted the rule of partibility: see (1899) ILR 22 Mad 297. But he nevertheless maintains that, as held by this Court in (1915) ILR 38 Mad 527, in respect of Nambudhiris, the principle of the son's obligation to pay the father's debts ought not be applied to the Ezhavas. We are unable to see any justification for this contention. The decision in (1915) ILR 38 Mad 527 proceeds on the theory that the Nambudhiris have followed the doctrine of corporate ownership of Illom property, that there is no question of anybody's share being alienated or seized in execution for the debts either of himself or of the father and that in these circumstances the Illom property as a whole can be made liable only for the debts binding on the Illom. Once, however, it is granted that individual members of the family have separate rights to which they can claim partition the reasoning of the above decision will not avail. It is only by unconsciously importing the Hindu Law theory, the son's right by birth to a share in the family property, that Mr. Krishna Iyer can claim that the son's shares ought not to be held liable for the father's debts."

A little lower down it was stated:

"We see no warrant for introducing one portion of the Hindu law without taking along with it the other portions which form an integral part of the whole system."

These last noticed observations were quoted by a Division Bench of this Court in a decision to be noted presently. The Division Bench ruling of the Madras High Court was thus a direct decision on the applicability of the doctrine of pious obligation to the Thiyyas of Calicut. The decision was noticed with approval by a Division Bench of this Court in Chinnaswamy v. Anthonyswamy (AIR 1961 Ker 161). The question there considered was whether the Tamil Vaniya Christians of the Chittur Taluk were governed by the Hindu law in matters of inheritance and succession. It was ruled that there was nothing in the Christian faith which precludes parcenership from being a part of the law governing the rights of a Christian family converted from the Hindu religion; and that the rule of Hindu law by which a son gets by birth a right in ancestral property cannot be said to be opposed to the Christian faith. It was observed (at p. 164):

"15. In the light of what is stated above, the appellant's contention that the rule of Hindu law by which a son gets by birth a right in ancestral property is opposed to the Christian faith cannot be sustained. The only question for decision on this aspect of the case will be whether the evidence on record is sufficient to come to the conclusion that that rule has been adopted by the Vaniya Christians of the Chittur Taluk as part of their law on their conversion from Hinduism.

16. In 12 Cochin 213 Narayana Menon J., said that "the rule as to the pious liability is closely connected with and is almost correlative to the rule relating to the right by birth" and that it will be "unreasonable to disassociate the two" in the matter of their applicability. To the same effect is Lalta Prasad v. Gajadhar Shukul, AIR 1933 All 235 wherein Iqbal Ahmad, J., said:

"So far as I can see, this rule was introduced as a sort of corrective to the rule that every male member of a joint Hindu family acquires an interest in the joint family pro-

perty from the moment of his birth, and therefore no member of such a family can predicate the extent of his share or can alienate the same. If by the mere fact of his birth the newly born son acquires an interest in the joint family property, and thus automatically reduces the extent of his father's interest in the same, it is but fair and just that he should shoulder along with the father the liabilities of the father. To make provision for the payment of debts due to a creditor far from being 'unsuited to any but a primitive and patriarchal society' is in consonance with common honesty and is, I should think, the recognised practice of the civilized world. The liability imposed on a son, to pay the just debts of his father is not a gratuitous obligation thrust on him by Hindu law but is a necessary corollary if not a salutary counter-balancing proviso, to the principle that the son from the moment of his birth acquires along with the father, an interest in joint family property".

In Balakrishnan v. Chittoor Bank, AIR 1936 Mad 937 the Court said:

"We see no warrant for introducing one portion of the Hindu law without taking along with it the other portions which form an integral part of the whole system";

and applied it to the Ezhava Community of Palghat which follows the Makkathayam system of law. 12 Cochin 213 and AIR 1936 Mad 937 were cited and followed in 31 Cochin 247, a case relating to the Makkathayi Kaniyans of the Cochin State".

11. Before concluding the discussion on this aspect of the matter we may notice some of the decisions rendered by the Cochin High (Chief) Court. In Sankaran v. Kailasa Iyen (10 Cochin LR 135) the question was whether impartibility can be said to be the rule among the Makkathayam Ezhavas. It was ruled that in the absence of a well established custom to the contrary, the property belonging to a family of Makkathayam Ezhavas should be deemed to be partible. The contention advanced is thus noted by Varugis J., who delivered the leading judgment of the Chief Court of Cochin:

"The defendant's contention on the other hand is that the Ezhavas are governed by ordinary Hindu law so far as it may be made applicable to a primitive community which allows divorce and remarriage and does not rise to the lofty religious plane on which the higher castes of Hindus move."

Discussing this aspect of the question and noticing the Madras decisions the learned Judge observed:

"No customary rule being found one way or other, the only thing left to us to do is to decide according to the principles of equity, justice and good conscience, taking into consideration, all that we do know of the habits, beliefs and modes of thought of the Ezhava community. As far as their beliefs are concerned, it is indisputable that they embrace the same faith as the higher castes and direct their devotions to the same consummation. In their habits and modes of thought they follow the standards set for them by the superior castes. The present Ezhavas being Makkathais, if we are compelled to resort to analogies in order to decide a question as to their personal law, we should go rather to the Makkathayi group than to the Marumakkathayi groups of Malayalees for the required analogy. The rule of impartibility does not obtain among the Makkathayis of Malabar. The exception is the Namboori community, but that community is at the opposite pole, socially, from the Ezhuvas and it would be absurd to suppose that the latter ever copied or desired to copy their manners. Thus we do no violence to the known conditions of the Ezhuva Society if we extend to it the ordinary incidents of Makkathayam. From the point of view of public policy the rule of partibility is in consonance with enlightened ideas. When the Nairs whose personal law is definitely fixed struggle to break the shackles of impartibility, it would be strange if we condemned any other community, on the score of equity and good conscience, to the very evils from which the Marumakathayam people want to be delivered. It seems to be a just rule to lay down that in the absence of a well-established custom to the contrary property should be deemed partible."

In the headnote of the decision we find it also stated:

"The strict rule of Hindu law of pious obligations cannot be applied to Ezhuvas."

The proposition as such is not seen stated in the body of the decision: In Sankaran v. Kailasa Iyer (12 Cochin 213 : 12 Cochin LR 382) the law relating to Ezhavas fell to be considered by a Full Bench of the Cochin Chief Court. It was ruled that the evidence was not sufficient to establish a customary rule that among Makkathayam Ezhavas the son acquires a right by birth in the ancestral properties. Varugis, J. delivering the leading judgment stated:

"Finally we are pressed with the argument that Thiyyas being Hindus, the Mithakshara should be applied to them as a matter of course in the absence of any special custom.

A decision of the Sub-Judge of Ottapalam was produced in this court to support the argument. The reasoning of this judgment is that the Thiyya community are immigrants from the Tamil country and were therefore originally under the influence of the Hindu Law. But the proofs advanced for this theory of the origin of the community do not dispel scepticism. Moreover, even assuming that the theory is proved. what is there to show that the community has continued the traditions of their pilgrim fathers? It may be that an examination of the skulls of a particular race may show their affinity with some other but such a discovery may not be of much value to the lawyer. Before I decide that sons have a right by birth in ancestral property among Thiyyas I desire to be satisfied that such a rule has long been recognised by them as obligatory."

Narayana Menon, J. observed:

"For these reasons I am of opinion, that the correct position to be taken up is that in the absence of any proved custom modifying any of the rules of the Mithakshara system, that system will be applicable whenever possible to the Ezhava community in this State." Discussing further the question of the applicability of the rule of pious obligation the learned Judge stated:

"But the above view does not, however, take us further in upholding the claim of the plaintiff in this case. While he may have a right by birth in the said ancestral estate, there is another rule of the Mithakshara, namely, the doctrine of pious obligation making his share also liable for the debts of his father which are neither illegal nor immoral. It is, no doubt, contended for the plaintiff that while the former rule of the Mithakshara is applicable to his community, the latter is not. But I fail to see any good ground for distinction between the two in the matter of applicability to the said community. The only manner in which we were able to uphold the right of the son by birth, with reference to the community in question, was by upholding the prima facie applicability of the entire body of the Mithakshara system. That being so, it is obvious that another rule of the same, namely, that relating to the pious liability, must also be equally applicable, in the absence of a custom abrogating or modifying that rule. The evidence in the case is not at all sufficient to make out any such custom. Moreover, the rule as to the pious liability is closely connected with and is almost correlative to the rule relating to the right by birth. So, it would be unreasonable to dissociate the two in the matter of the applicability."

Narayana Iyer C. J. expressed his concurrence with the colleagues.

12. In Rama Kurup v. Kochu Govinda Kurup (31 Cochin 247) the question that fell for decision was the law applicable to the Kaniyans. It was held that it was the same as the law governing the Makkathayi Ezhavas and that the sons do not acquire any right by birth in the property so as to disentitle the father alone to alienate it in the absence of family necessity. Discussing the question it was observed:

"The doctrine of pious liability is closely connected with, and is almost correlative to, the rule relating to the right by birth. It would be unreasonable to dissociate the two in the matter of their applicability. As observed by the learned Judges of the Madras High Court in a recent decision in Balakrishnan v. Chittur Bank (AIR 1936 Mad 937), there is

"no warrant for introducing one portion of the Hindu law without taking along with it the other portions which form an integral part of the whole system."

13. The trend of reasoning in 10 Cochin LR 135 which we have noticed earlier found its echo in the decision of Krishna Iyer, J. of this Court (as he then was) in Unnooli Alias Kuttimalu v. Thayyu (1969 Ker LJ 620). The learned Judge remanded the case to the trial Court for amendment of pleadings and for evidence regarding the applicability of the rule of pious obligation, but made the following observations:

"15. Before parting with this subject, I would like to observe that the Hindu Code, which encountered opposition and was eventually withdrawn in Parliament, did contain a clause (Clause 88) abrogating the rule of pious obligation for all Hindus. The theological foundation of the moral duty of the son to discharge his father's (and not of any other relation's) debt has now lost much of its appeal. In this context, particularly when the Constitution directs the State to have a uniform Civil Code for all Indians, it is a matter worthy of serious consideration whether the rather obsolescent rule of pious obligation should be extended by the Courts to all the non-brahmin Makkathayyes of Kerala. Although these considerations are largely for Parliament and not for the Courts they may serve to understand whether the Thiyyas of South Malabar had really assimilated this rule as custom."

14. It remains to notice the decision of the Supreme Court in Anthonyswamy v. M. R. Chinaswamy (AIR 1970 SC 223) at p. 225. This was an appeal against the decision of this Court in Chinnaswamy v. Anthonyswamy (AIR 1961 Ker 161). While confirming the judgment the Supreme Court observed:

"7. It is evident therefore that the doctrine of pious obligation is not merely a religious doctrine but has passed into the realm of law. The doctrine is a necessary and logical corollary to the doctrine of the right of the son by birth to a share of the ancestral property and both those conceptions are correlated. The liability imposed on the son to pay the debt of his father is not a gratuitous obligation thrust on him by Hindu law but is a salutary counterbalance to the principle that the son from the moment of his birth acquires along with his father an interest in joint family property. It is, therefore not possible to accept the argument addressed on behalf of the appellant that though the community is governed as a matter of custom by the Mitakshara School of Hindu law the doctrine of pious obligation was not applicable. In Balakrishnan v. Chittoor Bank, (AIR 1936 Mad 937), the question arose whether among the Ezhava community of Palghat though they follow Makatayam Law and not Marumakatayam Law, the sons are liable for the debts of their father not incurred for illegal or immoral purposes irrespective of any question of family necessity. It was held by Varadachariar J., that the sons were so liable and it was observed that there was no warrant for introducing one portion of the Hindu Law in governing a certain community without taking along with it the other portions which form an integral part of the whole system."

Further down, the Supreme Court observed:

"For the reasons already given we are of opinion that the doctrine of pious obligation is not merely a religious doctrine but has passed into the realm of law. It is an integral part of the Mitakshara School of Hindu law wherein the sons from the moment of their birth acquire along with their father an interest in the joint family property. The doctrine is in consonance with justice, equity and good conscience, and it is not opposed to any principle of Christianity."

The last sentence in the above quotation should perhaps be an effective refutation of any doubts as to the obsolescence of the doctrine and the suitability of its application. There is no need to canvass the correctness of the decision in 1962 Ker LT 712, in the light of the above Supreme Court decision, and in view of our explanation of the actual scope of the said decision, and the mere obiter dictum nature of the observation therein regarding pious obligation being excluded by the custom of polyandry.

15. An examination of the authorities, the pleadings and the evidence in the case, leaves us in no doubt that no custom having been proved, the Hindu law doctrine of pious obligation must be presumed to apply to the Thiyyas of Calicut, and that the conclusion to the contrary of the Court below cannot be sustained. Counsel for the appellant was at pains to point out with reference to the decisions where this aspect of the matter has been stressed, that pious obligation is a counterpart or a necessary corollary to the doctrine of the right of the son by birth, and this latter doctrine being applicable to the Thiyyas of Calicut, the rule of pious obligation must also stand attracted as a necessary corollary We do not see any reason, at any rate, in this case, to travel by this comparatively circuitous route, when a plainer and simpler one to reach the same conclusion is available. No rule of custom having been proved, the rule of Hindu law must be presumed to be the rule of decision, and that will be sufficient to attract the doctrine of pious obligation.

16. We desire to add one word about the decree passed by the learned Judge. The learned Judge was wrong in directing at this stage, the allotment of only one share in item No. 6 to the 3rd defendant. As to how equities have to be adjusted and whether interests of justice and equity cannot be made by allotting item 6, as prayed for, to the 3rd defendant, are all matters to be considered and decided at the stage of the final decree; and nothing said at this stage shall preclude such consideration at that stage.

17. We allow this appeal and set aside the judgment of the learned Judge and hold that Ext. B-5 mortgage over items 1 to 5, and Ext. B-13 sale in respect of item 6 are valid and binding on the plaintiffs by reason of the doctrine of pious obligation. The result is, that the plaintiffs will not be entitled to a partition of item 6, and will be entitled to partition of only the equity of redemption of items 1 to 5. The preliminary decree passed by the court below will stand modified to this extent and the appeal will stand allowed as above. As stated, the court below will consider the question of adjustment of equities and working out the rights of parties

at the stage of the final decree. The appellant is entitled to his costs from the contesting respondents.

Appeal allowed.

AIR 1978 KERALA 126
FULL BENCH

V. P. GOPALAN NAMBIYAR, C. J., P. SUBRAMONIAN POTI AND KUMARI P. JANAKI AMMA, JJ.

K. Balachandran, Appellant v. The Dy. Registrar, Co-operative Societies and others, Respondents.

W. A. N. 262 of 1975, D/- 13-1-1978.*

Kerala Co-operative Societies Act (21 of 1969) S. 69 (c) — Jurisdiction of Registrar to arbitrate — Dispute as to seniority and promotion etc. of employees in Co-operative Society — Rules as to service conditions not framed — Registrar has no jurisdiction to arbitrate — 1975 Ker LT 460, Reversed.

The jurisdiction of the Registrar under S. 69 to arbitrate is conterminous with the jurisdiction of the ordinary civil courts. Where no rules or bye-laws regulating seniority and promotion in respect of the employees of a Co-operative Society have been framed, a dispute as to seniority or promotion cannot be entertained or made the subject of litigation in a civil court. The provisions of S. 14 (1) (b) of the Specific Relief Act and the inability to grant the relief of reinstatement would exclude them from the purview of the ordinary civil courts. Ex hypothesi, such a dispute cannot be a subject-matter of arbitration by the Registrar. 1973 Ker LT 523 and 1975 Ker LT 861, Approved; AIR 1969 SC 1320 and AIR 1970 SC 245, Rel. on; 1975 Ker LT 460, Reversed.

(Paras 3, 5)

Cases Referred: Chronological	Paras
1975 Ker LT 861	2
1973 Ker LT 523	2
AIR 1970 SC 245 : 1970 Lab IC 285	2
AIR 1969 SC 1320	2
1964 Ker LJ 175	2
1963 Ker LT 705	2
AIR 1954 Mad 103 (FB)	2
AIR 1949 PC 129	2

K. Chandrasekharan, for Appellant; K. P. Radhakrishna Menon, for Respondents.

V. P. GOPALAN NAMBIYAR, C. J.:— The appeal is against the decision of a learned Judge of this Court in O. P. No. 363 of 1973 reported in 1975 Ker LT 460. In view of the importance of the question raised the matter was directed to be placed before a Full Bench. The learned judge dismissed the writ petition to quash Ext. P1 Award of the Registrar, confirmed on appeal by Ext. P2 order of the Co-operative Appellate Tribunal. The question relates to a dispute as to the seniority and promotion as between the writ petitioner-appellant and the 4th Respondent. The Committee of the Kuttipuram Service Co-operative Bank Ltd. (referred to for short as the Society) promoted the appellant as Assistant Accountant on 1-5-1969. The 4th Respondent thereupon submitted a petition to the Committee complaining against the said promotion. The Committee by an order referred to in Ext. P1 as Ext. C1) referred the matter to the Deputy Registrar of Co-operative Societies. The Deputy Registrar after considering the services and qualifications of the two candidates gave his opinion (referred to in Exts. P1 as C2) that the 4th Respondent was to be promoted in preference to the appellant. In pursuance of this opinion, the Committee reverted the appellant and promoted the 4th Respondent on 1-1-1970. The appellant put in a petition to the Committee for reconsideration. The Committee re-considered and created a fresh post for the appellant and gave seniority to the appellant. The matter went up again before the Deputy Registrar for re-consideration. After considering the matter in detail and on the merits, the Deputy Registrar passed Ext. P1, order by which he ordered that the Resolution of the Committee dated 10-4-1970 be rescinded and the direction Ext. C2 upheld. He also ordered that the 4th respondent is senior in rank to the appellant. This order was confirmed on appeal by the Appellate Tribunal in Ext. P2 order. The appellant's writ petition was to quash these orders.

2. Before the learned Judge the main question that was canvassed was that the jurisdiction of the Registrar to arbitrate under S. 69, in regard to the matter referred, was not attracted, and therefore had not been properly invoked. The question depends upon the provisions of the Co-operative Societies Act. S. 2 (i) of the Act and S. 69 (c) read:

"2 (i) "Dispute" — means any matter touching the business, constitution, establishments or management of a society capable of being the subject of litigation and includes a claim in respect of any sum payable to or by a society, whether such claim be admitted or not." (underlining ours)

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* (Against judgment of single J. of this Court reported in 1975 Ker LT 460).

"69. Notwithstanding anything contained in any law for the time being in force, if a dispute arises—

(a) & (b) xx xx xx

(c) between the society or its committee and any past committee, any officer, agent or employee, or any past officer, past agent or past employee, or the nominee, heirs or legal representatives of any deceased officer, deceased agent or deceased employee of the society; or

xx xx xx

such dispute shall be referred to the Registrar for decision, and no court shall have jurisdiction to entertain any suit or other proceeding in respect of such dispute."

The pattern of those provisions is somewhat different from what has till recently been followed under the provisions of the Co-operative Societies' Acts, where almost uniformly, the Registrar's jurisdiction related, broadly speaking, to matters touching the business of the Society, without any independent definition of the term 'dispute'. Under the present Act of 1969 while the requirement of a 'dispute touching the business of the Society' is undoubtedly indicated, the definition makes it clear that the dispute may touch the business, constitution, establishments or management of a Society etc. The argument advanced before the learned Judge, based on the trend of opinion rendered with respect to the pattern of the provisions of the various Co-operative Societies Acts, till then in force, was that a dispute regarding service conditions, promotion and seniority etc. of employees in a Co-operative Society was not a matter 'touching the business' of the Society, and therefore not cognisable by the Registrar for arbitration as it is called, under the Co-operative Societies Act. The argument derives support from two decisions of the Supreme Court in D. M. Co-op. Bank v. Dalichand (AIR 1969 SC 1320) and Co-op. Cr. Bank v. Ind. Tri., Hyderabad (AIR 1970 SC 245). Those have laid down the limitation that a matter 'touching the business' of the Society must relate to the trade and commercial activities of the society. More important, is the decision of this Court in Kaloor Vadakkummury Service Co-operative Society Ltd. v. Asst. Registrar (1973 Ker LT 523). After examining the position elaborately, the Division Bench stated at page 525 as follows:

"3. The question for decision is whether the dispute that has been decided by the 2nd respondent by Ext. P5 award is a dispute that can competently be resolved by the Registrar functioning under S. 69 of the Act For deciding this question, it is necessary to understand the scope and nature of the disputes that can be settled by an Industrial Tribunal or Labour Court. We must in this connection, refer to a passage from the decision of the Privy Council in Labour Relations Board of Saskatchewan v. John East Iron Works Ltd. reported in AIR 1949 PC 129. The question therein was whether the provisions in the British North America Act, 1867, should be complied with in appointing the members of the Labour Relations Board under the Trade Unions Act 1944. This question turned on the further question whether the Labour Relations Board could be termed a District and County Court. The members of the Judicial Committee, considered the scope and functions of the Labour Relations Board and we think that two paras. in the judgment are relevant. We shall extract those paras:

"26. It is a truism that the conception of the judicial function is inseparably bound up with the idea of a suit between parties, whether between Crown and subject or between subject and subject, and that it is the duty of the Court to decide the issue between those parties, with whom alone it rests to initiate or defend or compromise the proceedings. Here at once a striking departure from the traditional conception of a Court may be seen in the functions of the appellant Board. For, as the Act contemplates and the Rules made under it prescribe, any trade union, any employer, any employers' association or any other person directly concerned may apply to the Board for an order to be made (a) requiring any person to refrain from a violation of the Act or from engaging in an unfair labour practice, (b) requiring an employer to reinstate an employee discharged contrary to the provisions of the Act and to pay such employee the monetary loss suffered by reason of such discharge, (c) requiring an employer to disestablish a company dominated organisation or (d) requiring two or more of the said things to be done. Other rules provide for the discharge by the Board of other functions. It is sufficient to refer only to (b) supra, which clearly illustrates that, while the order relates solely to the relief to be given to an individual, yet the controversy may be raised by others without his assent and, it may be, against his will, for the solution of some far-reaching industrial conflict. It may be possible to describe an issue thus raised as a "lis" and to regard its determination as the exercise of judicial power. But it

appears to their Lordships that such an issue is indeed remote from those which at the time of confederation occupied the superior or district or county Courts of Upper Canada.

27. In the Court of Appeal for Saskatchowan the learned Chief Justice (in whose opinion the other Judges concurred) accepted the view that the Board exercised a judicial power analogous to that of the Courts named on the ground that such Courts always had jurisdiction in connection with the enforcement of contracts of hiring and awarding damages for the breaches thereof. But, as their Lordships think, this view ignores the wider aspects of the matter. The jurisdiction of the Board under S. 5 (e) is not invoked by the employee for the enforcement of his contractual rights; these, whatever they may be we can assert elsewhere. But his reinstatement which the terms of his contract of employment might not by themselves justify, is the means by which labour practices regarded as unfair are frustrated and the policy of collective bargaining as a road to industrial peace is secured. It is in the light of this new conception of industrial relations that the question to be determined by the Board must be viewed, and, even if the issue so raised can be regarded as a justiciable one, it finds no analogy in those issues which were familiar to the Courts of 1867."

4. It is this concept, we venture to think, that weighed with this Court when it decided Malabar Co-operative Central Bank Limited, Kozhikode v. State of Kerala reported in 1963 Ker LT 705 and Chief Justice M. S. Menon, if we may say so with great respect, in his inimitable style used facile language to express the same opinion:

"Co-operative societies are creatures of statute, controlled by their constitution, and concerned with their contracts. Industrial disputes stem, not from the subtle refinements of contractual obligations, but from the rougher jurisprudence of social justice and readjustment. The uplands of the Industrial Tribunals are out of bounds to the Registrar of Co-operative Societies."

This, the learned Chief Justice said in relation to the question whether wages, promotions, gratuity and pension, medical aid, recruitment and probation and retirement which were referred to an Industrial Tribunal, were matters which fell within the purview of the Registrar under S. 51 of the Madras Co-operative Societies Act, 1932. It is unnecessary for us to read that section and notice the difference in the wording of that section with S. 69 of the Act because the judgment is based on the nature of the disputes that can be settled by a Registrar under the Act.

5. The same learned Chief Justice had to deal with this question again and we must refer to this decision as well for it settles another principle which we find has not been noticed in the numerous decisions that have been placed before us and which turns on the question whether a dispute was one "touching the business of the society" or affecting or relating to the business of the society. The decision we have in mind is the one in Kerala State Handloom Weavers' Co-operative Society Ltd. v. State of Kerala reported in 1964 Ker LJ 175. After referring to the passage which we have just read, and a passage from the judgment of the Bombay High Court wherein Chief Justice Chagla had said this:

"Now Mr. Rane has very rightly pointed out that the disputes contemplated by S. 54 are disputes of a civil nature which could have been decided by Civil Courts but for the provisions with regard to compulsory arbitration provided in S. 45. Mr. Rane has also rightly pointed out that the present dispute between the second respondent and the petitioners could not have been the subject-matter of a reference to arbitration under S. 54. The second respondent is not claiming to assert any civil rights against the petitioners. What he is claiming is certain rights which are now conferred upon workmen and employees as a result of principles of social justice which are now almost universally acknowledge all the world over. There is no right of reinstatement under civil law which can be enforced by an employee against his employer. No contract of personal service can be specifically enforced by a civil court nor does a civil court determine whether the wages paid to an employee are proper wages or not. Civil Courts are bound down by the law of contract and it is under the law of contract that the Civil Courts decide disputes between a master and his servant.

The learned Chief Justice observed as follows :

"Emphasis was placed on the words 'touching the business of a registered society' occurring in S. 60 (1) of the Travancore-Cochin Co-operative Societies Act, 1951, and various decisions bearing on those words—like M. S. Madhava Rao v. D. V. K. Surya Rao (AIR 1954 Mad 103) (FB)—were brought to our notice. It is unnecessary to consider those decisions in this judgment. The question in cases like this is not whether the dispute referred for adjudication touches the business

of a co-operative society; the question really is whether that dispute comes within the category of disputes covered by S. 60 (1) of the Travancore Cochin Co-operative Societies Act, 1951. The purpose of Chapter XIII of the Travancore Cochin Co-operative Societies Act, 1951 the Chapter in which S. 60 (1) occurs—is not to resolve all controversies touching the business of co-operative societies under the provisions of that Chapter; but resolve only such controversies as can be resolved in an ordinary court of law. In other words the arbitration provided by Chapter XIII is an alternative to the normal processes of the ordinary courts and not to the extraordinary process of adjudication under the Industrial Disputes Act. 1947, which has been designed to deal with controversies which by their very nature are outside the purview of ordinary litigation.

With great respect, we fully agree with the views expressed in the above passage and in the light of that passage, we are not dealing with the numerous other decisions that have been quoted before us, on the question whether the dispute with which we are concerned here is a dispute touching the business of the co-operative society or touching the establishment or management of the co-operative society."

Paragraphs 7 and 8 of the judgment which we refrain from quoting in full, noticed the two Supreme Court decisions in AIR 1969 SC 1320 and AIR 1970 SC 245. We venture to extract the following quotation from the latter decision quoted in para 8 of 1973 Ker LT 523:

"Applying these tests, we have no doubt at all that the dispute covered by the first issue referred to the Industrial Tribunal in the present cases could not possibly be referred for decision to the Registrar under S. 61 of the Act. The dispute related to alteration of a number of conditions of service of the workmen which relief could only be granted by an Industrial Tribunal dealing with an industrial dispute. The Registrar, it is clear from the provisions of the Act, could not possibly have granted the reliefs claimed under this issue because of the limitations placed on his powers in the Act itself....." The principle thus settled was that the Registrar will have jurisdiction to entertain all matters ordinarily and normally cognisable by civil courts. The same principle was reiterated in Sankaran v. Deputy Registrar (1975 Ker LT 861.

3. The jurisdiction of the Registrar in regard to arbitration under the Co-operative Societies Act, having been thus sketched by the decisions of this Court, the question is whether, on the facts disclosed in this case, the Registrar had jurisdiction or not. The learned Judge found jurisdiction in the Registrar on the addition of the word 'establishments' in the definition of the word 'dispute', which we have extracted earlier. In so finding the learned Judge has lost sight of the important principle stated by the decisions to which we have just made reference, that the jurisdiction of the Registrar is conterminous with the jurisdiction of the ordinary civil courts. It is beyond dispute that no rules or bye-laws regulating seniority and promotion as between the appellant and the 4th Respondent, or in respect of the employees of the Co-operative Society have been framed. In the absence of such rules, regulations or bye-lays, a dispute as to seniority or promotion cannot be entertained or made the subject of litigation in a civil court. The provisions of S. 14 (1) (b) of the Specific Relief Act and the inability to grant the relief of reinstatement would exclude them from the purview of the ordinary civil courts, as stated in the decisions already noticed. Ex hypothesi, such a dispute cannot be a subject-matter of arbitration by the Registrar.

4. The learned Additional Advocate General sought to sustain the Registrar's powers under Rules 176 and 185 of the Kerala Co-operative Societies Rules. These Rules read:

"176. Registrar's power to rescind resolution.— Notwithstanding anything contained in the bye laws of a registered society. it shall be competent for the Registrar to rescind any resolution of any meeting of any society or of the committee of any society, if it appears to him that such resolution is ultra vires of the objects of the society, or is against the provisions of the Act, Rules. Bye-laws or of any direction or instructions issued by the Department, or calculated to disturb the peaceful and orderly working of the society or is contrary to the better interest of the society."

"185. Promotions.

(1) Appointments to higher categories of service in a Society shall ordinarily be made by promotion from among members eligible for appointment to such category in accordance with those rules on the basis of seniority in the feeder category. The feeder category for this purpose shall be prescribed by the society by framing suitable subsidiary regulations with the approval of the Registrar.

(2) It shall be competent for the committee of a society to relax the qualifications of an employee for purpose of promotion in deserving cases with the prior approval of the Registrar and for reasons to be recorded in writing."

As far as R. 176 is concerned, we do not think we would be justified in tracing the impugned order Ext. P1 to that Rule. The order itself expressly states that it was passed on a petition under S. 69 (1) of the Act. The terms of the order also make it clear that it cannot possibly be sustained as one passed under R. 176 of the Act. For these reasons we rule out R. 176.

5. Rule 185 has no application at all, as it came into force only on 1-1-1974 i. e. beyond the relevant date of the impugned proceedings. We are of the opinion, in the light of the principles settled by the decisions of the Supreme Court and by this Court which we have noticed earlier, the jurisdiction of the Registrar under S. 69 of the Co-operative Societies Act is not attracted. It is unnecessary to consider whether the addition of the term 'establishments' in S. 2 (i) would comprehend disputes as to seniority and promotion.

We allow this appeal and set aside the judgment of the learned Judge. The result is that O. P. 363 of 1978 will stand allowed and Exts. P1 and P2 orders will stand quashed. We make no order as to costs.

Appeal allowed.

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FULL BENCH

V. P. GOPALAN NAMBIYAR, C. J., P. SUBRAMONIAN POTI AND KUMARI P. JANAKI AMMA, JJ.

Ommen Simon and others, Petitioners v. State of Kerala, Respondent.

C. M. P. No. 9569 of 1977 in L. A. A. No. 305 of 1976, C. R. P. Nos. 2435 and 2436 of 1976, D/- 5-12-1977.

Kerala Land Acquisition Act (21 of 1962), Ss. 25 (2), 30 — Solatium is part of the compensation — Interest has to be awarded on solatium amount also — ILR (1973) 2 Ker 1 Overruled. (Land Acquisition Act (1 of 1894), S. 28). AIR 1973 SC 305 Disting. (Paras 2, 4)

Anno: AIR Manual (3rd Edn.), Land Acquisition Act, S. 28 N. 1.

BV/BV/A572/78/DVT

Cases Referred: Chronological Paras

AIR 1973 SC 305 : (1972) 2 SCWR 878 2, 3, 4

ILR (1973) 2 Ker 1 1, 2, 3, 4

C. S. Thomas (In C.M.P. No. 9569 of 1977) and T. Unnikrishna Menon, K. A. Alexander and M. P. Vasudevan Nair (In C.R.P's. Nos. 2435 and 2436 of 1976) for Petitioners; Govt. Pleader for Respondents in all the Matters.

GOPALAN NAMBIYAR, C. J.:— These three cases raise a common question in regard to the correctness of certain observations in a Division Bench Judgment of this Court in State of Kerala v. Periyar & Pareekanni Rubber Ltd., Palai (ILR (1973) 2 Ker 1), in which, the judgment was delivered by one of us (myself). The question is whether interest can be awarded on the statutory solatium provided for under the Land Acquisition Act, in reckoning the compensation payable.

2. C. M. P. No. 9569 of 1977 : The question arises on an application preferred to correct the decree passed by this Court in L. A. A. No. 305 of 1976. The decree, which was drawn up by the office, limited interest at 4 per cent to the amount of compensation awarded, excluding solatium. The office, when drawing up the decree, followed the principle of the Supreme Court decision reported in Union of India v. Ram Mehar (AIR 1973 SC 305). We have examined this case. The Supreme Court's decision was with reference to S. 4 (3) of the Land Acquisition (Amendment and Validation) Act (1967), which is as follows:

"4 (3). — Where acquisition of any particular land covered by a notification under sub-s. (1) of S. 4 of the principal Act published before the commencement of the Land Acquisition (Amendment and Validation) Ordinance 1967, is or has been made in pursuance of any declaration under S. 6 of the principal Act, whether made before or after such commencement, and such declaration is or has been made after the expiry of three years from the date of publication of such notification, there shall be paid simple interest, calculated at the rate of six per centum per annum on the market value of such land, as determined under S. 23 of the principal Act, from the date of expiry of the said period of three years to the date of tender of payment of compensation awarded by the Collector for the acquisition of such land;

Provided....."

It will be seen that the above Section limits the award of interest to the "market value of the land" and not to the compensation adjudged by the Court. Quite different are the provisions we are concerned with, in the Kerala Land Acquisition Act, or, for that matter, in the Travancore Land Acquisition Act, (which was the Act concerned in the decision reported in (ILR (1973) 2 Ker 1). In the Kerala Land Acquisition Act, S. 25 (1) provides that: "In determining the amount of compensation, the Court shall take into account" the considerations mentioned therein. Sub-sec. (2) of the said Section provides:

"In addition to the market value of the land as above provided, the Court shall in every case award a sum of fifteen per centum on such market value in consideration of the compulsory nature of the acquisition."

It is, thus, clear that the solatium provided by sub-sec. (2) is part of the compensation that is envisaged by sub-section (1) of the said section. The award of interest is provided for in S. 30 of the Act, which is as follows:

"If the sum which, in the opinion of the Court, the Collector ought to have awarded as compensation is in excess of the sum which the Collector did award as compensation, the award of the Court may direct that the Collector shall pay interest on such excess at the rate of four per centum per annum from the date on which he took possession of the land to the date of payment of such excess into Court."

Interest being on the compensation awarded by the Court, on the statutory provisions, it is clear that, interest must attach to the solatium also. We are, therefore, of the opinion that, the office was wrong in drawing up the decree by deleting the interest on the amount of solatium. C.M.P. No. 9569 of 1977 is allowed. No costs.

3. C.R.P. Nos. 2435 & 2436 of 1976: These revisions arise out of orders passed by the Sub Court, Ernakulam, dismissing the applications for amendment of the decree in so far as it denied interest on solatium. The decree, as drawn up, did not allow interest on the solatium. Applications for correction praying, inter alia, to award interest on the solatium also, was disallowed, on the basis of the Supreme Court decision — AIR 1973 SC 305 and (ILR (1973) 2 Ker 1). In our judgment in C.M.P. No. 9569 of 1977 we have examined the decision in AIR 1973 SC 305, and held that the failure to award interest on solatium cannot be sustained. The decision of the Supreme Court in AIR 1973 SC 305 was concerned with the provisions of a Statute, quite differently worded, from the terms of which, it is clear that interest is only as (on) the market value, and as such, has no application.

4. The observations in State of Kerala v. Periyar & Pareekanni Rubber Ltd., Palai (ILR (1973) 2 Ker 1) in paragraph 18 of the Judgment are as follows:

"The Advocate-General's contention that interest awarded cannot cover the solatium is well founded in view of the recent decision of the Supreme Court in Union of India v. Sri Ram Mehar (1972) 2 SCWR 878) : (AIR 1973 SC 305)."

In the light of the statutory provisions of the Land Acquisition Act, which we have examined in C.M.P. No. 9569 of 1977 in L.A.A. No. 305 of 1976, the above observations were unfounded and cannot be accepted as correct. The learned Advocate-General who appeared in these cases, also accepted the position.

These revision petitions are allowed and the applications for correction of the decree will stand allowed to the extent of allowing interest on the amount of solatium awarded also. There will be no order as to costs.

Petitions allowed.

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FULL BENCH

V. P. GOPALAN NAMBIYAR, C. J.
P. SUBRAMONIAN POTI AND KUMARI P. JANAKI AMMA, JJ.*

Kesavan Sivan Pillai, Rev. Petitioner v. Sreedharan Rajamohan and others, Respondents.

Criminal R. P. No. 227 of 1976, D/- 27-1-1978.

Criminal P. C. (2 of 1974), Ss. 399 (3) and 397 (3) — Revision petition — Maintainable directly before High Court

*(Note: In this case, the Judges of the Full Bench differ in their views. The majority view is taken by V. P. Gopalan Nambiyar C. J. and P. Subramonian Poti J. and minority by P. Janaki Amma J.)

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without first approaching Sessions Judge. 1975 Ker LT 451 and 1975 Ker LT 739 Overruled.

Per Majority (P. Janaki Amma, J. Contra) : — Revision petition is maintainable directly in High Court. There is no necessity to follow the old practice of insisting on a party filing revision petition first before Sessions Judge before approaching High Court. (Para 17)

On a reading of provisions of Ss. 397, 399, 401 and 402 of the Code it will be seen that a concurrent jurisdiction in the matter of revision is conferred by S. 397 (1) on the High Court and on the Sessions Judge. It is a salutary and well accepted principle that in such cases, where a concurrent jurisdiction is conferred on two forums the lower forum should be exhausted first before approaching the higher one. In the face of the bar provided by cl. (3) of S. 399, to import such a rule of salutary practice would be to render the option under cl. (1) of S. 397 nugatory. A rule of practice or convention cannot justifiably be imported so as to destroy the statutory option given to a party of choosing any one of two forums for filing the revision. (Para 4)

The remedy against conflicting decisions and the resulting chaos, if one party were to resort to the Sessions Judge, and another, to move the High Court in the same proceedings, lies in an appropriate resort to the provisions of S. 402. Further, under S. 407 (1) (c), there is a wide power of transfer on the High Court where it is expedient to direct a transfer for the ends of justice. In the light of the amended provisions of the Code there is no room for applying any rule of practice. A party's right of revision cannot be cut down or rendered otiose by any rule of practice. 1975 Ker LT 451 and 1975 Ker LT 739 Overruled; Case law reviewed. (Paras 5, 8)

Per Janaki Amma, J.: It is evident that under the scheme of the revisional jurisdiction, no party to a proceeding before an inferior Criminal Court has got a right to claim that a revision petition filed by him should be either admitted for hearing or heard on the merits by the High Court or by the Sessions Judge. S. 397 (3) does not confer an implied right on any party to a proceeding to move either the High Court or the Sessions Judge. (Paras 10, 11)

If a party to a proceeding has no right to say that a petition filed by him for invoking the revisional powers of the High Court should be either admitted or heard by the High Court, it is within the powers of the High Court to lay down a rule of practice and say that concurrent revisional jurisdiction having been given both to the High Court and to the Sessions Judge, the person desiring to invoke such jurisdiction should proceed first to the Sessions Judge. The Sessions Judge under S. 399 and S. 401 of the new Code, is conferred plenary powers of revision and is competent to give relief to the party to the same extent as the High Court. The provisions relating to the revisional jurisdiction in the new Code would tend to show that the Parliament was of the view that only in cases where the Sessions Judge differs from the inferior court and in cases against the decisions of the Court of Session need the party approach the High Court for invoking its powers of revision. (Paras 12, 13)

If the provisions relating to revisional jurisdiction are to be construed as conferring a right on a person to choose the forum, he is entitled to have the case disposed of by the court chosen by him and it will be inequitable to transfer his case to another court just because his opposite party or a stranger chose another forum. Such a contingency is inherent in a transfer under S. 407 Cr. P. C. and can be avoided if the High Court lays down a rule of practice in respect of revision petitions. (Para 14)

Whenever the order of the Sessions Judge in revision failed to satisfy the concerned person and he made out a case for interference under S. 482 of the Cr. P. C. High Court has not hesitated to interfere. The bar under S. 397 (3) does not stand in the way of the High Court in exercising its inherent powers in matters which fall under the purview of S. 482 Cr. P. C. It goes without saying that by regulating the exercise of its powers of revision, the High Court is not deprived of such powers. It only means that the High Court, as a prudent measure, with a view to provide an orderly procedure and prevent confusion that may be caused by parties in the same case approaching indiscriminately the High Court and the Court of Session for exercise of their powers of revision decides not to entertain revision petitions from courts inferior to the Sessions Judge so that the concerned persons may approach the Sessions Judge and seek redress. It is

always open to the High Court to exercise its powers of revision suo motu. (Para 15)

It is only fit and proper that the High Court regulates the exercise of its powers of revision at the instance of individuals and continues the rule of practice requiring the party to resort to the lower forum before moving the higher one. (Paras 15, 16)

Anno: AIR Comm., Cr. P. C. (7th Edn.), S. 399, N. 1; S. 397, N. 14.

Cases Referred: Chronological **Paras**

1978 Cri LJ 165 : AIR 1978 SC 57 15
1977 Cri LJ 116 (All) 8, 15
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1969 Cri LJ 611 : 1968 Ker LT 495 : AIR 1969 Ker 126 (FB) 2, 3, 5, 6, 9, 12, 16
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(1950) 51 Cri LJ 1514 : AIR 1950 SC 124 4, 10
(1935) 294 U. S. 103 : 79 Law ed 791 Mooney v. Holohan. 4
(1933) 34 Cri LJ 1115 : AIR 1933 All 678 (FB) 4
(1906) 205 US 179 : 51 Law ed. 760 Urquhart v. Brwn 4

Pirappancode Sreedharan Nair and V. N. Achutha Kurup, for Rev. Petitioner. P. Sukumaran Nair and A. K. Chinnan, State Prosecutor, for Respondents.

V. P. GOPALAN NAMBIYAR C. J. (Majority view) (for himself and P. Subramonian Poti J.):— This matter has been placed before a Full Bench to consider the correctness of two Division Bench Rulings of this Court in Abraham v. Thankamma (1975 Ker LT 451) and Raman Pillai v. Dakshayani (1975 Ker LT 739). Both the decisions were by a Division Bench consisting of Khalid and Janaki Amma JJ. Khalid J. who made the order of reference in the first instance noticed the conflict of judicial opinion on the question, expressed his misgiving as to the correctness of the prior rulings, and his embarrassment in the matter, and felt that the matter had to be decided by a Full Bench. It was accordingly referred by a Division Bench of two of us to a Full Bench.

2. The two Division Bench rulings referred to earlier took the view that the introduction of Section 399 in the new Criminal Procedure Code alters the practice settled for this Court in Narayanan v. Kannamma Bhargavi 1968 Ker. LT 495 : (AIR 1969 Ker 126) (FB). The Division Bench noticed that the Sessions Judge had been given power to pass final and effective orders in all cases, unlike the position in the previous Code where, in certain cases, the Sessions Judges could only report the matter for final orders of the High Court. Taken along with the fact that the Code contemplated institution of proceedings in the court of the lowest jurisdiction, the Division Bench was of the view that the Sessions Judge had to be moved first in revisional jurisdiction also. The Division Bench felt that a harmonious construction of S. 397 cl. (3) with S. 399 cl. (3) led to the conclusion that the legislative intent was, as far as possible, to make the Sessions Judge the final Court and that if every party approaches the High Court direct, S. 399 cl. (3) would become unnecessary. In Abraham v. Thankamma (1975 Ker LT 451) the position was stated thus:

"24. We, therefore, hold relying upon the Full Bench ruling laid down in 1968 Ker LT 495 : (1969 Cri LJ 611) and on the basis of the new section of the Code that no party can approach this Court direct without moving the Sessions Judge at the first instance in revision."

The position was stated in terms absolute imposing a total ban on the party approaching the High Court in the first instance in revision. In Raman Pillay's case (1975 Ker LT 739) the position was re-affirmed.

3. It is unnecessary to notice in detail the history of the rule of practice settled for this Court in 1968 Ker LT 495 : (1969 Cri LJ 611) (FB). With respect to the provisions of Ss. 435, 436, 438 and 439 of the earlier Cr. P. C. a Division Bench of this Court had in Devaki v. Kitta (1967 Ker LT 31) : (1967 Cri LJ 1640) laid down that ordinarily and normally a party filing a revision petition must first approach the Sessions Judge and only thereafter come to the High Court. The Division Bench followed the ruling of the Andhra Pradesh High Court in Veera Ramayya v. Udayagiri Venkita Seshavatharam (AIR 1956 Andhra 97) : (1956

Cri LJ 571 (2)). The Full Bench in 1968 Ker LT 495 : (1969 Cri LJ 611) took the view that under the then Criminal Procedure Code the Sessions Judge could not pass an effective order in certain categories of cases, but had to report the matter for the decision of the High Court (vide S. 438 of Cr. P. C.);and that in this view, it would not be just or equitable to compel a party to resort in the first instance to the Sessions Judge before approaching the High Court. Let us approach the consideration of the question with respect to the provisions of the present Criminal Procedure Code.

4. S. 397 of the Code in so far as it is material reads:

"397. (1). The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may. when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record."

* * * * *

(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them."

Ss. 399, 401 and 402 may also be noted:

"399. (1) In the case of any proceeding the record of which has been called for by himself, the Sessions Judge may exercise all or any of the powers which may be exercised by the High Court under sub-sec. (1) of S. 401.

(2) Where any proceeding by way of revision is commenced before a Sessions Judge under sub-sec. (1), the provisions of sub-secs. (2), (3), (4) and (5) of S. 401 shall, so far as may be, apply to such proceeding and references in the said sub-sections to the High Court shall be construed as references to the Sessions Judge.

(3) Where any application for revision is made by or on behalf of any person before the Sessions Judge, the decision no further proceeding by way of revision at the instance of such person shall be entertained by the High Court or any other Court.

401 (1) In the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of appeal by Ss. 386. 389, 390 and 391 or on a Court of Session by S. 307 and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by S. 392.

(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Nothing in this secion shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction.

(4) Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.

(5) Where under this Code an appeal lies but an application for revision has been made to the High Court by any person and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly.

402. (1) Whenever one or more persons convicted at the same trial makes or make application to a High Court for revision and any other person convicted at the same trial makes an application to the Sessions Judge for revision, the High Court shall decide, having regard to the general convenience of the parties and the importance of the question involved, which of the two Courts should finally dispose of the applications for revision and when the High Court decides that all the applications for revision should be disposed of by itself. the High Court shall direct that the applications for revision pending before the Sessions Judge be transferred to itself and where the High Court decides that it is not necessary for it to dispose of the applications for revision, it shall direct

(2) Whenever any application for revision is transferred to the High Court, that Court shall deal with the same as if it were an application duly made before itself.

(3) Whenever any application for revision is transferred to the Sessions Judge, that Judge shall deal with the same as if it were an application duly made before himself.

(4) Where an application for revision is transferred by the High Court to the Sessions Judge, no further application for revision shall lie to the High Court or to any other Court at the instance of the person or persons whose applications for revision have been disposed of by the Sessions Judge."

S. 403 enacts that save as otherwise expressly provided by the Code, there is no right to be heard either personally or by pleader before any Court exercising its powers of revision; but the Court may, if it thinks fit, when exercising such powers, hear any party either personally or by pleader. On these provisions it will be seen that a concurrent jurisdiction in the matter of revision is conferred by S. 397 (1) on the High Court and on the Sessions Judge. It is a salutary and well accepted principle that in such cases, where a concurrent jurisdiction is conferred on two forums the lower forum should be exhausted first before approaching the higher one. This practice is referred to by the Supreme Court in Romesh Thappar v. State of Madras (AIR 1950 SC 124): (51 Cri LJ 1514) as follows:

"5. The Advocate-General of Madras appearing on behalf of the respondents raised a preliminary objection, not indeed to the jurisdiction of this Court to entertain the application under Art. 32, but to the petitioner resorting to this Court directly for such relief in the first instance. He contended that, as a matter of orderly procedure, the petitioner should first resort to the High Court at Madras which under Art. 226 of the Constitution has concurrent jurisdiction to deal with the matter. He cited criminal revision petitions under S. 435, Cr. P. C., applications for bail and applications for transfer under S. 24, Civil P. C. as instances where, concurrent jurisdiction having been given in certain matters to the High Court and the Court of a lower grade, a rule of practice had been established that a party should proceed first to the latter Court for relief before resorting to the High Court. He referred to 56 All 158: (AIR 1933 All 678: 34 Cri LJ 1115 FB), where such a rule of practice was enforced in a criminal revision case, and called our attention also to certain American decisions, Urquhart v. Brown, (1906) 205 US 179 and Mooney v. Holohon, (1935) 294 US 103 as showing that the Supreme Court of the United States ordinarily required that whatever judicial remedies remained open to the applicant in Federal and State Courts should be exhausted before the remedy in the Supreme Court — be it habeas corpus or certiorari — would be allowed. We are of opinion that neither the instances mentioned by the learned Advocate-General nor the American decisions referred to by him are really analogous to the remedy afforded by Art. 32 of the Indian Constitution. That Article does not merely confer power on this Court, as Art. 226 does on the High Courts, to issue certain writs for the enforcement of the rights conferred by Part III. or for any other purpose, as part of its general jurisdiction. In that case it would have been more appropriately placed among Arts. 131 to 139 which define that jurisdiction. Art. 32 provides a "guaranteed" remedy for the enforcement of those rights and this remedial right is itself made a fundamental right by being included in Part III. This Court is thus constituted the protector and guarantor of fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights. No similar provision is to be found in the Constitution of the United States and we do not consider that the American decisions are in point."

The principle was not accepted or applied on the ground that an application under Art. 32 of the Constitution was for enforcing fundamental rights and was itself a guaranteed remedy. We may also notice the decision in Daryao v State of U. P. (AIR 1961 SC 1457) to which our attention was drawn by the learned Advocate General to the effect that a decision on a petition under Art. 226 of the Constitution may, in conceivable cases, operate as res judicata and bar a petition for similar relief under Art. 32 of the Constitution. The principle was affirmed in M/s. Trilokchand Motichand v. H. B. Munshi, Commr. of Sales-Tax, Bombay (AIR 1970 SC 898) and Arati Ray Choudhury v. Union of India (AIR 1974 SC 532). But with these principles

thrown in, on the terms of the statutory provisions, would we be justified in insisting even as a rule of salutary practice that the party should approach the Sessions Judge first before moving the High Court? In the face of the bar provided by cl. (3) of S. 399, to import such a rule of salutary practice would be to render the option under cl. (1) of S. 397 nugatory. We see that the bar under S. 399 (3) can operate only against a party who moved the Sessions Judge; so that, if the party succeeded before the Sessions Judge a right of further revision to the High Court could be availed of by the opposite party. But this, we think, is only an attenuated right, available only in a small percentage of cases. It is one thing to apply a rule of salutary practice requiring the party to resort to the lower forum before moving the higher one, so long as the two forums are available for resort. But when this is coupled, so to say, with a penalty as in S. 399 (3) that the choice of the one will bar access to the other, still to confine the party to the lower forum will be, practically, to destroy the option. A provision more or less on the lines of S. 399 (3) occurs in S. 435 cl. (4) of the earlier Cr. P. C. which was as follows:

"435 (4). If an application under this section has been made either to the Sessions Judge or District Magistrate, no further application shall be entertained by the other of them".

But the scope and the applicability of that provision and the plane at which it operated, were quite different and understandable. We do not think we would be justified by importing a rule of practice or convention so as to destroy the statutory option given to a party of choosing any one of two forums for filing the revision.

5. But the learned Advocate General to whom we issued notice, made a forceful submission to still confine the party to the Sessions Judge before approaching the High Court. It was contended that without any such limitation, conflict of decisions was likely to result if some of the parties approached the Sessions Judge and others, the High Court. This was particularly so in proceedings under Ss. 133 or 145 of the Cr. P. C. To avoid the anomaly it was contended that rule of limitation or salutary practice was necessary. This was emphasised with respect to the provisions of S. 403 of the New Code of 1973 which had statutorily recognised that the party had no right to be heard either in person or by pleader before a court of revision. The considerations stressed by the learned Advocate General are forceful; but we do not think they should be allowed to override the effect of the statutory provision under S. 397 (1) of the Code. The remedy against conflicting decisions and the resulting chaos, if one party were to resort to the Sessions Judge, and another, to move the High Court in the same proceedings, lies in an appropriate resort to the provisions of S. 402 of the Criminal Procedure Code, which we have extracted earlier. Further under S. 407 (1) (c), there is a wide power of transfer on the High Court where it is expedient to direct a transfer for the ends of justice. In such a case the Section provides for the transfer of any particular case from one subordinate criminal court to another or for transfer of any particular case to the High Court to be tried by itself. These provisions appear sufficient to meet the ends of justice. In the light of the amended provisions of the Code we are satisfied that there is no room for applying any rule of practice or for reviving the principle of the decision in Narayanan v. Kannamma Bhargavi (1968 Ker LT 495): (1969 Cri LJ 611) (FB). We also feel satisfied that the rule stated in absolute terms in Abraham's case (1975 Ker LT 451) and in Raman Pillay's case (1975 Ker LT 739) cannot be accepted as correct. These decisions, to the extent to which they laid down the rule in that fashion are overruled.

6. We may briefly notice the state of the authorities cited to us on this question. In Puvvula Abbulu v. State, (1975 Cri LJ 139) a Division Bench of the Andhra High Court after noticing the provisions of the Cr. P. C. ruled that there was no longer any justification for following a rule of practice till then followed by the Andhra High Court and insisting on the party filing a revision first before the Sessions Judge before approaching the High Court. It was this Rule of practice of the Andhra High Court laid down in AIR 1956 Andhra 97: (1956 Cri LJ 571) (2) that was followed by the Division Bench of this Court in 1967 Ker LT 31: (1967 Cri LJ 1640) which view was upset by the Full Bench in 1968 Ker LT 495: (1969 Cri LJ 611).

7. The Gujarat High Court in Satyanarayana v. Kantilal (1976 Cri LJ 1806) again examined the provisions of the new Cr. P. C. and went to the extent of holding that R. 14 of the Bombay High

Court Rules which ordained that in the matter of filing Criminal Revision Petitions the Sessions Judge shall be approached first before moving the High Court, was inconsistent with the provisions of the new Code.

8. The decisions in Mohd. Khan v. Shamim Begum, (1977 Cri LJ 116) (All) and in Harakh Singh v. Lalmuni Kuer (1977 Cri LJ 723) (Pat) are not directly relevant. In the first of these, an application to the Sessions Judge was withdrawn and it was held by the Allahabad High Court that the party was not barred from approaching the High Court. In the second, the application to the Sessions Judge was made and dismissed as not pressed by the party. It was held by the Patna High Court that he was precluded from approaching the High Court. The decisions thus support the position that a party's right of revision cannot be cut down or rendered otiose by any rule of practice. The decisions are consistent with the principle that we have deduced from a construction of the statutory provisions.

In the result, we hold that the revision petition is maintainable in this Court. The case will be posted for hearing in the usual course.

JANAKI AMMA, J. (Minority view):—

9. Being a party to the decisions in Abraham v. Thankamma (1975 Ker LT 451) and Raman Pillai v. Dakshayani (1975 Ker LT 739), which have been overruled in the judgment of the Hon'ble the Chief Justice, I would like to express my views on some of the aspects which came up for consideration before the Full Bench. I may also state at the outset that I do not share the embarrassment expressed by Khalid, J. in his order of reference. I feel that it was for sound reasons that the Division Bench decided to continue the rule of practice hitherto followed by the High Court in the matter of entertaining applications for revision and which has been referred to in Devaki v. Kitta (1967 Ker LT 31): (1967 Cri LJ 1640) and Narayanan v. Kannamma Bhargavi (1968 Ker LT 495): (1969 Cri LJ 611) (FB). It is no doubt true that the High Courts of Andhra Pradesh, Bombay and Gujarat in Puvvula Abbulu v. State Station House Officer, Vijayawada (1975 Cri LJ 139) (Andh Pra), Madhavlal v. Chandrasekhar (1976 Cri LJ 1604) (Bom) and Satyanarayan v. Kantilal (1976 Cri LJ 1806) (Guj) decided otherwise. The decision of the Andhra Pradesh High Court has been referred to by Khalid J., in Abraham v. Thankamma (1975 Ker LT 451) and has been dissented from. The decisions of the Bombay High Court and the Gujarat High Court came after the Division Bench decisions of this court, referred to above. The High Courts of Bombay and Gujarat. I may say with respect, did not take into account the reasons mentioned by the Division Bench of this Court in the Judgments in Abraham v. Thankamma (1975 Ker LT 451) and Raman Pillai v. Dakshayani (1975 Ker LT 739). The above decisions were not brought to the notice of the High Courts of Bombay and Gujarat. For obvious reasons, I do not want to elaborate the grounds covered in 1975 Ker LT 451 and 1975 Ker LT 739.

10. I doubt very much whether the ratio of the decision in Romesh Thappar v. State of Madras (AIR 1950 SC 124): (51 Cri LJ 1514) has any application in the present context. In that case, it was no doubt contended that as a matter of orderly procedure, the Supreme Court should not entertain an application under Art. 32 of the Constitution before resort being made by the petitioner to the High Court under Art. 226. The Supreme Court rejected the contention with the observation that Art. 32 confers a guaranteed remedy for the enforcement of certain right and not merely a power on the court itself. The decision arose under Art. 32 of the Constitution which reads:

"Art. 32 — Remedies for enforcement of rights conferred by this part:—

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

(2) The Supreme Court shall have power to issue directions or orders or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by cls. (1) and (2), Parliament may, by law, empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under cl. (2).

(4) The right guaranteed by this Article shall not be suspended except as otherwise provided for by this Constitution.

The Article confers a right on the citizen to move the Supreme Court and a power on the Supreme Court to issue directions, orders and writs. While the right of the citizen to move the Supreme Court is guaranteed, the exercise of the power is discretionary in the sense that the Court can refuse to exercise it unless proper grounds are made out. That was the reason why the Supreme Court declined to follow the rule of practice viz., that when concurrent jurisdiction is given in certain matters to the High Court and a Court of a lower grade, the party should proceed to the latter court. The provision relating to revision in S. 397 of the Code of Criminal Procedure stands on a different footing. The marginal note to the section reads:

"Calling for records to exercise powers of revision."

The Section begins with the words:

"The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court....."

The section does not make mention of a motion by a party to a proceeding before an inferior Criminal Court. It is open to the High Court to invoke its revisional powers either suo motu or at the instance of any person. The word "person" is wide enough to include strangers. It is evident that under the scheme of the revisional jurisdiction, no party to a proceeding before an inferior Criminal Court has got a right to claim that a revision petition filed by him should be either admitted for hearing or heard on the merits by the High Court or by the Sessions Judge. The position is covered by the decision of the Supreme Court in P. K. Mitra v. State of West Bengal (AIR 1959 SC 144) : (1959 Cri LJ 256). The Supreme Court held in that case that the revisional jurisdiction vested in the High Court by S. 439 of the Cr. P. C. (1898) is a discretionary power which has to be exercised in aid of justice and added:

"Whether or not the High Court will exercise its revisional jurisdiction in a given case, must depend upon the facts and circumstances of that case. The revisional powers of the High Court vested in it by S. 439 of the Code, read with S. 435 do not create any right in the litigant but only conserve the power of the High Court to see that justice is done in accordance with the recognized rules of criminal jurisprudence and that subordinate Criminal Courts do not exceed their jurisdiction, or abuse their powers vested in them by the Code."

11. The ratio of the decision applies in the case of the revisional jurisdiction conferred under the Code of 1973 (new Code). That this is so is further made clear from S. 403 of the new Code which states that no party has any right to be heard either personally or by pleader before any Court exercising its powers of revision. It is true that S. 397 (3) states that if an application under S. 397 has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them. But neither S. 397 (1) nor S. 397 (2) makes mention of any application by any person. Section 397 (3) only means that if either the High Court or the Court of Session is called upon to exercise its revisional jurisdiction by means of an application by a person, no further application will be entertained at his instance by the other of them. Section 397 (3) does not confer an implied right on any party to a proceeding to move either the High Court or the Sessions Judge. To recognize such an implied right will be against the ratio of the decision in P. K. Mitra v. State of West Bengal (AIR 1959 SC 144) : (1959 Cri LJ 256).

12. If a party to a proceeding has no right to say that a petition filed by him for invoking the revisional powers of the High Court should be either admitted or heard by the High Court, it is within the powers of the High Court to lay down a rule of practice and say that concurrent revisional jurisdiction having been given both to the High Court and to the Sessions Judge, the person desiring to invoke such jurisdiction should proceed first to the Sessions Judge. The Sessions Judge under S. 399 and S. 401 of the new Code, is conferred plenary powers of revision and is competent to give relief to the party to the same extent as the High Court. Therefore, the ground which led the Full Bench in Narayanan v. Kannamma Bhargavi (1968 Ker LT 495) : (1969 Cri LJ 611) to modify the rule of practice recommended in Devaki v. Kitta (1967 Ker LT 31) : (1967 Cri LJ 1640) does not exist now.

13. Reference has been made in the course of the hearing to the 41st report of the Law Commission where it makes mention of the recommendations of the Judicial Reforms Committee of Uttar

Pradesh that the Sessions Judge may be invested with power to pass final orders in revision in all matters other than petitions against orders of acquittal and for enhancement of sentence. The proposal did not find favour with the Law Commission. The Commission observed:

"The High Court is able to maintain one single standard for interference in such matters; but if this power descends to the Courts of Session, it is very doubtful if a uniform standard can be maintained. There is, then, the plain fact that the High Court can and does, by its prestige, make its decisions acceptable to a large number of people, which would not be the case with the Courts of Session."

It is argued that the rule of practice adopted in the two Division Bench cases of this Court will go against the above report of the Law Commission. That may be so. But a scrutiny of the several sections relating to revisional jurisdiction contained in the new Code will show that the Parliament did not give much weight to the above expression of opinion by the Law Commission. In fact some of the other recommendations of the Law Commission relating to powers of revision are seen not acted upon by the Parliament. Contrary to the recommendation, the Sessions Judge has been made the final authority in cases where his revisional powers are invoked and where he concurs with the views of the trial Court. Therefore, the report of the Law Commission need not be taken into consideration in deciding whether the High Court should lay down a rule of practice. On the other hand, the provisions relating to the revisional jurisdiction in the new Code would tend to show that the Parliament was of the view that only in cases where the Sessions Judge differs from the inferior Court and in cases against the decisions of the Court of Session need the party approach the High Court for invoking its powers of revision.

14. An argument is advanced on the basis of S. 402, Code of Criminal Procedure that the framers of the Code intended to confer the option to persons interested to move either the High Court or the Sessions Judge in matters relating to revision. Assuming that that was the intention, the question is only whether the High Court should exercise its own discretion and lay down a rule of practice as to when the power should be exercised. Section 402 is no answer to the question. On the other hand, if the parties are given the option to move whichever Court they want, S. 402 will be found to be inadequate to cope with a situation where different parties to the same proceeding choose to file separate petitions before the High Court and the Sessions Judge. Section 402 contemplates only cases of revision against conviction. A party convicted is ordinarily entitled to file an appeal against conviction and appeals against conviction, by Magistrates are to be preferred before the Sessions Judge. (See S. 374). If the Sessions Judge confirms the conviction, the revision lies to the High Court only and no question of transfer under S. 402 arises in such cases. It is only in cases where no appeal lies from conviction and in cases where the Sessions Judge makes over the appeal to the Chief Judicial Magistrate that revision petitions can be filed against conviction to the Sessions Judge and in such cases alone, S. 402 can be invoked. On the other hand, there may be cases under S. 125 and S. 145 and allied provisions in the Code of Criminal Procedure where no conviction is involved. In such cases, if revision petitions are filed by different persons before the High Court and the Sessions Judge, transfer can be effected only under S. 407, Cr. P. C. If the powers of transfer are not invoked in time, there is the risk of conflicting decisions being arrived at by the High Court and the Sessions Judge. Ordinarily, a party who chooses a particular Court and files a revision petition would like to have his petition heard by that Court. Therefore, if the provisions relating to revisional jurisdiction are to be construed as conferring a right on a person to choose the forum, he is entitled to have the case disposed of by the Court chosen by him and it will be inequitable to transfer his case to another Court just because his opposite party or a stranger chose another forum. Such a contingency is inherent in a transfer under S. 407, Cr. P. C. and can be avoided if the High Court lays down a rule of practice in respect of revision petitions.

15. Reference was also made to the decision in Mohammad Khan v. Shamim Begum (1977 Cri LJ 116) (All) and Harakh Singh v. Lalmuni Kuer (1977 Cri LJ 723) (Pat). Though these cases do not deal with the matter in issue, there is no doubt that problems like those dealt with in the above decisions can be

avoided if the rule of practice hitherto followed is continued. This practice has been in force in this Court ever since the coming into force of the new Code and in my view, it has worked satisfactorily. Whenever the order of the Sessions Judge in revision failed to satisfy the concerned person and he made out a case for interference under S. 482 of the Criminal P. C, this Court has not hesitated to interfere. The Supreme Court has recently held that the bar under S. 397 (3) does not stand in the way of the High Court in exercising its inherent powers in matters which fall under the purview of S. 482, Cr. P. C. See Madhu Limaye v. State of Maharashtra (AIR 1978 SC 47) : (1978 Cri LJ 165). On a parity of reasoning, it is open to this Court to invoke its inherent powers in appropriate cases in spite of the bar under S. 397 (3). In other appropriate cases, the High Court can exercise its powers under Art. 227 of the Constitution. It goes without saying that by regulating the exercise of its powers of revision, the High Court is not deprived of such powers. It only means that the High Court, as a prudent measure, with a view to provide an orderly procedure and prevent confusion that may be caused by parties in the same case approaching indiscriminately the High Court and the Court of Session for exercise of their powers of revision decides not to entertain revision petitions from Courts inferior to the Sessions Judge so that the concerned persons may approach the Sessions Judge and seek redress. It is always open to the High Court to exercise its powers of revision suo motu.

16. I am, therefore, of the view that it is only fit and proper that the High Court regulates the exercise of its powers of revision, at the instance of individuals and continues the rule of practice referred to in Devaki v. Kitta (1967 Ker LT 31) : (1967 Cri LJ 1640) and Narayanan v. Kannamma Bhargavi (1968 Ker LT 495) : (1969 Cri LJ 611) and followed in Abraham v. Thankamma (1975 Ker LT 451) and Raman Pillai v. Dakshayani (1975 Ker LT 739). I regret that I am unable to agree with the order of the Hon'ble the Chief Justice which has been concurred to by Subramonian Poti, J.

ORDER BY COURT

17. In view of the majority opinion, the Criminal Revision Petition is maintainable in this Court and the same will be posted for hearing in the usual course.

Petition maintainable.

AIR 1978 KERALA 140

V. P. GOPALAN NAMBIYAR, C. J. AND G. BALAGANGADHARAN NAIR, J.

State Transport Authority, Kerala and others, Appellants v. Nallappa Transports, Pollachi, Respondent.

W.A. No. 341 of 1975, D/- 20-1-1978.

Motor Vehicles Act (4 of 1939), (as amended by Act 56 of 1969), S. 48 (3) (xxi) — Power to extend route by more than 24 kilometres — No limitation contained in the permit — R. T. A. is free to grant extension.

The limitation on the power of the R.T.A. to extend route of a permit holder by more than 24 Kilometres in length will be available only if the Proviso to S. 48 (3) (xxi) has been incorporated in the permit. Where no such limitation is found in the permit, there is no limitation on the power of the authorities to sanction an extension of the route beyond 24 kilometres if the variation was actually in public interest : AIR 1968 SC 748 Applied. (Para 4)

Anno: AIR Comm., M. V. Act, 1st Edn. S. 48, N. 7.

Cases Referred: Chronological Paras

AIR 1968 SC 748 1, 2

Govt. Pleader, for Appellants. V. Sivaraman Nair, K. Raveendran and M. Krishnakumar, for Respondent.

GOPALAN NAMBIYAR, C. J.:— We think the learned Judge was right and his judgment has only to be affirmed. The State Transport Anthority, in the first instance, by Ext. P1 order, and the State Transport Appellate Tribunal on revision, by Ext. P4 order, found that the denial of extension of the route from Wadakkancherry to Trichur, in continuation of the existing route Pollachi-Wadakkancheri, was justified, as the proviso to S. 48 (3) (xxi) of the Motor Vehicles Act was attracted; and the same did not empower an extension of a route by more than 24 kilometres. It was on this only ground that they refused to sanction the extension. The criterion of public interest was found in favour of the operator. The learned Judge before whom the matter came up on a writ petition by the writ petitioner/ respondent, found on the strength of the

decision of the Supreme Court in Sri Ram Vilas Service Ltd. v. Raman & Raman (P) Ltd. (AIR 1968 SC 748) that the power under the proviso to S. 48(3) (xxi) cannot get automatically attracted, but will be available only if the same had been specifically incorporated in the permit granted to the writ petitioner/respondent. In view of the provisions in Ext. P3 permit, which is the relevant permit concerned in this case, the learned Judge was of the view that the said power had not been incorporated in the permit, and therefore the authority was not within its jurisdiction in refusing sanction for the extension. The writ petition was allowed.

2. Section 48 (3) cls. (i) and (xxi) of the Motor Vehicles Act may conveniently be noticed:

"48. Grant of stage carriage permits.—

xx xx xx

(3) The Regional Transport Authority, if it decides to grant a stage carriage permit, may grant the permit for a service of stage carriages of a specified description or for one or more particular stage carriages, and may, subject to any rules that may be made under this Act, attach to the permit any one or more of the following conditions, namely—

(i) that the vehicle or vehicles shall be used only in a specified area, or on a specified route or routes;

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(xxi) that the Regional Transport Authority may, after giving notice of not less than one month,—

(a) vary the conditions of the permit;

(b) attach to the permit further conditions:

Provided that the conditions specified in pursuance of cl. (i) shall not be varied so as to alter the distance covered by the original route by more than 24 kilometres and any variation within such limit shall be made only after the Regional Transport Authority is satisfied that such variation will serve the public convenience and that it is not expedient to grant a separate permit in respect of the original route as so varied or any part thereof;"

Clause (i) and the proviso to cl. (xxi), in the form in which they now appear, are the result of amendment by Act 56 of 1969 with effect from 2-3-1970. On the terms of the Section, the RTA is given a power to attach to the permit any one of the conditions listed in sub-sec. (3), Clause (xxi) specifies one such condition which may be added to the permit. The question arose as to the nature of the power conferred by the proviso to the said clause, viz., whether it was an independent statutory power available to the Regional Transport Authority or a power gained only by incorporation in the permit. This fell for consideration in the Supreme Court decision in Raman & Raman's case (AIR 1968 SC 748). Clauses (i) and (xxi) of S. 48(3) which were considered in that case read as follows (at p. 750):

"48 (3) The Regional Transport Authority, if it decides to grant a stage carriage permit, may grant the permit for service of stage carriages of a specified description or for one or more particular stage carriages, and may, subject to any rules that may be made under this Act, attach to the permit any one or more of the following conditions, namely:

(i) that the stage carriage or stage carriages shall be used only on a specified route or routes or in a specified area,

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(xxi) that the Regional Transport Authority, may after giving notice of not less than one month:

(a) vary, extend or curtail the route or routes or the area specified in the permit. Provided that in the case of —

(i) variation, the termini shall not be altered and the distance covered by variation shall not exceed 24 kms.

(ii) extension of the distance covered by the extension shall not exceed 24 kms. from the termini.

(aa) vary any other condition of the permit."

S. 5 of the Madras Act III of 1964 introduced an amendment by S. 5(1) thereof, which stated as follows:

"5 (1). Notwithstanding anything contained in the principal Act, the route or routes or the area specified in every stage carriage permit granted before the commencement of this Act shall be deemed to be a condition attached to such permit under sub-sec. (3) of Section 48 of the principal Act, as if this Act were in force on the date of grant of such permit.

(2) Notwithstanding any judgment or order of any Court all proceedings taken for the grant of, and all orders passed granting any variation, extension or curtailment of the route or routes or the area specified in a stage carriage permit before the commencement of this Act by the State Transport Authority or by a Regional Transport Authority or by an authority or person to whom the powers

and functions of the State Transport Authority or a Regional Transport Authority have been delegated, or by an authority exercising the powers of appeal or revision against the orders of the State Transport Authority or a Regional Transport Authority, shall not be deemed to be invalid merely by reason of the fact that the State Transport Authority or the Regional Transport Authority, as the case may be, had no power to grant such variation, extension or curtailment and all such proceedings taken or orders passed shall be deemed always to have been validly taken or passed in accordance with law notwithstanding the distance covered by the variation or extension exceeded twentyfour kilometres."

In the light of the provisions thus amended, the relevant discussion of the Supreme Court is contained in paras. 6 to 8 of the judgment, which are as follows:

"(6) The learned counsel for the respondent contends that S. 48(3)(xxi), as amended, operates whether a condition to that effect has been put in a permit or not. But we are unable to read S. 48 in this sense. S. 48(3) clearly enables the R. T. A. to attach to the permit any or one of the twentyone conditions. It may in a particular case put one or two or more of the conditions or it may put all the conditions. It seems to be common ground that if any of the first twenty conditions in S. 48(3) is not attached to a permit it will not have effect. What makes condition (xxi) different is hard to appreciate. If condition (xxi) as amended is not attached to a permit it is difficult to see how the R. T. A. can derive any power from the existence of S. 48(3)(xxi) in the Act. S. 5(1) of Act III of 1964 makes the route or routes or the area specified in every stage carriage permit granted before the commencement of the Amending Act a condition attached to such permit under sub-sec. (3) of S. 48 of the principal Act; it does not say that S. 48(3)(xxi) shall be deemed to be a condition attached to every such permit. The learned counsel for the respondent says that this was the intention of the amendment, but if this was so, the intention has not been carried out.

(7) It was argued before us that the history of legislation supports the interpretation placed by the High Court but, in our view, the Act as it stands amended by Act III of 1964 is quite clear and it is not necessary to go into the history of the legislation.

(8) It seems to us that the High Court erred in holding that S. 48(3)(xxi) of the Act as amended, by itself gave power to the R. T. A. to vary the route within certain limits. This power, in our view, would be exercisable only if a condition to that effect is put in the permit. In the case of the appellant we saw the permit and what it contained was a condition similar to the condition mentioned in S. 48(3)(xxi) before its amendment by Act III of 1964. Therefore, for the purpose of this appeal we must treat S. 48(3)(xxi), as amended, as non-existent. If S. 48(3)(xxi) as amended, is treated as non-existent, then there can be no difficulty in coming to the conclusion that no limitation had been placed on the powers of the R. T. A. in respect of the grant of applications for variation of the route. The order of the Regional Transport Authority cannot therefore be challenged as being beyond its jurisdiction."

3. On the above exposition of the Supreme Court, it is plain that the power conferred by S. 48(3)(xxi) of the Act, even after amendment, is exercisable only if a condition to that effect is incorporated in the permit. It was also stressed by the Supreme Court that the permit in question contained only a condition prior to the amendment of the Act by Act III of 1964. In such circumstances, it was held that there was no limitation on the powers of the R. T. A., in respect of the grant of the application for variation of the route.

4. The reasoning of the Supreme Court seems to apply with full force to the facts on hand, with the only difference which we may notice. The amendments to S. 48(3)(1) and the proviso to S. 48(3)(xxi) were, as stated, by Act 56 of 1969. The authorities in this case found that the variation was actually in public interest, but refused extension on the ground that the extension prayed for was more than 24 kilometres in length. But this limitation on the power will be available only if the proviso to S. 48(3)(xxi) has been incorporated in the permit, Ext. P3, to which we shall now turn. The relevant clauses in Ext. P3 are cls. (1), (21) and (28). These clauses are as follows:

"1. The Stage Carriage shall be used only on the routes or area specified in the permit.

** ** **

21. The conditions of this permit shall be varied or added to by the Transport Authority which issued the permit at its discretion.

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28. This permit shall be subject to all the provisions of Indian M. V. Act IV of 1939 as amended by the Act 100/56 and the Kerala Motor Vehicles Rules 1961 framed thereunder and in force for the time being. Any infringement of the provisions will be considered as a breach of the permit conditions for action under S 60(1)(a) of the M. V. Act of 1939 as amended by the Act 100/56."

The most important and crucial of these is cl. 28; and it is very significant that under this clause the power conferred by the amendment Act 56 of 1969 was not adverted to. at all, much less incorporated. The result is, as pointed out by the Supreme Court, there is no limitation on the power of the authorities to sanction an extension of the permit. The learned Judge was right in having interfered with Exts. P1 and P4 decisions and allowed the writ petition. We sustain the judgment of the learned Judge and dismiss this appeal with no order as to costs.

Appeal dismissed.

AIR 1978 KERALA 143

V. P. GOPALAN NAMBIYAR. C. J. AND G. BALAGANGADHARAN NAIR, J.

Pazhekottal Nabeessu, Appellant v. Pazhekottal Kunhamina and others, Respondents.

C. M. A. No. 132 and C. R. P. No. 2241 of 1975, D/- 13-12-1977.

Civil P. C. (5 of 1908), O. 9 R. 13 and O. 5, R. 19 — Setting aside an ex parte decree — Considerations on which application to be decided — Refusal to accept summons cannot constitute sufficient service.

Under O. 9, R. 13 the question for consideration would be whether summons was not duly served or whether the applicant was prevented by sufficient cause from appearing when the suit was called for hearing. Either of these grounds would suffice. (Para 3)

Mere endorsement on the summons as to refusal to accept summons cannot constitute sufficient service under O. 5, R. 19 in absence of a declaration of sufficiency of service. 1970 Ker LT 907 Rel. on. (Para 3)

Once it is found that the summons was not duly served time runs for filing the application for setting aside an ex parte decree from the date of knowledge of the decree. (Para 4)

Anno: AIR Comm., C.P.C. (8th Edn), O. 9 R. 13 N. 1; O. 5 R. 19 N. 4.

Cases Referred: Chronological Paras

1970 Ker LT 907 3

K. N. Karunakaran and K. G. Devarajan for Appellant in C.M.A. No. 132 of 1975 and for Petitioner in C.R.P. No. 2241 of 1975.

GOPALAN NAMBIYAR C. J.:— This Civil Miscellaneous Appeal arises out of the order of the Sub Judge, Tellicherry, refusing to set aside an ex parte decree. The only ground on which the application to set aside the ex parte decree was dismissed was that I. A. No. 391 of 1975 filed to excuse delay in filing the application had been dismissed. The revision-petition is preferred against the order on the I. A.; and Civil Miscellaneous Appeal, against the order rejecting the application to set aside the ex parte decree. The Civil Revision Petition has not been admitted, but was directed to be posted along with the Civil Miscellaneous Appeal. We think it unnecessary to deal separately with the C. R. P., as the grounds which led to the rejection of the application to excuse delay can well be heard as part of the Civil Miscellaneous Appeal against the order refusing to set aside the ex parte decree. We accordingly dismiss the Civil Revision Petition.

2. Dealing therefore with the Civil Miscellaneous Appeal, the question for consideration is whether the application to excuse delay was filed out of time and whether the learned Judge was right in refusing to excuse delay in filing the application. The time limit is thirty days from the date of the decree; or, if summons was not duly served, of the date of knowledge of the decree. The learned Judge noticed that the suit for partition was filed on 10-8-1974 and the first hearing date had been fixed for 12-9-1974. Summons taken to the appellant was returned on 23-8-1974. with the endorsement that the appellant refused the summons. An ex parte decree followed on 16-9-1974. The application to excuse delay was filed on 12-2-1975 on the ground that the appellant knew of the

decree only on 17-1-1975 when she was served with notice of the final decree application. The learned Judge was of the view that the summons had been duly served, that some of the defendants in the suit who had been residing with the appellant in the same house had been served with notices of the suit, and that there was reason to infer that the appellant had knowledge of the proceedings and had refused to accept summons as a result of some collusion on her part with the others who had also chosen to remain ex parte, so that all of them could get the benefit of a setting aside of the ex parte decree at the instance of the appellant. In the circumstances, the learned Judge was of the view that the delay was wilful and that there were no grounds to allow the application to excuse delay. It was therefore dismissed.

3. We regret to observe that the learned Judge has not kept in mind the relevant provision of the Civil P. C. in regard to the setting aside of an ex parte decree; nor borne in mind the two aspects of the said provision. Under O. IX R. 13 C.P.C., the question for consideration would be whether summons was not duly served; or, whether the applicant was prevented by sufficient cause from appearing when the Suit was called on for hearing. Either of these grounds would suffice. We have noticed the two termini from which time for filing the application has to be reckoned. Addressing ourselves first to the question, whether the summons had been duly served, we see that the summons was returned with the endorsement that the appellant had refused to accept the summons. Under the Civil Procedure Code in force at the relevant time, which had application to the case, this cannot constitute sufficient service—vide Order V Rule 19 of the C. P. C. — in the absence of a declaration of sufficiency of service. If authority is needed for the proposition, it is enough to notice the direct ruling of a Division Bench of this Court in Daveed Aseervadam v. Krishna Pillai Govinda Pillai (1970 Ker LT 907). It is regrettable that the learned Judge did not address herself either to the relevant provisions of the Civil Procedure Code or to the judicial decisions which are innumerable on this aspect of the matter.

4. If summons was not duly served — as we hold it was not — time runs for filing the application from the date of knowledge of the decree; as to which, the averment of the petitioner-appellant about her knowledge of the decree is not contested; and we are not prepared to infer knowledge of the decree from service of summons prior thereto, on others in the same house, and inferential collusion with them. It follows that the petition to excuse delay was unnecessarily, filed, understandably, as a safeguard against possible judicial vagaries. If the same were necessary, there was, we think, sufficient cause for non-appearance, as the appellant could not expect a trial and disposal on the date of first hearing.

5. Even assuming a petition to excuse delay was necessary, the suit had been posted for first hearing to 12-9-1974. Assuming the appellant had knowledge of the decree, it should be obvious to the learned Judge that the ex parte decree passed on 16-9-1974 without even posting the case for defence or for trial, was quite illegal and improper. There was therefore sufficient cause for non-appearance and to set aside the ex parte decree, and to allow the application to excuse delay.

6. We allow the appeal, set aside the order of the learned Judge and set aside the ex parte decree passed by the learned Judge. The Suit, that is. O. S. No. 107 of 1974, will be tried by the Sub Court, in accordance with law. There will be no order as to costs.

Appeal allowed.

AIR 1978 KERALA 144

V. P. GOPALAN NAMBIYAR, C. J. AND G. BALAGANGADHARAN NAIR, J.

Travancore-Cochin Chemicals Limited, and others, Appellants v. Kerala State Electricity Board and others, Respondents.

W. A. Nos. 466, 493 and 494 of 1976, D/- 18-1-1978.

Electricity (Supply) Act (54 of 1948), S. 49 — Electricity Board undertaking to supply electricity at special tariff for a particular period — Revision of tariff before expiry of stipulated period — Validity.

Where the Electricity Board, while agreeing to supply electricity at a special tariff to a consumer for a stipulated period also retained the right by a clause in the agreement of revising the tariff and making the revised tariff binding on the consumer, revision of the

tariff before the expiry of the period in question was not open to challenge. AIR 1976 SC 127 Rel. on. AIR 1975 SC 1967 Disting.

(Para 3)

Anno: AIR Manual (3rd Edn), Electricity (Supply) Act, S. 49, N. 1.

Cases Referred: Chronological Paras

AIR 1976 SC 127 3

AIR 1975 SC 1967: (1975) 2 SCC 436 2, 3

Menon and Pai, for Appellants in all the appeals. N. Raghava Kurup and M. S. N. Pillai (for Nos. 1 to 5) in W. A. No. 466 of 1976, (for Nos. 1 to 4) in W. A. Nos. 493 and 494 of 1976 and Govt. Pleader (for No. 6) in W. A. No. 466 of 1976 (for No. 5) in W. A. Nos. 493 and 494 of 1976. for Respondents.

GOPALAN NAMBIYAR C. J.:— These Writ Appeals raise the same question in regard to the validity of the revision of tariffs effected by the Kerala State Electricity Board. By way of example, it would be enough to refer to the facts in W. A. No. 466 of 1976. The facts in the remaining cases are, it was admitted, practically the same, and need not be repeated.

W. A. No. 466 of 1976

The appellant in this Writ Appeal is the Travancore-Cochin Chemicals Limited, Eloor. Udyogamandal. The agreement executed by it with the Electricity Board is Ext. P2 dated 26-3-1974. Clause 9 of the agreement is as follows:

"9. The consumer shall pay for all electrical energy supplied to him by the Board and ascertained as hereinbefore provided an amount calculated at the rate and in accordance with the terms given in the Schedule.

The rates, shown in the Schedule, are liable to revision by the Board from time to time in which case the revised rate/rates shall be binding on the consumer and the levy of charges for electricity consumed shall be at the revised rate or rates."

By cl. 12, the agreement was to be in force for a period of 10 years from 25-11-1970, which was the date on which the previous agreement dated 7-9-1967 expired. After the said period of 10 years, the agreement may be renewed on such terms and conditions as the parties may mutually agree upon. The Schedule to the agreement is as follows:

SCHEDULE

1. Description of the premises at which the supply is to be given.	The Travancore-Cochin Chemicals, Ltd., Udyogamandal.
2. Purpose for which the supply is to be given.	Power and lighting.
3. Rate for supply.	Rs. 100/- per K W/ year of maximum demand, exclusive of electricity duty leviable by Government and surcharges if any imposed from time to time.
4. Maximum Electrical Power required by the consumer.	10000 K W at 66,000 Volt 5.
5. Minimum revenue per year guaranteed by the consumer.	Rs. 6,33,340/-

Ext. P3 dated 21-12-1974 was another agreement between the Board and the Company. Clause 9 is identically worded. The Board promulgated Ext. P8 notification on 27-5-1975 revising tax for the supply of electricity effected from 1-1-1970. The revision was under the powers conferred by S. 49 of the Electricity (Supply) Act, 1948, and also by the Kerala State Electricity Board (General Tariff) Regulations 1976, and the Kerala State Electricity Board (General Tariff) (Amendment) Regulation 1969 and other enabling provisions in the statutes. Ext. P8 is a copy of the notification issued by the Board. Clause 7 of the notification dealt with the revision of the rates of tariffs applicable to extra high tension consumers and provided that it shall be according to the "Two part tariff" given below. The details of the Two part tariff were indicated in the clause at some length. The question debated in the appeal is whether in the face of Exts. P2 and P3 noticed, the Board had power to revise tax as under Ext. P8.

2. For the appellant reliance was placed on Indian Aluminium Co. v. K. S. E. Board (AIR 1975 SC 1967). In the said decision, explaining the scope of Section 49 of the Electricity (Supply) Act, it was pointed out by the Supreme Court: (at P. 1973).

"It would, therefore, seem clear that the Board can, in exercise of the power conferred under sub-sec. (3) of S. 49, enter into an agreement with a consumer stipulating for a special tariff for supply of electricity for a specific period of time. Such a stipulation would amount to fixing of special tariff and it would clearly be in exercise of the power to fix special tariff granted under sub-sec. (3) of S. 49. Indeed, if the power to fix special tariff

through the modality of an agreement with the consumer were not there in sub-sec. (3) of S. 49, it cannot be found in any other provision of the Supply Act and in such a case it would be impossible for the Board to enter into any agreement with a consumer binding itself to supply electricity at a special rate for a certain period of time. Such an agreement would be wholly ultra vires the power of the Board and that would cause considerable mischief and inconvenience as no industry would be able to enter into an agreement ensuring supply of electricity which would be binding on the Board. Tariff is the most important element in such an agreement and if no binding stipulation can be made in regard to tariff, the agreement itself would be meaningless and would be no more than a mere rope of sand. The power to enter into an agreement fixing a special tariff for supply of electricity for a special period of time is, therefore, relatable to sub-sec. (3) of S. 49 and such an agreement entered into by the Board would be in exercise of the power under that sub-section. The three agreements for supply of electricity to the appellant must, in the circumstances, be regarded as having been entered into by the Board in exercise of the statutory power conferred under sub-section (3) of S. 49. Now when the power to fix special tariff for a consumer is given to the Board, the possibility cannot be ruled out that the Board may in exercising this power show undue preference to one consumer as against the other. Sub-sec. (4) of S. 49 therefore, provides a safeguard by enacting that in fixing tariff and terms and conditions for the supply of electricity, the Board shall not show any undue preference to any person. This safeguard is obviously necessary only in cases where special tariff is fixed by the Board under sub-sec. (3) of S. 49. When uniform tariffs are fixed by the Board under sub-secs. (1) and (3) of S. 49, there could be no question of the Board showing undue preference to any one consumer against another because every consumer falling within the category would have to pay the same tariff for the same benefit received by him. It is, therefore, obvious that sub-sec. (4) of S. 49 controls the action of the Board in fixing tariff under sub-sec. (3) of S. 49 and it has no application where uniform tariffs are fixed under sub-secs. (1) and (2) of S. 49." (Para 9)

3. But as rightly pointed out by the learned Judge himself, and as noticed in a subsequent decision of the Supreme Court to be referred to presently, the fundamental distinction between the Indian Aluminium Company's case (AIR 1975 SC 1967) and the present case is that cl. 9 of the agreement which we have extracted earlier itself confers on the Board the right of revising tariffs and making such revision binding on the appellant. This aspect of the matter was clearly pointed out by the Supreme Court in a more recent decision in Bisra Stone Lime Co. v. O. S. E. Board (AIR 1976 SC 127). After referring to the Indian Aluminium Company's case (AIR 1975 SC 1967) and the Titagarh Paper Mills Ltd.'s case (1975) 2 SCC 436 : (AIR 1975 SC 1967), the Supreme Court observed with respect to the latter decision (at p. 130 of AIR 1976 SC):

"It is clear from the above decision that an agreement entered in exercise of the power conferred by the statute such as under S. 49 (3) of the Act, cannot be set at naught by unilateral exercise of power by the Board under the Act to enhance the rates agreed upon between the parties in the absence of any provision in that behalf in the agreement itself. In the Indian Aluminium Company's case (supra) there was no provision in the agreement with regard to the revision of tariff, such as we find in cl. 13 of the present agreement. This Court, therefore, had not to consider in that case about the effect of a clause like Cl. 13. In the Titagarh's case (supra), however, this Court had to take into consideration Cl. 13 of the agreement therein which is the identical clause in the present case. "(para 12)" Cl. 13 which the Supreme Court considered in the above case and which according to them made all the difference was extracted in para 4 of the Supreme Court judgment, and was as follows:

"The tariff and conditions of supply mentioned in this agreement shall be subject to any revision that may be made by the supplier from time to time."

Clause 9 of the agreement here considered is more specific and more pointed, and definitely more in favour of the Electricity Board. We are of the opinion, that the learned Judge was right in holding that the principle of the Supreme Court decision in Bisra Stone Lime Co. v. O. S. E. Board (AIR 1976 SC 127) is attracted to the case and that the earlier decisions in the Aluminium Company's case (AIR 1975 SC 1967) and the Titagarh

Paper Mills Ltd.'s case (1975) 2 SCC 436 : (AIR 1975 SC 1967) have no application.

4. We dismiss the appeal with no order as to costs.

W.A. Nos. 493 and 494 of 1976

It is agreed that these Writ Appeals may abide and follow the fate of W.A. No. 466 of 1976. These appeals are accordingly dismissed with no order as to costs.

Appeals dismissed.

AIR 1978 KERALA 147

GEORGE VADAKKEL, J.

Choyyan Narayani, Appellant v. Ibrahim Kunhi and others, Respondents.

S. A. No. 508 of 1976, D/- 18-1-1978.

Registration Act (16 of 1908), S. 49, Proviso — Suit for specific performance of contract — Receipt acknowledging some payment out of the price agreed upon — Whether admissible in evidence.

The plaintiff filed a suit for specific performance of a contract. He produced a receipt which showed that the defendant agreed to sell the land to the plaintiff for certain amount and out of that, some amount was paid to the defendant. It was contended that the document required registration and was therefore, inadmissible in evidence under S. 49 (c) of the Act.

Held, that the plaintiff relied on the document to establish certain payment and the contract for sale of that property for certain amount mentioned therein. Therefore, the document could be received in evidence for that purpose. Case Law discussed. (Para 6)

Anno: AIR Manual 3rd Edn., Registration Act, S. 49, N. 6.

Cases Referred: Chronological	Paras
AIR 1969 Mad 418	5
AIR 1968 All 168	4
AIR 1963 Punj 182	4
AIR 1960 Mad 33	5
AIR 1951 Mad 12 (FB)	5
AIR 1946 Pat 62	4
AIR 1943 Mad 761 (FB)	5
AIR 1929 PC 269	4

C. P. Damodaran Nayar, for Appellant; V. R. Venkatakrishnan, for Respondents.

JUDGMENT:— The suit for specific performance of an agreement for sale of a small strip of land described in the plaint schedule as having an extent of 2 cents but actually having an area of 2¾ cents was decreed by the lower courts and the defendant has come up in appeal. The suit property adjoins a plot of land 12 cents in extent purchased by the respondents' mother Kunhalima from the defendant as per Ext. A-1 sale deed dated 26-5-1962. The lower courts accepting the evidence of P. W. 1, the 3rd plaintiff and P. W. 2, an attestor to Ext. A-2 receipt, found that the defendant on 13-4-1969 agreed with Kunhalima to sell this strip of land to the latter for Rs. 350/-, that Kunhalima paid Rs. 300/- to the defendant, and that the defendant passed Ext. A-2 receipt therefor.

2. P. W. 1 swears to these facts and P. W. 2, to the payment of Rs. 300/- and the passing of Ext. A-2 receipt. The lower courts believed them, and nothing has been brought to my notice which would go to show that these witnesses are not worthy of credence. Ext. C-1 Commission report and Ext. C-2 plan show that a substantial portion of plaintiffs' latrine abuts into the suit property. According to Ext. C-1 report 'it is long since the latrine had been constructed' and the defendant's father 'admitted the plaintiffs' possession and use of the latrine'. This fortifies the plaintiffs' case that pursuant to the agreement their mother (she died before the suit was laid) got possession of the suit property. The defendant as D. W. 1 admits that one half of the latrine stands on the suit property. D. W. 2, her husband also admits this. Though both of them, have deposed that they have complained about it before the municipality, there is no evidence of any such complaint.

3. It is contended on behalf of the appellant that the lower courts were very much influenced by Ext. A-2 receipt, which according to him is a document that requires to be registered and is therefore, inadmissible in evidence. It is pointed out by him that in that document the defendant purports to state that she has sold the 2 cents of land mentioned therein to Kunhalima besides acknowledging receipt of Rs. 300/- out of the price agreed upon and that therefore the same is inadmissible in evidence under S. 49 (c) of the Registration Act, 1908.

4. That in view of the proviso to S. 49, even an unregistered sale deed may be received in evidence of the contract sought to be specifically performed in a suit for specific performance cannot be disputed. The said proviso has been introduced to get over the rule enun-

ciated in J. R. Skinner v. R. H. Skinner (AIR 1929 PC 269) to the effect that an unregistered sale deed cannot be received in evidence in a suit for specific performance to prove the agreement for sale of the property to which it relates. The decisions in Jhaman Mahton v. Amrit Mahton (AIR 1946 Pat 62), Rattan Chand v. Bhagirath Ram (AIR 1963 Punj 182) and Saudan Singh v. Goswami Rasikanand (AIR 1968 All 168) take the view that such an unregistered sale deed itself would be evidence of an antecedent agreement for sale. In the first mentioned case Fazl Ali C. J. said 'that an incomplete sale deed may be regarded as a contract for sale' and in the last mentioned case, the Patna decision was referred to and followed by holding that 'an incomplete deed of sale itself, in a suit for specific performance of a contract to sell, can be treated as a contract for sale'. It was pointed out in the Allahabad decision that an agreement to sell is 'inherent in the very fact of the execution' of the sale deed.

5. In Subramanian Chettiar v. Arunachalam Chettiar (AIR 1943 Mad 761) (FB) the Madras High Court said: (at p. 762)

"The proviso makes it perfectly clear that an unregistered document affecting immovable property may be put in evidence in a suit for specific performance."

xx xx xx xx

"In such a suit, the production of the document and its proof will be sufficient to support the plaintiff's case if it embodies the whole agreement between the parties and there are no other factors to be taken into consideration. The proviso in express terms says that it may be received as evidence of a contract in a suit for specific performance."

This decision was followed in Ramachandra v. Ramayya, (AIR 1969 Mad 418). The decision in Hutchi Gowder v. Bheema Gowder (AIR 1960 Mad 33) also recognises the right of plaintiff in a suit for specific performance to tender in evidence an unregistered sale deed 'with a view to prove the antecedent agreement to sell', though, according to that decision, the words in the Proviso: 'may be received in evidence to prove a contract' do not mean: 'may itself be read as a contract to execute a document in future', and when such an agreement is proved by production of an unregistered document, the question will still arise as to whether the antecedent agreement to sell is enforceable, (as in any other case for specific performance of a contract for sale of land). This appears to be so, for the Proviso only removes the inhibition on reception of an unregistered document in evidence for any purpose, thereby restricting and confining the check only to tendering in evidence an unregistered document required to be registered, for the purpose of establishing that it affects the immovable property comprised therein, which, in view of S. 49 (a) of the Registration Act, 1908, it does not and cannot affect, for want of registration, and does not define or declare the quantitative sufficiency or the qualitative value of the evidence furnished by such a document —these would depend upon the facts and circumstances of each case and the construction placed on each document. That the effect of the Proviso is to remove the bar on reception in evidence of documents required by law to be registered but not so registered, for all purposes other than for proving any transaction affecting immovable property, is clear from the majority decision in Muruga Mudaliar v. Subba Reddiar (AIR 1951 Mad 12) (FB) where the question arose as to whether in a suit for damages for breach of the agreement contained in an 'agreement' of lease in writing which ought to have been registered since it operated as a lease, but was not, the unregistered document could be received in evidence, and it was held that it can be.

6. Therefore assuming without deciding, that Ext. A-2 document purports to affect the immovable property comprised therein as a sale, that document shall not operate so as to affect that property and it cannot be received in evidence of any transaction affecting that immovable property. The plaintiffs also have no such case nor have they sought reception of the same in evidence to prove any transaction affecting the immovable property mentioned therein. They rely on that document to establish payment of Rs. 300/- and the contract for sale of that property for a price of Rs. 350/- as sworn to by P. Ws. 1 and 2. The document, Ext. A-2, can be received in evidence for that purpose.

There is no merit in the appeal. The same is dismissed with costs.

Appeal dismissed.

AIR 1978 KERALA 149

V. P. GOPALAN NAMBIYAR, C. J.
AND K. K. NARENDRAN, J.

Varkey Joseph Pothanikatt, Appellant v. The Board of Revenue, Trivandrum and others, Respondents.

Writ Appeal No. 104 of 1975, D/- 12-1-1978.*

Civil P. C. (5 of 1908), O. 21, Rr. 97, 99 — Obstruction to delivery of possession — Obstructor must be in possession in good faith. O. P. No. 4716 of 1972 (Ker) Reversed.

It is the essence of the provision under R. 99 that the resistance or obstruction must have been occasioned by a person other than judgment-debtor and that such person should claim in good faith to be in possession of the property on his own account or on account of someone other than the judgment-debtor. (Para 2)

Where an auction purchaser of a property under the management and possession of the Govt. sought its possession, the mere squatters on it could not obstruct delivery of possession as the element of good faith would be wanting and the auction purchaser would be entitled to actual possession. O. P. No. 4716 of 1972 (Ker) Reversed. (Paras 2, 4)

Anno: AIR Comm. C. P. C. (8th Edn.), O. 21, R. 99, N. 4.

Cases Referred:	Chronological Paras
1969 All LJ 929	3
AIR 1924 All 495	3

Varghese Kalliatu, for Appellant; Govt. Pleader (for Nos. 1, 2 and 3) and K. George Varghese, Thomas V. Jacob and P. C. Joseph (for Nos. 4 to 8), for Respondents.

GOPALAN NAMBIYAR, C. J.:— The appeal is against the judgment of a learned Judge who dismissed the writ petition to quash Ext. P-7 order of the Board of Revenue. The writ petitioner was a purchaser in revenue sale of an extent of 44 cents of land which was attached on 24-3-1939. The property was under Government management from 15-12-1940. The sale was on 12-7-1946 and was confirmed on 16-11-1946. On 16-11-1948 there was a publication declaring the purchaser to be the owner of the property. The sale certificate was issued on 29-3-1952 and registered on 23-5-1952. Symbolical delivery was effected on 23-12-1952 on the ground that respondents 3 to 8 in the writ petition were squatters on the property and therefore actual possession could not be given to him. On application being made to the Collector, he, by Ext. P-1 proceedings dated 21-7-1964 directed to put the purchaser in possession. That again resulted in Ext. P-4 order granting only symbolical delivery. O. P. No. 467 of 1967 was moved in this Court against that order which resulted in Ext. P-5 judgment dated 13-11-1968 by one of us (myself) holding that Ext. P-4 order was unhelpful, and was a non-speaking order, and directing investigation and enquiry into the question as to why the purchaser was not entitled to actual possession. In pursuance of this judgment the Tahsildar passed Ext. P-6 order dated 14-11-1971 holding that the purchaser was entitled to actual possession. That order was carried up in revision to the Board of Revenue which resulted in the impugned order Ext. P-7 reversing and setting aside Ext. P-6 and holding that the writ petitioner was entitled only to symbolical delivery.

2. The learned Judge after noticing the facts and discussing the position found that respondents 3 to 8 were squatters on the property and they were claiming in their own right, and therefore, having regard to the provision of O. XXI R. 99 of the Civil P. C. which provides for delivery of possession after removal of obstruction, the purchaser was not entitled to get actual possession of the property. Section 41 of the Travancore-Cochin Revenue Recovery Act which is the relevant provisions reads:

"Where notwithstanding such publication, any lawful purchaser of land may be resisted and prevented from obtaining possession of his purchased land, the Collector, on application and production of the certificate of sale provided for by S. 39, shall cause the proper process to be issued for the purpose of putting such purchaser in possession in the same manner as if the purchased land had been decreed to the purchaser by a decision of a civil court.

For purposes of this section the Collector may exercise all the powers of a Civil Court under the Civil P. C. for the time being in force."

It would be noticed that the deeming,—so to say—of the proceedings to be a

*(Against judgment of this Court in O. P. No. 4716 of 1972.)

decree by decision of a civil court is only for the purpose of issuing process for putting the purchaser in possession. It is for this purpose that the Collector has to exercise all the powers of a civil court under the Civil P. C. We shall assume, without finally deciding, that this provision is sufficient to attract O. XXI Rr. 97 and 99 of the Civil P. C. Even then we find it difficult to sustain the order of the learned Judge. Order XXI Rule 97 allows a right for the removal of obstruction or resistance against any person in order to obtain possession of the property. Rule 98 deals with the applications against persons who offer resistance or obstruction on behalf of the judgment-debtor or acting at his instigation. We may leave out this provision which has no application. We then come to R. 99 which reads:

"99. Resistance or obstruction by bona fide claimant.—Where the Court is satisfied that the resistance or obstruction was occasioned by any person (other than those mentioned in R. 98) claiming in the good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application."

It is of the essence of this provision that the resistance or obstruction must have been occasioned by a person other than the judgment-debtor and that such persons should claim in good faith to be in possession of the property on his own account or on account of someone other than the judgment-debtor. With these ingredients or requirements of the rule, we should couple the absence of any finding in Ext. P-7, of a claim in good faith on the part of respondents 3 to 8. Indeed we find it difficult to posit good faith on their behalf especially in view of the facts noticed in Exts. P-6 and P-7 orders. In Ext. P-6 order it is stated:

"It is therefore clear that the property was in the effective management and possession of Government all these years without any occupants on the site. It was put to sale while it was under sirkar management. Hence the auction was made of a property free of any occupation."

This finding of the Tahsildar was not in any way interfered with or set aside or differed from in Ext. P-7 order of the Board of Revenue. Having regard to the accepted fact that the property was under Government management and possession, it would be a sad reflection on the said management, to lightly presume that the Government permitted, or connived at encroachers roaming over the property. Without any material and data we would not be justified in coming to such conclusion. We are therefore of the opinion that the Board of Revenue was wrong in passing Ext. P-7 order without adverting to these relevant and material aspects of the provisions that we have noticed.

3. We may now refer to certain decisions in regard to the provisions of the Civil P. C. which were noticed by the learned Judge, and distinguished. One of these decisions on which considerable reliance was placed for the writ petitioner was the judgment of Sulaiman J. of the Allahabad High Court (as he then was) in Sobha Ram v. Tursi Ram (AIR 1924 All 495). The decision is noticed in para 4 of the learned Judge's judgment and there occurs the following quotation from the said judgment:

"There can be no doubt that after an auction sale has taken place and it has been confirmed, the property vests in the auction-purchaser. The auction-purchaser can obtain delivery of possession against his judgment-debtor. For this, remedy is provided under the Code. If, however, there is some person other than the judgment-debtor, who is not his representative and not holding the property on his behalf and who resists or obstructs his possession, there are two remedies open to the auction-purchaser, namely, either to bring a regular suit for possession against that person, or to have recourse to a summary remedy by way of an application as provided in O. 21, R. 97. It is well settled that the auction-purchaser is not bound to have recourse to the second remedy. It is open to him to do so if he wants to save time. Of course, if he does and fails, then his remedy, to bring a regular suit is curtailed and the period of time is prescribed by Art. 11-A of the Limitation Act. It is, therefore, clear that unless the defendants can satisfy us that there is an order which falls under R. 99 of O. 21, which operates as a bar to the present claim, the regular suit certainly is not barred."

The principles stated by the learned Judge correctly expound the law, made, no doubt in considering whether the remedy of a suit was available and the period of limitation for the same. Ad-

verting to the decision of Sulaiman J. the learned Judge however observed:

"With respect, I am constrained to say that it is an unhappy sentence. Technically speaking, the learned Judge is right in the above statement, since R. 97 states only resistance or obstruction by any person. It does not say whether it should be by a judgment-debtor or some other person acting at his instigation or on his behalf."

We cannot endorse the learned Judge's comment on the judgment of Sulaiman J. We are also unable to agree with the learned Judge who noted the provisions of R. 99 of Order XXI ignoring that the claim had to be in good faith or bona fide. Another decision cited to the learned Judge and noticed by him was the decision in Ragho Prasad v. Pratap Narain Agarwal (1969 All LJ 929). That is referred to in para 5 of the learned Judge's judgment. The following quotation from the said judgment will be found in that para: (at p. 934)

"An examination of the provisions of Rules 35, 97, 98 and 99 of O. 21 appears to me to indicate the following scheme of execution. Under R. 35, the executing court directs delivery of possession of the property to the decree-holder, or to his agent in that behalf, and, if necessary, it will direct the delivery of possession by removal of the judgment-debtor or any other person bound by the decree who refuses to vacate the property. A "person bound by the decree" includes a person claiming through the judgment-debtor. The provision for removal of the person bound by the decree who does not vacate takes into account a situation where resistance to possession is offered or obstruction is made by the judgment-debtor or any other person bound by the decree on a ground which is patently without substance. It will include the case of a person who claims to be in possession in his own right and independently of the judgment-debtor but whose claim is on the face of it unacceptable and cannot be said to be made in good faith. In such a case, there is, in my opinion, no bar to the issue of a fresh warrant for possession. Such a bar, it seems to me, cannot be spelled out either from R. 35 or R. 97. Where, however, resistance is offered or obstruction is made by a judgment-debtor on a ground which appears to necessitate investigation, the proceedings will be under R. 97. So also, where resistance or obstruction proceeds from a person claiming to be in possession in his own right and independently of the judgment-debtor and whose claim cannot be rejected as not being made in good faith without investigation, the decree-holder must proceed under R. 97. While an ex facie consideration of the ground for resistance or obstruction can be had under R. 35, a ground or claim which cannot be disposed of as obviously without foundation needs to be investigated under R. 97."

The learned Judge commented on the judgment by observing:

"Here again the question was whether the order under appeal was one passed under R. 95 of O. XXI C. P. C. When the court held that it was so, there was an end of the matter. The observations made regarding the scope of Rules 35, 97, 98 and 99 in O. XXI C. P. C. were in the nature of obiter. With great respect, I am unable to agree with the two sentences in the above passage on which the petitioner's counsel relied."

Here again we are unable to agree with the learned Judge's comment or understanding of the judgment of Pathak J. We think the said judgment has correctly expounded the law and we are in agreement with it. In the case on hand there is no finding in Ext. P-7 that the occupation of the petitioner was bona fide; and the facts negative bona fides.

4. Counsel for respondents 3 to 8 raised the contention that the Tahsildar who passed Ext. P-6 order had no jurisdiction to pass the same, and that he had not been empowered by the Government to perform the functions of the Collector either by name or by virtue of his office. The objection in regard to the jurisdiction of the Tahsildar was not raised at any stage. The Tahsildar's order was carried up in revision to the Board of Revenue. There was no occasion for respondents, perhaps, to raise or press the plea of want of jurisdiction of the Tahsildar as they succeeded in the revision on the merits. Before the learned single Judge again who heard the writ petition against Ext. P-7 order, there was, presumably, no ground to urge the plea of want of jurisdiction on the part of the Tahsildar, as the learned Judge dismissed the writ petition on the merits. Before us the plea was urged. The learned Government Pleader stated that he could not positively state whether the Tahsildar had jurisdiction; but that, he gathered that there is no spe-

cific empowerment of the Tahsildar. Even assuming, without deciding, that the Tahsildar had no jurisdiction we do not think on this ground we should decline to interfere with Ext. P-7 order of the Board of Revenue. We think the interests of justice would be advanced by quashing Ext. P-7 order to enable the purchaser to realise the fruits of his purchase rather than maintain the order and continue the illegal occupation of the Respondents.

We allow the appeal and set aside the judgment of the learned Judge. In the result we allow O. P. No. 4716 of 1972 and direct that Ext. P-7 order of the Board of Revenue will stand quashed. There will be no order as to costs.

Appeal allowed.

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V. BALAKRISHNA ERADI AND T. KOCHU THOMMEN, JJ.

Neelakantha Pillai Ramachandran Nair, Petitioner v. Ayyappan Pillai Kumara Pillai, Respondent.

Civil Revn. Petn. No. 2620 of 1976, D/- 8-8-1977.

(A) Civil P. C. (5 of 1908), O. 1, R. 10 (2) — Addition of parties — If and when can be made after preliminary decree for partition or redemption.

In suits for redemption or partition where the passing of a preliminary decree is contemplated, the power conferred under O. 1 R. 10 C. P. C. is to be regarded as circumscribed by the provisions contained in S. 2 (2) and S. 97 of the Code. The impleadment of additional parties subsequent to the passing of the preliminary decree is permissible only if none of the questions already settled by the preliminary decree would have to be reopened by the court as a consequence of such impleadment; the addition of parties can be allowed at that stage only on condition that the further proceedings to be taken in the suit will be only on the basis of the preliminary decree already passed, and none of the questions settled by the preliminary decree will be allowed to be reagitated on the ground that the person newly impleaded was not before the court at the time of the passing of the preliminary decree. As to whether or not the impleadment of a new party should be allowed on the aforesaid condition in the circumstances of a particular case will have to be considered by the court on the merits of each case as and when the said question arises. No party should be impleaded against his will if that would involve his being subjected to the terms of a preliminary decree which was passed without his being on the party array, particularly when there are pleas which the said party could have put forward in respect of the matters considered and settled by the preliminary decree. Case law discussed.

(Paras 4, 5)

Anno: AIR Comm. (9th) 1976 Edn., C. P. C. O. 1, R. 10, N. 32.

(B) Civil P. C. (5 of 1908), S. 115, O. 1, R. 10 and O. 34, R. 1 — Suit for redemption — In final decree proceedings, transferee from mortgagee added as party defendant — Interference in revision.

Held that the order impleading him did not involve reopening of any matters settled by preliminary decree as he admitted the mortgage and claimed only value of improvements and as such could not be interfered in revision.

(Para 6)

Anno: AIR Comm. (9th) 1977 Edn., O. 1, R. 10, N. 43.

Cases Referred: Chronological	Paras
1977 Ker LT 414	3
AIR 1976 Andh Pra 226	3
(1970) 1 Mad LJ 243	3
AIR 1966 Orissa 160	3
AIR 1964 Andh Pra 260	3
AIR 1963 SC 992	4
AIR 1956 Mad 288 : 68 Mad LW 831	3
AIR 1942 Pat 185 (2)	3
AIR 1935 Rang 23	3
AIR 1924 Mad 648	3

P. Sukumaran Nair, A. K. Chinnan, V. Vyasan Poti and N. Sugathan, for Petitioner.

BALAKRISHNA ERADI, J.:— This Civil Revision Petition is directed against an order passed by the 1st Addl. Munsiff, Neyyattinkara, allowing I. A. No. 2689 of 1975 filed by the plaintiff in O. S. No. 2522 of 1968 of his court under O. 1, R. 10, Civil P. C. for impleading the revision petitioner herein as an additional defendant in the suit. The suit O. S. No. 2522 of 1968 has been filed by the respondent herein for redemption of a mortgage of 1104. That suit was instituted on 20-12-1968. Prior thereto, the plaintiff had issued a notice of suit to the defendant on 10-12-1968 to which there was no

reply. It would now appear that subsequent to the receipt of the said notice and just two days prior to the institution of the suit, the defendant-mortgagee had executed a document dated 18-12-1968 purporting to transfer his mortgage right in favour of the revision petitioner. The plaintiff however was kept in the dark about this. The result was that the suit was filed with the original mortgagee as the sole defendant and that position remained till 22-10-1970 on which date a preliminary decree for redemption was passed. It is necessary to mention at this stage that even though the defendant in the suit had been duly served with summons he chose to remain ex parte without even filing a written statement. On 4-12-1970 the plaintiff filed an application praying for the passing of a final decree in the suit. Notice of that application was duly served on the defendant on record. After a lapse of very nearly four years an objection petition was put in by the defendant on 31-10-1974 mentioning for the first time that the mortgage right had been transferred by him in favour of the revision petitioner as per the document dated 18th Dec. 1968. On coming to know about the said fact from the said objection petition the plaintiff filed I. A. No. 2689 of 1975 out of which this revision petition arises, praying that the assignee, namely, the present revision petitioner, should be impleaded as a party in the suit. That application was opposed by the revision petitioner contending that it was not open to the court below to implead additional parties under O. 1, R. 10, Civil P. C., after a preliminary decree had already been passed in the suit. The lower court overruled that contention and allowed I. A. No. 2689 of 1975. Hence this revision petition filed by the assignee who has been impleaded as the additional 2nd defendant.

2. Our learned brother Narendran, J. before whom this revision petition originally came up for hearing considered that the case should be heard by a Division Bench, since there has not been any pronouncement of a Division Bench of this Court on the question of law as to whether subsequent to the passing of the preliminary decree for partition or redemption it is legally competent for the court to implead additional parties under O. 1, R. 10, C. P. C. It is pursuant to that order of reference that the case has now come up before us.

3. In support of his contention that the court below had no jurisdiction to order the impleadment of additional parties subsequent to the passing of a preliminary decree, the learned advocate for the revision petitioner strongly relied on the decision of a learned Single Judge on the Orissa High Court reported in Baman Chandra v. Balaram (AIR 1966 Ori 160) and also a ruling of our learned brother Narendran, J. reported in Vasudeva Kallurao v. Ramachandra Rao (1977 Ker LT 414) wherein the Orissa ruling has been followed. As against this, the learned advocate appearing for the respondents pressed into service certain rulings of the Andhra Pradesh, Madras and Patna High Courts to which we shall presently be referring. Before we discuss the rulings cited before us, it is necessary to read O. 1, R. 10, C. P. C. which is the relevant provision contained in the Code empowering the court to strike out or add parties:

"10. Suit in name of wrong plaintiff:—

(1) Whether a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

(2) Court may strike out or add parties.— The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.

(4) Where defendant added, plaint to be amended.— Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amend-

ed copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.

(5) Subject to the provisions of the Indian Limitation Act, 1877 (15 of 1877), S. 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons."

It is with the interpretation of sub-r. (2) of R. 10 that we are directly concerned with in this case. Going by the plain words used in that provision, the court is empowered to order at any stage of the proceedings the addition of the name of any person who ought to have been joined as a party to the action whether as plaintiff or defendant, or whose presence before the court in such capacity may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit. What is however contended by the petitioner is that in the case of suits for partition or redemption where the passing of more than one decree is contemplated, the earlier being preliminary in nature, although the suit will undoubtedly be pending until a final decree is passed, several matters get finally determined on the passing of a preliminary decree dealing with those questions and that it is not contemplated that new party should be impleaded after the passing of such preliminary decree because that would necessarily involve ripping open the finality of the determination made in the preliminary decree. This is the aspect mainly relied on in the decision of a learned Single Judge of the Orissa High Court in Bamon Chandra v. Balaram (AIR 1966 Ori 160). There it has been laid down as a general principle that except in certain exceptional circumstances such as impletion of transferees subsequent to the preliminary decree or death of parties whose rights were carved out in the preliminary decree" there cannot be any addition of new parties in an action for partition or redemption subsequent to the passing of the preliminary decree. In Krishna Aiyar v. Subrahmania Aiyar (AIR 1924 Mad 648) it was held that where circumstances render it necessary the court may add a person interested in the equity of redemption as a party even after the preliminary decree and can reopen the decree so far as the added party is concerned. The said view has been reiterated in Swaminatha Iyer v. Alagiriswami Chettiar ((1955) 68 Mad LW 831): (AIR 1956 Mad 288) and in Swayamprakasam v. Vijayarangam ((1970) 1 Mad LJ 243). In the last mentioned case ((1970) 1 Mad LJ 243) it is observed by Sadasivan J. that the proceedings in a suit for partition cannot come to an end till the final decree is passed and that the court has jurisdiction at any stage before the passing of a final decree to order impleadment of any person as an additional party in case it is satisfied that such person ought to have been joined as a party to the suit or that his presence before the court may be necessary to enable the court to effectually and completely adjudicate upon all the questions arising therein. A Division Bench of the Andhra Pradesh High Court has taken the same view in R. A. Narasinga Rao v. Chunduru Sarada (AIR 1976 Andh Pra 226) approving an earlier ruling of a Single Judge of that Court reported in Syed Mohiddin v. Abdul Rahim (AIR 1964 Andh Pra 260). Our attention was also drawn to the rulings in Daw Aye v. U Kwe (AIR 1935 Rang 23) and Kunja Behari v. Bundudhar Panda (AIR 1942 Pat 185 (2)) which are also to the same effect.

4. After having given our anxious consideration to all aspects of the matter, we are of opinion that (in cases such as suits for redemption or partition) where the passing of a preliminary decree is contemplated, the power conferred under O. 1, R. 10, C. P. C. is to be regarded as circumscribed by the provisions contained in S. 2 (2) and S. 97 of the Code. As pointed out by the Supreme Court in Venkata Reddi v. Pethi Reddi (AIR 1963 SC 992), S. 97, C. P. C. clearly indicates that in respect of the matters covered by a preliminary decree, the said decree is to be regarded as embodying the final decision of the court passing it. It will not, therefore, be reasonable to understand the provision in O. 1, R. 10, C. P. C. as empowering the impleadment of additional parties in a suit in circumstances which would necessitate the ripping open of the determination made in the preliminary decree already passed in the suit. However, one can very well conceive of several situations where an impleadment of an additional party may be asked for or may be considered by the court to be necessary for a proper and complete adjudication of the matters in controversy in such a suit and such impleadment would not involve the reopen-

ing of matters already finally settled by the preliminary decree. The correct legal position in our opinion is that while the passing of a preliminary decree in a suit for partition or redemption will not ipso facto operate as a total bar against the addition of any new parties to the action, the impleadment of additional parties subsequent to the passing of the preliminary decree is permissible only if none of the questions already settled by the preliminary decree would have to be reopened by the court as a consequence of such impleadment; the addition of parties can be allowed at that stage only on condition that the further proceedings to be taken in the suit will be only on the basis of the preliminary decree already passed, and none of the questions settled by the preliminary decree will be allowed to be reagitated on the ground that the person newly impleaded was not before the court at the time of the passing of the preliminary decree. As to whether or not the impleadment of a new party should be allowed on the aforesaid condition in the circumstances of a particular case will have to be considered by the court on the merits of each case as and when the said question arises. No party should be impleaded against his will if that would involve his being subjected to the terms of a preliminary decree which was passed without his being on the party array, particularly when there are pleas which the said party could have put forward in respect of the matters considered and settled by the preliminary decree.

5. We do not, therefore, find it possible to agree wholly with the principle laid down in either of the two sets of rulings cited before us, as, in our opinion, it would not be right either to completely rule out the addition of parties after the passing of a preliminary decree or to recognise an unrestricted power to allow the impleadment of additional parties even after the preliminary decree so as to rip open matters already decided and settled by the preliminary decree. As we have already indicated the correct view seems to us to be that the power of the court to implead additional parties at a stage subsequent to the passing of a preliminary decree in an action for partition or redemption must be limited to cases where such impleadment of additional parties would not involve the ripping open of any of the matters already dealt with in the preliminary decree and the case can be proceeded with the additional parties on record on the basis of the determination already given in the preliminary decree.

6. Tested in the light of the above principle the order passed by the court below permitting the plaintiff to implead the revision petitioner as an additional defendant cannot be said to be erroneous or illegal. The mortgage sued on is admitted and the only contention that the additional defendant seeks to put forward is that he should be awarded the value of improvements before he is called upon to surrender the property. The question of value of improvements is very often relegated for consideration to the final decree stage in a mortgage suit. In the preliminary decree passed in this suit this question has not been dealt with or determined. The impleadment of the 2nd defendant at this stage does not, therefore, involve the reopening of any of the matters settled by the preliminary decree. The order of the court below does not, therefore, call for any interference. We make it clear that the revision petitioner who is impleaded as the 2nd defendant can urge all his contentions in respect of his claim for value of improvements in the course of the final decree proceedings.

7. The revision petition accordingly fails and is dismissed. The parties will bear their respective costs.

Revision dismissed.

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V. P. GOPALAN NAMBIYAR, C. J. AND G. BALAGANGADHARAN NAIR, J.

State of Kerala and others, Appellants v. C. M. Sebastian, Respondent.

Writ Appeal No. 291 of 1977. D/- 16-12-1977.*

Constitution of India, Art. 226 — Petition involving construction of terms of contract — Petition not maintainable. O. P. No. 783 of 1977 (Ker), Reversed.

The High Court could not interfere in proceeding under Art. 226 for construing and expounding purely a term in a contract. No writ or order could be issued under Art. 226 to compel the authorities to remedy a breach of contract pure and simple. AIR 1977 SC 1496; AIR 1973 SC

*(Against judgment of Single Judge of this Court in O. P. No. 783 of 1977 (Ker)).

BV/CV/A857/78/PNK/DHZ

964; AIR 1966 SC 334 and AIR 1974 Pat 230, Followed. O. P. No. 783 of 1977 (Ker), Reversed. (Paras 6 and 7)

Anno: AIR Comm., Const. of India (2nd Edn.), Art. 226, N. 7 (4).

Cases Referred: Chronological	Paras
AIR 1977 SC 1496	6
AIR 1974 Pat 230	6
AIR 1973 SC 964 : 1973 Lab IC 229	6
AIR 1966 SC 334	6

Govt. Pleader, for Appellants; V. Bhaskaran Nambiyar, C. R. Natarajan, M. K. Anandakrishnan, R. Bhaskaran and K. Joseph Ninan, for Respondent.

GOPALAN NAMBIYAR, C. J.:— We regret our inability to agree with the learned Judge who allowed the writ petition of the 1st respondent and held that under Ext. P-1 document the provision was categoric that the seigniorage fee is leviable at the rates mentioned and not at something to be estimated de hors the provisions of the document. The learned Judge pronounced that the writ petitioner was entitled to issue of a transport permit and that the value to be realised for timber was only at the rate of Rs. 3/- (sic Rs. 4/- ?) per candy and that on the petitioner paying the same in accordance with the conditions in Ext. P-1 the respondent would issue the transport permit to the petitioner expeditiously and without delay. The State of Kerala and the Chief Conservator of Forests, and the Divisional Forest Officer, Nenmara have come up in appeal.

2. The controversy hinges round the construction of a term in Ext. P-1 lease, executed by and between His Highness the Maharaja of Cochin and one George S. Duppen on 16-7-1877 (the learned Government Pleader submitted that 1877 shown in the copy Ext. P-1 is a mistake for 1867), in respect of about 409 Acres of the Nelliampathi tract of forest land known as 'Nelliccolla' situated on the Nelliampathi Range, and containing a number of teak, ebony, and blackwood trees. These were excepted from the demise in the preambulary part of the document. Clause (3) of the lease-deed provided:

"3. Teak, ebony and blackwood trees excepted and reserved out of the grant hereby made, shall be felled and removed within six months from the date hereof, otherwise the same shall become and be the property of the said George S. Duppen, His Heirs, and Assigns, he or they, paying to His Highness, His Heirs, Successors and Assigns for the same a royalty of three rupees for candy for Ebony, and blackwood and of four rupees per candy for teakwood".

Admittedly, the teak trees with which we are concerned in this application were not felled and removed within six months mentioned in the above clause. There is also no controversy that the rights of His Highness the Maharaja of Cochin to receive the royalty has now devolved upon the Kerala Government. By Ext. P-2 proceedings dated 22-11-1975 from the Chief Conservator of Forests, Nenmara to the Director Poothundu Plantations (P.) Ltd., sanction was accorded to fell 12 (twelve) marked rosewood trees in the estate, in pursuance of the application by the Estate dated 15-6-1975 recited in Ex. P-2, and subject to the conditions of the lease-deed. The writ petitioner is stated to have got the right of cutting the above trees, under a power-of-attorney from the Estate and an assignment of the cutting permit in his name on 3-12-1975 by the District Forest Officer, Nenmara. It appears that he felled the trees and stacked the logs in the Estate, and on 16-7-1976, sold the logs to a third party at Ernakulam. When he approached the Divisional Forest Officer, Nenmara for issue of a permit and for transportation of the logs the Officer had certain doubts and reservations to be cleared which delayed the issue of the permit. The petitioner thereupon seems to have presented Ext. P-3 petition dated 20-4-1976 setting out the above facts to the Minister for Forests, Kerala, praying to issue directions to the Divisional Forest Officer, for issuing a permit for transportation of the logs after receiving the security as per conditions in the registered lease-deed. We fail to see how an application of this type for executive intervention with a statutory authority's discretion in the matter of granting a permit was called for or happened to be made. But we notice that by Ext. P-4 dated 21-7-1976 which is a copy of the letter from the Secretary to the Government to the Chief Conservator of Forests, the latter's letter dated 20-5-1976 was recalled, and it was stated that a royalty of Rs. 3/- per candy for ebony and blackwood trees and of Rs. 4/- per candy for teak-wood alone could be collected as seigniorage rate as per condition in the lease deed. The letter stated that the removal of timber may be allowed on payment of value as per condition 3 of the lease deed in modification of the general terms laid down

in G. O. Rt. No. 2161/62/Agr. dated 6-10-1962. By Ex. P-5 of the same date the writ petitioner was informed that suitable instructions had been issued to the Chief Conservator of Forests. Things apparently did not again move expeditiously enough; for, we find that Ex. P-6 petition dated 28-8-1976 was filed by the petitioner again before the Minister stating that the Divisional Forest Officer had still some misgivings and praying for necessary direction to the Officer for removal of difficulties. This was responded to by Ex. P-7 communication dated 27-1-1977 informing the writ petitioner that the Divisional Forest Officer had suitable instructions. Not still succeeding to get the necessary transport permit, or not being able to remove the timber logs, the writ petitioner filed Ex. P-8 petition dated 3-2-1977 before the Chief Conservator of Forests requesting necessary instructions to the Divisional Forest Officer, Nenmara to issue the transport permit. This resulted in Ex. P-9 order dated 4-2-1977 which recalled G. O. Rt. 290/77 dated 27-1-1977 in which the Government had ordered to issue the permit after realising full seigniorage fee at the existing rate of cent per cent valuation. The writ petitioner was directed to contact the Divisional Forest Officer, Nenmara. A copy of the G. O. dated 27-1-1977 referred to in Ext. P-9 has been filed along with the counter-affidavit of the 1st respondent as Ex. R-1. That has referred to an earlier G. O. Rt. 2161/62/Agrl. dated 6-10-1962, on the basis of which orders were issued to receive the current seigniorage value of the timber trees.

3. In the writ petition the prayers were:

"(i) To issue a writ of certiorari or other appropriate writ, order or direction calling for the papers leading to Ex. P-9 communication from the 2nd respondent and G. O. Rt. No. 290/77/Ad. dated 27-1-1977 issued by the 1st respondent and referred to in Ext. P-9 and quashing the G. O. and Ext. P-9;

(ii) To declare that Cl. 3 of Ex. P-1 lease deed is binding on the first respondent and the respondents are bound to issue permit to the petitioner for the removal of the rosewood logs felled and kept in the Poothundy Estate under the terms and conditions as laid down in Ext. P-1;

(iii) To issue a writ of mandamus or other appropriate writ, order or direction, compelling the respondents to issue a permit to the petitioner to remove the rosewood logs of 12 marked rosewood trees that were felled by the petitioner pursuant to Ex. P-2 after paying the seigniorage as provided in Ex. P-1 lease-deed;

(iv) To issue an interim direction to the 3rd respondent to issue permit to the petitioner for the removal of the rosewood logs felled by him as per the sanction accorded to him as per Ex. P-2 order of the 3rd respondent and after paying the royalty as laid down in Exhibit P-1 lease deed; pending final disposal of the above original petition;

(v) To issue such other writ, order or direction as this Hon'ble Court deems fit and proper in the interests of justice; and

(vi) To award the costs of this O. P. to the petitioner."

4. The learned Judge held after stating the facts that Ex. P-1 was unequivocal and that the blackwood and ebony trees had to be paid for, only at Rs. 3/- per candy for all time and that the insistence on stipulating the rate having regard to the prevailing conditions was unsustainable. The learned Judge felt that it was very difficult to read any such intention against the express terms of the document, and that the document was categoric on the point. The learned Judge concluded:

"Hence the complaint of the petitioner is well founded. The petitioner is entitled to the issue of transport permits and the value to be realised for the timber is only at the rate of Rs. 3/- per candy. On petitioner making the payment in accordance therewith the respondents will see that transport permits are issued to the petitioner expeditiously and without any delay.

Allowed as above. No costs."

5. From what we have stated it would be noticed that while the Officer entitled to deal with the question whether the writ petitioner was entitled to the transport permit in respect of the timber logs or not, was engaged in considering and dealing with the matter, there were repeated attempts to forestall his decision and action and to interfere with his discretion by executive or administrative directions from the Government or the superior authority. For the one thing, these appear to have been improper. Our attention was not called to the statutory provisions or other rules or directions under which the application for

transport permit had to be dealt with and disposed of, and the considerations to be borne in mind by the authority in dealing with and disposing of such an application. But we see that the authority was subjected to conflicting orders of the Government. Ext. R-1 dated 27-1-1977 is one order; and that expressly recites that it is passed in supersession of all orders issued on this matter. It has recited a prior order dated 6-10-1962, which, we see, has been modified in Ext. P-4 order. Then there was Ext. P-9 which recited Ex. R-1. In these circumstances and under these conditions, we are not inclined to cavil at the doubts or misgivings which assailed the Divisional Forest Officer, Nenmara. Nor can we approve the writ petitioner's attempts at repeatedly filing petitions before the Minister or the Chief Conservator of Forests and getting them to issue orders either interfering with the discretion of the authority charged with the duty of issuing permits, or forestalling the decision of such authority.

6. That apart, we do not think this is a matter in which this Court can interfere in proceedings under Art. 226 for construing and expounding purely a term in the contract Ext. P-1. The learned Government Pleader for the State cited to us the recent decision of the Supreme Court in Radhakrishna Agarwal v. State of Bihar (AIR 1977 SC 1496), where, after an analysis of the relevant decision the Court observed thus (at pp. 1500, 1501):

"12. The Patna High Court had, very rightly, divided the types of cases in which breaches of alleged obligation by the State or its agents can be set up into three types. These were stated as follows:—

"(i) Where a petitioner makes a grievance of breach of promise on the part of the State in cases where on assurance or promise made by the State he has acted to his prejudice and predicament, but the agreement is short of a contract within the meaning of Art. 299 of the Constitution;

(ii) Where the contract entered into between the person aggrieved and the State is in exercise of a statutory power under certain Act or Rules framed thereunder and the petitioner alleges a breach on the part of the State; and

(iii) Where the contract entered into between the State and the person aggrieved is non-statutory and purely contractual and the rights and liabilities of the parties are governed by the terms of the contract, and the petitioner complains about breach of such contract by the State."

In the light of the principles thus stated by the Supreme Court it was held that the case considered fell within the third category where, questions of alleged breach of contract were involved, and, on the strength of the decisions in AIR 1973 SC 964, AIR 1966 SC 334, and AIR 1974 Pat 230, no writ or order can issue under Art. 226 of the Constitution, to compel the authorities to remedy a breach of contract pure and simple. Here too, there is no question of assurance or promise by the State to issue a transport permit on which the writ petitioner can be said to have acted; the case does not fall in the second category, and can only fall in the third. For that reason, we think, the learned Judge was wrong in interfering under Art. 226 and issuing the writ as directed.

7. We hesitate to agree with the learned Judge that the terms of Ext. P-1 are categorical and do not and cannot admit of any doubt. Under the terms of Ext. P-1, teak, ebony and blackwood trees are excepted from the subject-matter of the demise. Under Cl. (3) these trees are to be cut, felled, and removed within six months of Ext. P-1; otherwise they are to become the property of the lessee, the lessee paying to the lessor, his heirs, successors and assignees, royalty at the stipulated rate. This admittedly was not done. It appears to require at least some consideration whether the payment recited was necessary before the property would pass. If it was, and the same was not done within six months of 16-7-1867 (date of Ex. P-1) and the question of payment of seigniorage arises more than a century later, are the parties tied down to the rates stipulated in the document? If, on default of cutting within six months, property in the standing timber automatically passed to the lessee, could there be any question of paying seigniorage at all? But there seems to be no such case. We refer to these aspects without expressing any opinion only to show that it was inappropriate for this Court to enter into these regions of contract-law, and seek to expound a contractual term in proceedings under Art. 226 of the Constitution.

8. We allow this appeal, set aside the judgment of the learned Judge and direct that O. P. No. 783 of 1977 will stand dismissed. We make no order as to costs.

Appeal allowed.

AIR 1978 KERALA 159

V. P. GOPALAN NAMBIYAR, C. J. AND K. K. NARENDRAN, J.

K. C. M. Mather, Appellant v. Vijaya Movies, and 4 others, Respondents.

Writ Appeals Nos. 82 and 279 of 1976, D/- 28-11-1977.

(A) Telegraph Act (13 of 1885), Ss. 3, 4 and 7 and General Statutory Rules and Orders Vol. XVI, Part V Rules for Telephones, R. 429 — Transfer of telephone — No unqualified right in the subscriber or transferee to require transfer — Application for transfer being considered no writ of mandamus would issue. (Constitution of India, Art. 226).

Since Ss. 4 and 7 of the Telegraph Act recognise the exclusive privilege of the Central Government to establish, maintain and work telegraphs which expression by its definition u/s. 3 would include telephones, neither the subscriber nor the person claiming a transfer of the facility to him had the absolute right to demand the transfer. The matter was governed by the rules framed for the purpose and depended on the discretion exercisable by the Government. Writ of mandamus would not issue when the matter of transfer was being considered by the Department. Merely because the Department conveyed an impression that the transfer application was being accepted and acted upon by the Department and the Transferee had paid the required fee of Rs. 500/-, the Department was not bound to shift the telephone to the transferee's premises without examining the complaint from the Department's Officer against a possible misuse of the telephone by the person claiming to be the subscriber. AIR 1974 Ker 157 Ref. (Paras 2 & 3)

Anno: AIR Man., 3rd Edn., Telegraph Act, Ss. 4 & 7, N. 1; Const. of India, 2nd Edn., Art. 226, N. 7 (H).

(B) Constitution of India, Art. 226 — Complicated questions of fact cannot be gone into the writ proceedings — Matter concerning transfer of a telephone — Consideration of several deeds of partnership and dissolution to find if the transferor had the existing right to transfer was held to be beyond the scope of the writ petition filed to effectuate the transfer. (Telegraph Act (1885), Ss. 4 and 7). (Para 4)

Anno: Const. of India, 2nd Edn., Art. 226, N. 7 (H); AIR Man., (3rd Edn.), Telegraph Act (1885), Ss. 4 & 7, N. 1.

Cases Referred: Chronological Paras

AIR 1974 Ker 157: 1974 Ker LT 170 2

V. K. K. Menon, P. Mohamed and P. S. Mohamed Nasir, for Appellant in W. A. No. 82 of 1976 and for Respondent No. 2 in W. A. No. 279 of 1976. P. F. Thomas, for Respondent No. 1 in both the W. Appeals. Central Govt. Pleader, for Respondents Nos. 2 to 5 in W. A. No. 82 of 1976 and for Appellants in W. A. No. 276 of 1976.

GOPALAN NAMBIYAR, C. J.:— These are two appeals arising out of the same judgment of a learned Judge of this Court in O. P. No. 3900 of 1975. W. A. No. 82 of 1976 is by the supplemental 5th respondent in the Original Petition, and W. A. No. 279 of 1976 is by respondents 1 to 4, namely, the Divisional Engineer, Telephones, the Commercial Officer, Telephones, the Director of Posts & Telegraphs, and the District Manager, Telephones, Ernakulam. The writ petition was filed seeking a writ of mandamus to direct the departmental respondents to give a telephone connection to the writ petitioner. The same was prayed for on the strength of an application for transfer (copy Ext. P-1) dated 30-6-1975 made by one T. J. Joseph stated to be the Managing Partner of M/s. Mas Auto Spares. The relationship between the subscriber and the transferee was stated in the relevant column of the application as "friendship". The address at which the telephone was working was shown as Mas Auto Spares, M. G. Road, Ernakulam. By Ext. P-2 dated 30-6-1975 Shri T. J. Joseph gave the required undertaking not to claim the telephone or to ask for the refund of any amount due from the Telephone Department in future. Exts. P-3, P-4 and P-5 are the documents which show that his application for transfer was being accepted and acted upon by the Department. The learned Judge on these facts proceeded, in para 4 of the judgment under appeal, on the basis that Shri T. J. Joseph was the subscriber of the telephone in question. After the re-

quired amount of Rs. 500/- by way of transfer fee was paid (Vide Exts. P-4 and P-5) the petitioner firm by Ext. P-6 letter requested the 2nd respondent to take immediate steps in the matter of transfer of the telephone. This was on 4-8-1975. The 5th respondent had addressed Ext. R-3 letter to the 4th respondent, dated 30-7-1975. The said letter complained that the telephone in question was being used by M/s. Mas Auto Spares, and was in custody of the aforesaid firm in its premises, and that Shri T. J. Joseph was not the subscriber of any telephone in his personal capacity. It has been proved and brought out by the records filed in this case that Shri T. J. Joseph had retired from the firm of M/s. Mas Auto Spares in 1967 — vide Ext. R-4. The learned Judge after noticing Rule 429 of the Rules for Telephones contained in Part V of the General Statutory Rules and Orders Vol. XVI, according to which, a transfer of telephones shall not be made without the permission of the Telegraph Authority, stated that the Telegraph Authority had permitted by Exts. P-1 to P-5, the assignment or transfer of the telephone, and that for faults, if any, of the former subscriber, the transferee-firm, viz., the writ-petitioner, should not be made to suffer. The learned Judge stated that he was not called upon to decide as to whether there was any unauthorised use after 13-7-1967 when the former subscriber Shri T. J. Joseph retired from M/s. Mas Auto Spares. He was firmly of the view that once the transfer was permitted, and on that basis the transferee had invested amounts, respondents 1 to 4 cannot revoke the transfer, and that the petitioner-firm was entitled to have the telephone in question shifted to their premises. The learned Judge accordingly allowed the original petition and granted a writ of mandamus to the petitioner for the installation of the telephone in their premises.

2. While the learned Judge had correctly noticed the facts and the course of events relating to the telephone, we think the learned Judge was wrong in issuing a writ of mandamus directing the installation of the telephone in the petitioner's premises. Sections 4 and 7 of the Indian Telegraph Act, 1885, make it clear that it is the exclusive privilege of the Central Government to establish, maintain and work telegraphs (which expression, by the definition in S. 3 of the Act, would include a telephone also), and that the grant of this exclusive privilege is subject only to such rules and restrictions as may from time to time be laid down by the Government consistent with the provisions of the Act. This Court in Mahomed Ali v. Union of India (1974 Ker LT 170): (AIR 1974 Ker 157) has noticed the scope and the nature of the Government's privilege in allowing use of telegraphs including telephones. That being the nature of the right of the Government, we do not think it can be posited that there is an unqualified right on the part of any subscriber or of any transferee to have his application for a telephone or for a transfer of the telephone invariably allowed and granted. The same must essentially depend upon the discretion to be exercised by the Government in dealing with the application. In the instant case, in the counter affidavit filed by the 2nd respondent, paras 5, 10 and 12 have clearly noticed the facts that we have referred to earlier and stated that a case of misuse of the telephone by Shri T. J. Joseph from 1967 when he retired from M/s. Mas Auto Spares (Ext. R-4) till 1975 when Ext. P-1 application was filed, was brought to the notice of the Department, and was pending examination and final decision in accordance with the Rules. It was pointed out that the Department cannot allow any trade in telephones and that it was not bound to make transfer of the telephone to the petitioner. Having regard to the facts noticed and the stand taken by the Department in the counter affidavit, we think that the learned Judge was wrong in having issued a mandamus directing connection of the telephone to the writ-petitioner, when the matter was pending examination and final decision.

3. We allow the Department's appeal — W. A. No. 279 of 1976 — and set aside the judgment under appeal and the direction for mandamus issued by the learned Judge. The writ-petition will stand dismissed; but we make it clear that the Department will be at liberty — indeed will be bound — to consider the matter, and deal with the application for transfer of the telephone in such manner as it deems fit according to the facts and the circumstances of the case disclosed. The appeal is allowed as above. There will be no order as to costs.

4. In W. A. No. 82 of 1976, the appellant agitated mainly her right to get

the telephone transferred in his name. In the nature of things, this is a disputed question of fact which cannot be gone into in these proceedings. We were invited to go through a cycle of transformations and evolutions from Electro Diesel Spares to M/s. Mas Auto Spares, the constitution, re-constitution and dissolution of these firms, and the retirement of one of the partners, Shri T. J. Joseph, from the latter firm, and to examine whether the writ-petitioner was not the better claimant for, and had not the better title to, the installation of the phone. We have resolutely refused to examine the matter in these proceedings, especially when the matter is under examination by the Department. As far as the issue of the writ of mandamus directed by the learned Judge is concerned, we have vacated the same and left the authorities to deal with the application for transfer in accordance with law. In view of that, the appellant is not entitled to any further relief in this Writ Appeal, which we dismiss, with no order as to costs, subject to our direction granted in W. A. No. 279 of 1976.

Issue carbon copy of this judgment to all counsel concerned on usual terms.

Appeal allowed.

AIR 1978 KERALA 161

V. P. GOPALAN NAMBIYAR, C. J.

AND K. K. NARENDRAN, J

Ulahannan Chacko and others, Petitioners v. Pareed Marakkar and others, Respondents.

C. R. P. Nos. 3089, 3091 and 3093 of 1976, D/- 21-11-1977.

Limitation Act (36 of 1963), Ss. 5 and 14 — Applicability — Appeal under Kerala Rent Control Act — Appellate authority not a "Court" — Cannot excuse delay under S. 5 Limitation Act — Principle of S. 14 cannot also be extended. (Kerala Buildings (Lease and Rent Control) Act (2 of 1965), S. 18).

The Limitation Act applies to proceedings before a Court. The appellate authority under the Kerala Buildings (Lease and Rent Control) Act is not a Court and where an appeal under the Rent Control Act is barred by limitation, it has no power to condone delay under, S. 5 of the Limitatoin Act. So also, where due to uncertainty in the identity of the forum where the appeal under the Rent Control Act had to be presented, it flitted between one court to another, the delay in filing appeal cannot be excused by the appellate authority under Rent Control Act by extending the principle of S. 14 of the Limitation Act on ground that the time was spent in bona fide prosecuting the litigation. The Limitation Act cannot be extended by analogy to proceedings to which it would not apply. Case law discussed.

(Paras 2, 4 & 6)

Anno: AIR Comm., Limitation Act (1963) (5th (1976) Edn.), S. 5, N. 5-AA & S. 14, N. 5.

Cases Referred: Chronological Paras

AIR 1977 SC 282: 1976 Ker LT 810 4
AIR 1977 Bom 1: 1977 Lab IC 23 6
AIR 1976 SC 2161 1, 5
AIR 1974 Ker 162: 1973 Ker LT 138 (FB) 1, 2, 3, 6
AIR 1974 Ker 202: 1973 Ker LT 1004 4
(1971) O. P. Nos. 353, 363 and 364 of 1971 (Ker) 2
AIR 1970 SC 209: 1970 Lab IC 269 3, 4
AIR 1969 SC 1335: 1969 Lab IC 1538 3, 4
AIR 1969 Ker 103: 1968 Ker LT 583 (FB) 6
AIR 1964 SC 227 6
AIR 1929 PC 103 6

Panicker & Potti, for Petitioner in C. R. P. Nos. 3089, 3091 and 3093 of 1976; V. Parameswara Menon & R. S. Shenoi in C. R. P. No. 3089 of 1976; V. Parameswara Menon and R. D. Shenoi, in C. R. P. No. 3091 of 1976; V. Parameswara Menon, C. K. Ravindranath and R. D. Shenoi, in C. R. P. No. 3093 of 1976, for Respondents.

GOPALAN NAMBIYAR, C. J.:— These three revision petitions were adjourned by our learned brother Viswanatha Iyer, J. to be heard by a Division Bench. It was submitted before the learned Judge that the Full Bench decision of this Court in Jokkim Fernandez v. Amina Kunhi Umma (1973 Ker LT 138): (AIR 1974 Ker 162) required reconsideration in the light of the decision of the Supreme Court in Mohd. Ashfaq v. State Transport Appellate Tribunal, U. P. (AIR 1976 SC 2161). The learned Judge felt that the question involved was fairly important.

2. The respondent in an application for eviction before the Rent Control Court under the Kerala Buildings (Lease & Rent Control) Act, filed an appeal

against the decree to the appellate authority under the Act. Owing to the uncertainty in the identity of the forum where the appeal had to be presented, it flitted between the Sub Court, Parur, and the District Court, Ernakulam, till it was eventually decided by this Court in O. P. Nos. 353, 363, and 364 of 1971 that the proper court for presentation of the appeal was the Sub Court, Ernakulam, and that in view of the delay that had intervened, the appeal had to be presented to that court with a petition to excuse the delay, under Section 5 of the Limitation Act. This was done. Meanwhile, a Full Bench of this Court in Jokkim Fernandez v. Amina Kunhi Umma (1973 Ker LT 138) : (AIR 1974 Ker 162) had decided that the Limitation Act had application only to Courts. Following the principle of the said decision, it was ruled by the Sub Court that there was no power to excuse delay in filing the appeal. The application to condone the delay was dismissed; and consequently the appeal was also dismissed. A revision was preferred to the District Court. That Court held that although the Limitation Act and the provisions of S. 5 thereof cannot apply in view of the Full Bench decision in Jokkim Fernandez v. Amina Kunhi Umma (1973 Ker LT 138): (AIR 1974 Ker 162), the principle of S. 14 of the Limitation Act would apply and the time spent in bona fide prosecuting the litigation, during the period when the appeals flitted between the Sub Court and the District Court, was liable to be excluded. The applications to excuse delay were accordingly allowed, and the appeals were directed to be taken on file. The Revision Petitions are before us against the said order.

3. In the Full Bench judgment in Jokkim Fernandez v. Amina Kunhi Umma, (1973 Ker LT 138) : (AIR 1974 Ker 162), speaking for the majority (Viswanatha Iyer, J. dissenting), it was observed that the Limitation Act applied only to Courts and prescribed periods of limitations in respect of suits, appeals and applications filed only in Courts. For the said proposition, reliance was placed on the decision of the Supreme Court in Town Municipal Council, Athani v. Presiding Officer, Labour Court, Hubli, (AIR 1969 SC 1335) which ruled that the Limitation Act would apply only to proceedings governed by the Code of Civil Procedure and only in respect of proceedings taken in Courts. The principle that the Limitation Act would govern only applications made to Courts was restated in Nityanand M. Joshi v. Life Insurance Corporation of India, (AIR 1970 SC 209). Following these two decisions, the Full Bench had laid down the principle that the Limitation Act would apply only to proceedings under the Code of Civil Procedure taken in Courts.

4. What is now sought to be contended before us is that a different strand of reasoning was struck in a later ruling of the Supreme Court in Kerala State Electricity Board v. T. P. Kunhaliumma (1976 Ker LT 810): (AIR 1977 SC 282). In view of the said decision it was stated that the earlier Full Bench decision requires re-examination. In 1976 Ker LT 810: (AIR 1977 SC 282), a petition under Ss. 10 and 16 (5) of the Indian Telegraph Act, 1885 read with S. 51 of the Indian Electricity Act 1910 claiming compensation was filed before the District Judge, Tellicherry. Objection was raised that the petition was barred by time under Art. 137 of the Limitation Act, 1963. For the Electricity Board, it was answered that the said Article did not apply to applications to District Judge under the Telegraph Act. It was ruled by this Court that in view of the decision in Kerala State Electricity Board v. Parvathi Amma (1973 Ker LT 1004): (AIR 1974 Ker 202) by a Division Bench of this Court, the Limitation Act would apply only to proceedings under the Civil P. C. This Court in that case referred to the pronouncement of the Supreme Court in Town Municipal Council, Athani v. Presiding Officer, Labour Court, Hubli (AIR 1969 SC 1335) that the Limitation Act applied only to proceedings under the Civil P. C. and only to proceedings in Courts. It also referred to Nityanand M. Joshi v. Life Insurance Corporation of India (AIR 1970 SC 209) which had endorsed the second of these grounds, but expressed doubt as to the first, viz., whether the Act would apply only to applications under the Code of Civil Procedure. In Kerala State Electricity Board v. T. P. K. (1976 Ker LT 810): (AIR 1977 SC 282) the Supreme Court observed:

"The conclusion we reach is that Art. 137 of the 1963 Limitation Act will apply to any petition or application filed under any Act to a civil court. With respect we differ from the view taken by the two Judge Bench of this Court in Athani Municipal Council case (AIR 1969 SC 1335) (supra) and hold that

Art. 137 of the 1963 Limitation Act is not confined to applications contemplated by or under the Civil P. C. The petition in the present case was to the District Judge as a court. The petition was one contemplated by the Telegraph Act for judicial decision. The petition is an application falling within the scope of Art. 137 of the 1963 Limitation Act." (At p. 814) (of Ker LT): (At p. 286 of AIR)

It would be seen that the Court "differed" only from one of the two grounds on which the decision about the non-applicability of the Limitation Act had been rested in Town Municipal Council, Athani v. Presiding Officer, Labour Court, Hubli (AIR 1969 SC 1335), namely, that the proceedings must be under the Code of Civil Procedure. The second ground that the proceedings must be in Court was not shaken. Indeed, this aspect of the matter was emphasised by stating that the application under the Telegraph Act was made to a civil court. It is therefore clear that this aspect of the law laid down in AIR 1969 SC 1335 has not in any way been affected.

5. Attention was then called to Mohd. Ashfaq v. S. T. A. T., U. P. (AIR 1976 SC 2161). The question there considered was regarding the applicability of S. 5 of the Limitation Act to an application filed before the Regional Transport Authority for renewal of a permit, under S. 58 (2) & (3) of the Motor Vehicles Act. Under sub-cl. (2) the application for renewal of a permit had to be made within a specified time; and under sub-cl. (3) the R. T. A., may entertain an application for renewal of a permit after the specified date, if the application is made not more than 15 days after the said date and is accompanied by the prescribed fee. The question considered was whether S. 29 (2) of the Limitation Act could permit the Regional Transport Authority to entertain an application even beyond the outer limit of more than 15 days from the time specified for making an application for renewal. The Court observed:

"Section 29, sub-sec. (2) of the Limitation Act, 1963 makes S. 5 applicable in the case of an application for renewal unless its applicability can be said to be expressly excluded by any provision of the Act. The only provision of the Act sought to be pressed into service for this purpose was sub-sec. (3). Does sub-section (3) expressly exclude further extension of time under S. 5? If it does, then S. 5 cannot be availed of by the appellant for condonation of the delay. Sub-sec. (3) in so many terms says that the Regional Transport Authority may condone the delay in making of an application for renewal and entertain it on merits provided the delay is of not more than 15 days. This clearly means that if the application for renewal is beyond time by more than 15 days, the R. T. A. shall not be entitled to entertain it, or in other words, it shall have no power to condone the delay. There is thus an express provision in sub-sec. (3) that delay in making an application for renewal shall be condonable only if it is of not more than 15 days and that expressly excludes the applicability of S. 5 in cases where an application for renewal is delayed by more than 15 days." (para 8)

We do not see anything in the above decision to hold that an application to excuse delay would lie to the Regional Transport Authority under S. 5 read with S. 29 (2) of the Limitation Act. On the other hand, if the Limitation Act would apply proprio vigore even to the Regional Transport Authority, the principle stated by the Supreme Court and its conclusion should have been different.

6. Counsel for the respondents placed reliance on the decision of the Privy Council in Ramdutt v. E. D. Sassoon and Co. (AIR 1929 PC 103) to contend that the principle of S. 14 of the Limitation Act would be attracted and delay could be excused on the said basis. In that case it was ruled by the Privy Council that although the Limitation Act does not in terms apply to arbitrations in mercantile references, it is an implied term of the contract that the arbitrator must decide the dispute in accordance with the existing law of contract, and that every defence which would have been open in a Court of law can be equally proponed for the arbitrator's decision unless the parties have agreed to exclude that defence. Hence it was ruled that S. 3 of the Limitation Act applies to arbitration proceedings. It was pointed out that arbitrations under the Indian Arbitration Act are not prosecuted by filing suits and preferring appeals from the decrees in such suits, but by procuring awards and filing them in Court and resisting applications to set them aside. Therefore, an arbitrator should exclude the time spent in prosecuting in good faith the same claim before the arbitrator who was without

jurisdiction. It will be noticed that the fundamental principle on which the decision was rested was quite different, namely, that the arbitrator had to decide in accordance with the existing law and that every defence could be taken before him which would have been open in a Court of law. We are afraid this principle cannot be pressed into service to cover the case of the appeals presented before the appellate authority which had no jurisdiction to entertain those appeals, and therefore returned the same for presentation to the proper authority. It was ruled in Krishnappa v. Somiah (AIR 1964 SC 227) that the Limitation Act cannot be extended by analogy to proceedings to which it would not apply. We are seeking to extend the principle of S. 14 from suits to appeals. The same principle was reiterated recently in Maharashtra State Road Transport Corporation v. R. H. Lad (AIR 1977 Bom 1). And we have the Full Bench ruling of this Court in Vareed v. Mary (1968 Ker LT 583) : (AIR 1969 Ker 103) that the appellate authority under the Rent Control Act, with which we are concerned in this case, is not a Court. We are therefore of the opinion that the order passed in revision by the District Court in proceedings herein impugned, were without jurisdiction and cannot be sustained. We do not think we would yet be justified in troubling a larger Bench with the question of reconsidering 1973 Ker LT 138 : (AIR 1974 Ker 162) (FB) in so far as it decided that the Limitation Act applies only to Courts. We allow these Revision Petitions, set aside the order of the District Court and direct that the applications to excuse delay which have given rise to these three Revision Petitions, will stand dismissed. There will be no order as to costs.

Petitions allowed.

AIR 1978 KERALA 164

V. BALAKRISHNA ERADI AND G. BALAGANGADHARAN NAIR, JJ.

Kadamkothu Valappil Sreedharan, Petitioner v. Keereerakath Muhammed Kunhi, Respondent.

C. R. P. No. 3645 of 1976-I, D/- 14-11-1977.

(A) Kerala Buildings (Lease and Rent Control) Act (Presi. Act 2 of 1965), Sections 11 (2) (c) and 23 (1) (i) — Interpretation of — Whether the Rent Control Court has power to enlarge the time originally fixed or granted in terms of S. 11 (2) (c) on an application made after expiry of that time.

The Rent Control Court has power, even after expiry of the time originally fixed or granted, to allow an enlargement even on a motion made after such expiry. (Para 5)

Section 11 (2) (c) while suspending the execution of the order of eviction for a month empowers the Rent Control Court to allow in its discretion such further period during which the order shall not be executed. The expression "such further period" which was added by Act 7 of 1966 in S. 11 (2) (c) replacing the expression "such other period" that had occurred in Cl. (c), empowers the Rent Control Court to enlarge the period and not merely to substitute a longer period than one month. The circumstance that the one month period of suspension of execution is laid down by the statute does not deprive the Rent Control Court's power to enlarge the period as the power to enlarge or to grant "such further period" is conferred by the statute itself. There is nothing in the expression "such further period" to suggest that the power to enlarge the period could be exercised only before and not after its expiry. Even though the expression "such other period" would have only empowered the Rent Control Court to substitute a different period by the order of eviction, the words "such further period" by which it was substituted, permits an enlargement by a subsequent order. The power to enlarge thus flows from S. 11 (2) (c) itself. Nor is this the sole source of power for S. 23 (1) (i) expressly confers the power to enlarge the time originally fixed or granted as is vested in a Court under the Civil P. C. As for the Civil Court, it has got the power to enlarge the time after expiry of the time originally fixed or granted and this can be done even on a motion made after the time has run out. The same power must therefore vest in the Rent Control Court by virtue of S. 23 (1) (i). (Case law discussed). (Para 5)

(B) Kerala Buildings (Lease and Rent Control) Act (Presi. Act 2 of 1965), Sections 23 (1) (i) and 11 (2) (c) — Enlargement of time originally fixed or granted — Application for enlargement of time after expiry of time originally fixed — Section 5, Limitation Act cannot be in-

voked as it applies to Courts and not to authority like the Rent Control Court which is only a persona designata — Further no period of limitation is prescribed for such an application. (Limitation Act (36 of 1963), S. 5). (Case law discussed). (Para 4)

Cases Referred: Chronological	Paras
1977 Ker LT 886	5
AIR 1976 SC 177	4
AIR 1975 Mad 383	4
AIR 1974 Ker 162 : 1973 Ker LT 138 (FB)	4
AIR 1972 All 246 (FB)	5
1971 Ker LT 199	5
AIR 1970 SC 209 : 1970 Lab IC 269	4
AIR 1970 SC 981	5
AIR 1969 SC 1335 : 1969 Lab IC 1538	4
AIR 1969 Ker 103 : 1968 Ker LT 583 (FB)	4
1964 Ker LJ 882	5
AIR 1961 SC 882	5
AIR 1958 Ker 88 : 1957 Ker LT 1175 (SB)	5

M. P. Balagopalan Nambiar, for Petitioner; M. A. Manhu and V. V. Narayanan, for Respondent.

BALAGANGADHARAN NAIR, J.:— Respondent who is the landlord applied for evicting the petitioner-tenant under S. 11 (2) (b) of the Buildings (Lease and Rent Control) Act (which we will call the Act for short) on the ground that he was in arrears of rent. On Feb. 26, 1974 the petitioner deposited in the Rent Control Court the rent till the end of that month for payment to the respondent. However on Feb. 28, 1974 the Rent Control Court passed an order of eviction on the ground that the amount deposited was insufficient as it did not cover the costs of the proceedings, adding a rider within S. 11 (2) (c) that the petitioner could get the order vacated by making up the deficit amount within one month. The petitioner did not do this within the time but made an application I. A. 192(A)/74 for vacating the order only on June 1, 1974, supporting it with an affidavit explaining the circumstances which led to the delay. He also deposited Rs. 37.10 being the costs and the rent upto-date. The Rent Control Court dismissed the application in the view that it had no power to condone the delay and allow the application, as it was made only after the period of one month had expired. This conclusion has been confirmed by the Appellate Authority and Revisional Court on substantially the same reasoning, dismissing the appeal and revision taken by the petitioner challenging the order of the Rent Control Court.

2. The revision filed by the petitioner has come before us pursuant to a reference made by a learned single Judge for deciding whether "... ... ... in view of Ss. 11 (2) (b) and (c) and 23 (1) (i) of the Kerala Buildings (Lease and Rent Control) Act, 1965, the Rent Control Court, which is a persona designata has all the powers of a civil court under S. 148 of the Civil P. C. read with S. 5 of the Limitation Act for the purpose of 'enlargement of time originally fixed or granted'. (See S. 23 (1) (i) of the Kerala Buildings (Lease and Rent Control) Act."

3. Section 11 (2) (b) lays down the circumstances under which the Rent Control Court can pass an order directing the tenant to put the landlord in possession on the ground of arrears of rent. The proviso that follows prescribes the conditions precedent to an application by the landlord for eviction. Clause (c) and S. 23 (1) (i) on whose interpretation the revision falls to be decided deserve to be quoted in full:

"Cl. (c) The order of the Rent Control Court directing the tenant to put the landlord in possession of the building shall not be executed before the expiry of one month from the date of such order or such further period as the Rent Control Court may in its discretion allow; and if the tenant deposits the arrears of rent with interest and cost of proceedings within the said period of one month or such further period, as the case may be, it shall vacate that order."

"S. 23 (1) Subject to such conditions and limitations as may be prescribed, the Accommodation Controller, the Rent Control Court and the appellate authority shall have the powers which are vested in a Court under the Civil P. C., 1908 (5 of 1908), when trying a suit in respect of the following matters:—

(a) to (h) omitted

(i) enlargement of time originally fixed or granted;

(j) and (k) omitted."

4. That the Rent Control Court under the Act is a persona designata and not a civil court is clear and has been settled by the Full Bench decision Vareed v. Mary, 1968 Ker LT 583 : (AIR 1969 Ker 103), delivered by one of us (Eradi J.). The question before us is whether it has the power under S. 11 (2) (c) and S. 23 (1) (i) of the Act to enlarge the time originally fixed or granted in terms of

S. 11 (2) (c) by the order dated Feb. 28, 1974, on an application made after expiry of that time. Although S. 5 of the Limitation Act had been invoked by the petitioner before the Rent Control Court and it is mentioned in the order of reference, that section in our view has no relevance, for the period of one month granted by the Rent Control Court is no period of limitation and the substance of the petitioner's prayer was to allow in its discretion further period within Section 11 (c) or enlarge the period within S. 23 (1) (i), till he made the deposit and not to condone any delay. Further no period is prescribed for an application of the type made by the petitioner before the Rent Control Court. And yet again S. 5, Limitation Act, applies only to courts and not to authorities like the Rent Control Court or the appellate authority. We might refer to Jokkim Fernandez v. Amina Kunhi Umma, 1973 Ker LT 138 : (AIR 1974 Ker 162) (FB) holding that S. 5, Limitation Act has no application to the appellate authority and to Sushila Devi v. Ramanandan Prasad, AIR 1976 SC 177, holding that a Collector to whom an application is made under S. 3 of the Kosi Area (Restoration of Lands to Raiyats) Act, even though he is vested with certain specified powers under the Civil P. C., is not a court within S. 5 of the Limitation Act. An earlier decision Nityanand v. L. I. C. of India, AIR 1970 SC 209, had ruled, in a case arising under the Industrial Disputes Act, that the "scheme of the Indian Limitation Act is that it only deals with applications to courts and that the Labour Court is not a court within the Indian Limitation Act 1963". This decision and a prior decision Athani Municipality v. Labour Court, Hubli, AIR 1969 SC 1335, were followed in Jokkim Fernandez v. Amina Kunhi Umma (supra) to hold that the Limitation Act applies only to courts and that consequently S. 5 had no application to appellate authority under the Act, as it is not a court but only a persona designata. 1973 Ker LT 138 : (AIR 1974 Ker 162) (FB) has itself been followed in S. Ganapathi v. N. Kumaraswami, AIR 1975 Mad 383, for the same purpose. Section 5 of the Limitation Act therefore creates no problem.

5. The point is thus narrowed to the question whether the Rent Control Court has the power to grant the petitioner's application in the light of S. 11 (2) (c) and S. 23 (1) (i) of the Act. Section 11 (2) (c) while suspending the execution of the order of eviction for a month empowers the Rent Control Court to allow in its discretion such further period during which the order shall not be executed. Cheriyan v. Mahadeva Iyer, 1971 Ker LT 199, has held that the expression "such further period" which was added by Act 7 of 1966 in S. 11 (2) (c) replacing the expression "such other period" that had occurred in Cl. (c), empowers the Rent Control Court to enlarge the period and not merely to substitute a longer period than one month. The circumstance that the one month period of suspension of execution is laid down by the statute does not deprive the Rent Control Court's power to enlarge the period as the power to enlarge or to grant "such further period" is conferred by the statute itself. There is nothing in the expression "such further period" to suggest that the power to enlarge the period could be exercised only before and not after its expiry. Even though the expression "such other period" would have only empowered the Rent Control Court to substitute a different period by the order of eviction, the words "such further period" by which it was substituted, permits an enlargement by subsequent order. The power to enlarge thus flows from S. 11 (2) (c) itself. Nor is this the sole source of power for Section 23 (1) (i) expressly confers the power to enlarge the time originally fixed or granted as is vested in a court under the Civil P. C. As for the Civil Court, it has got the power to enlarge the time after expiry of the time originally fixed or granted and this can be done even on a motion made after the time has run out, as will be clear from Subramonian Chettiar v. Krishnaveni Ammal, 1964 Ker LJ 882, following an earlier decision of this Court Kathyee Cotton Mills Ltd. v. R. Padmanabha Pillai, 1957 Ker LT 1175 : (AIR 1958 Ker 88) (SB) and Mahanth Ram Das v. Ganga Das, AIR 1961 SC 882. The same power must therefore vest in the Rent Control Court by virtue of S. 23 (1) (i). In C. R. P. 1910 of 1977-I,* one of us (myself), after considering the relevant provisions and discussing Mahanth Ram Das v. Ganga Das, AIR 1961 SC 882; B. C. Kame v. Nemi Chand, AIR 1970 SC 981 and Gobardhan v. Barsati, AIR 1972 All 246 (FB), took the view that the appellate authority under the Act had power, even after expiry of the time originally fixed or granted, to allow an enlargement

* Reported in 1977 Ker LT 886.

even on a motion made after such expiry and that the power had to be exercised in the proper exercise of its discretion. Of these cases AIR 1970 SC 981 arose under the Madhya Pradesh Accommodation Control Act and the decision was concerned with the construction of the expression "within such further time as the court may ... ... allow" which bears close correspondence with the expression "such further period as the Rent Control Court may in its discretion allow" in S. 11 (2) (c) of the Act. What applies to the appellate authority applies to the Rent Control Court as well. The decision in C. R. P. No. 1910 of 1977-I is therefore in accord with the view which we have expressed earlier. We hold that the Rent Control Court had power to allow the petitioner's application.

6. On the merits of the application, the ground alleged by the petitioner for the delayed deposit was that he bona fide thought that the amount deposited by him on 26-2-1974 was sufficient and that he was not informed by his lawyer or clerk about the order of eviction. This allegation has not been disbelieved but would even appear to be accepted by the Rent Control Court and Revisional Judge. Although the appellate authority does not seem fully to endorse the approach of the Rent Control Court we are satisfied that the ground could be accepted particularly as the petitioner's bona fides is manifest from his conduct in depositing the entire amount along with the application. The application could therefore be allowed.

We set aside the impugned orders, allow I. A. No. 192 (A)/74, vacate the order of eviction dated 28-2-1974 and dismiss O. P. (R. C. 232 of 1973). The revision is thus allowed but in the circumstances without costs.

Revision allowed.

AIR 1978 KERALA 167

FULL BENCH

GOPALAN NAMBIYAR, Ag. C. J.,
GEORGE VADAKKEL AND
CHANDRASEKHARA MENON, JJ.*

Lelitha, Petitioner v. Ayissumma, Respondent.

C. R. P. No. 2246 of 1976, D/- 6-4-1977.

(A) T. P. Act (4 of 1882), S. 106 — Contract to the contrary — Lease for a term certain — Notice — Necessity.

Provision in the lease deed for surrender of possession of the leasehold without demur on demand made after the expiry of the term fixed is not a contract to the contrary dispensing with quit notice. Thus, such a lease deed does not contain a contract to the contrary as envisaged by S. 106, T. P. Act. 1963 Ker LJ 556 and AIR 1970 Ker 40, Foll.; AIR 1973 Ker 51 (FB), Ref. (Para 3)

Anno: AIR Comm., T. P. Act (4th Edn.), S. 106, Notes 2, 3.

(B) T. P. Act (4 of 1882), S. 106 — Law to the contrary — Kerala Buildings (Lease & Rent Control) Act (President's Act 2 of 1965), S. 11 — Tenancy governed by Kerala Act — Section 106 of T. P. Act, if attracted.

Section 11 of the Kerala Buildings (Lease and Rent Control) Act begins with the words "Notwithstanding anything contained in any agreement or law to the contrary" and hence any attempt to import the provisions relating to the law of transfer of property for the interpretation of the Section would seem to be out of place. Section 11 is a self-contained section and it is wholly unnecessary to go outside the Act for determining whether a tenant is liable to be evicted or not, and under what conditions he can be evicted. Thus S. 106 of T. P. Act is not attracted to tenancies which are governed by the provisions of the Kerala Buildings (Lease and Rent Control) Act. Eviction of tenant in such cases cannot, therefore, be opposed for want of quit notice. Decisions in AIR 1976 SC 588 and in AIR 1976 SC 869 held to be not conflicting. AIR 1951 SC 115, Applied; AIR 1974 SC 818, Explained. (Case law discussed). (Paras 7, 8, 9)

Anno: AIR Comm., T. P. Act (4th Edn.), S. 106, N. 9.

*(Note:— The judgments in the case are printed in the order in which they are given in the certified copy.—Ed.)

GV/GV/C588/78/SSG

Cases Referred: Chronological Paras

AIR 1976 SC 588 : (1976) 2 SCC 103 1, 5-A, 10
AIR 1976 SC 869 1, 5, 5-A, 10
AIR 1974 SC 471 : (1974) 1 SCC 242 11
AIR 1974 SC 818 4, 5, 10
AIR 1973 Ker 51 : 1972 Ker LT 914 (FB) 3
AIR 1970 Ker 40 : 1968 Ker LT 865 3
AIR 1967 SC 1419 5, 10
AIR 1967 Mad 57 (FB) 4
AIR 1965 SC 101 5, 10
AIR 1964 SC 1341 5
AIR 1963 SC 120 10
1963 Ker LJ 556 3
ILR (1955) Punj 36 5
AIR 1951 SC 115 7
AIR 1949 Mad 139 4
AIR 1949 Mad 387 4
AIR 1949 Mad 780 4, 5, 10

P. C. Balakrishna Menon, V. P. Mohan Kumar and P. Sreekumar, for Petitioner; S. Easwara Iyer, C. Sankara Menon and E. Subramoni, for Respondent.

GEORGE VADAKKEL, J.:— The reference order reads:

"The question of law of general importance raised in this appeal relates to notice under S. 106 of the T. P. Act. What is required to be decided is whether a notice under S. 106 of the T. P. Act is a necessary pre-requisite for eviction under the Buildings (Lease and Rent Control) Act. In view of the apparent conflict between the decisions of the Supreme Court in Ratan Lal v. Vardesh Chander, (1976) 2 SCC 103 : (AIR 1976 SC 588) on the one hand and Puwada Venkateswara Rao v. Chidamana Venketa Ramana (AIR 1976 SC 869) on the other hand considering the great importance of the question, we consider it desirable to have authoritative pronouncement on the question of law and for this purpose we adjourn the hearing and direct it to be placed before the Chief Justice for passing appropriate order for placing it before a Full Bench.

We are told that C. R. P. No. 1707 of 1975 also raises the same question. This C. R. P. also may be posted along with it."

2. Sustaining the decision of the learned Subordinate Judge reversing the order of the Rent Control Court dismissing an application for eviction filed under sub-secs. (2) and (4) (i) of S. 11 of the Kerala Buildings (Lease and Rent Control) Act, 1965, the learned District Judge, on revision by the 2nd respondent before the Rent Control Court (and also before the learned Subordinate Judge) held that the landlord has made out a case of transfer by the tenant of his right under the lease evidenced by Ext. A-1 in favour of the 2nd respondent, though not one of sub-letting as held by the learned Subordinate Judge. On the question of notice to quit, differing from the learned Subordinate Judge according to whom proof of sending notice by registered post was sufficient to presume receipt thereof (there is such proof in this case) the learned District Judge held that there was a contract to the contrary as contemplated by S. 106 of T. P. Act, 1882, in so far as Ext. A-1 lease deed provides for surrender of possession of the building on demand, and that therefore, no notice to quit was required.

This civil revision petition is by the legal representatives of the tenant who was a co-respondent before the District Court and by the petitioner before that court whom that court held to be a transferee from the tenant of his rights under Ext. A-1 lease. The correctness of this last mentioned finding is not canvassed before us. Eviction is opposed before us solely on the ground of want of quit notice. According to the learned counsel for the civil revision petitioners, Ext. A-1 lease deed does not evidence a contract to the contrary as held by the learned District Judge. Therefore, it is submitted, without proper and sufficient notice determining the lease, neither the tenant nor his transferee can be evicted from the building in question. On these submissions two points alone arise for consideration, and they are:— (i) does Ext. A-1 lease deed contain a contract to the contrary as envisaged by S. 106 of the T. P. Act, 1882; (ii) if it does not, is S. 106 of the said Act attracted to statutory tenancies governed by the Kerala Buildings (Lease and Rent Control) Act, 1965.

3. Provision in the lease deed for surrender of possession of the leasehold without demur on demand made after the expiry of the term fixed is not according to the decisions of this court in Moothorakutty v. Ayissa Bi, 1963 Ker LJ 556 and Abdul Hameed Rawther v. Balakrishna Pillai, 1968 Ker LT 865 : (AIR 1970 Ker 40) a contract to the contrary dispensing with quit notice. The correctness of these decisions is not canvassed before us, though it was brought to our notice that in Philip v. State Bank of Travancore, 1972 Ker LT 914 : (AIR 1973 Ker 51) (FB) two of the learned Judges

on the Full Bench which decided that case expressed some doubt about the correctness of the principle laid down as above said. In that view the first point mentioned above has to be answered in the negative, and we do so.

4. Construing the Madras Buildings (Lease and Rent Control) Act XV of 1946 Rajamannar, Offg. C. J. on behalf of a Division Bench of the Madras High Court in Rangaswami Naidu v. Bangaru Chetty, AIR 1949 Mad 139 said that in doing so the principles of the T. P. Act, 1882 cannot be imported. Without noticing this decision in a subsequent decision reported in the same volume, Parthasarathy v. Krishnamoorthy, AIR 1949 Mad 387, Subba Rao J. took the view that the provisions of the aforesaid Act do not supersede the contractual terms between the parties but only put certain fetters on the landlord's pre-existing right of eviction and right to immediate possession which had accrued or would accrue to him on determination of the lease as provided for by law. Reversing this decision Horwill J. on behalf of the Division Bench in Krishnamurthy v. Parthasarathy, AIR 1949 Mad 780 said (at p. 782):—

"8. We are, therefore, of opinion that S. 7 must be given its plain meaning. If so, no question of attempting to reconcile Act XV (15) of 1946 with the T. P. Act arises. We are satisfied that S. 111 (h), T. P. Act, has no place in the scheme of procedure laid down in S. 7 of the Act. That is the answer to the first question that we have formulated".

The first question formulated by the Appellate Bench in that case was: "Whether notice to quit was necessary". The Madras High Court has consistently taken this view in respect of Madras Rent Control Acts, namely, that these Acts interfered with the contractual tenancies as regards the fixation of fair rent and as regards the right of the landlord to evict his tenants and the grounds for eviction. However, in view of the construction placed on certain other Acts by the Supreme Court, a Full Bench of the Madras High Court considered the question in detail again in Raval and Co. v. Ramachandran, AIR 1967 Mad 57. Ananthanarayanan, Offg. C. J. for the Full Bench said (at pp. 66-67):—

"Thus the Madras Act has to be interpreted as a special Act which does abrogate the T. P. Act, with reference to several of its provisions; of course, it goes further and applies, in its terms, not merely to contractual tenancies, during their subsistence, but also to statutory tenancies after the determination of a contractual tenancy. Under the terms of this Act, therefore a landlord can evict a tenant on the special grounds available notwithstanding the subsistence of a contractual tenancy and even though it has not been determined. But equally the tenant has the protection of the Act, even after the determination of the contractual tenancy so long as he does not do anything which removes the bar of eviction and provides no grounds for eviction in terms of the Act. Both during the subsistence of the contractual tenancy and thereafter the parties have the right to get the fair rent determined. This seems to be the only interpretation which does justice to the specific provisions of this statute, the legislative competence for such an enactment not being in question".

By this time the Madras Buildings (Lease and Rent Control) Act 18 of 1960 had replaced the earlier Act, and it was this Act that was considered. This decision was affirmed by a Constitution Bench of the Supreme Court in Raval and Co. v. K. G. Ramachandran, AIR 1974 SC 818. Alagiriswamy, J. speaking for the majority (himself, Ray C. J. and Khanna, J.) pointed out at p. 823 as follows:—

"It is clear, therefore, that the fair rent under the present Act is payable during the contract period as well as after the expiry of the contract period".

"18. The provisions of the Act under consideration show that they are to take effect notwithstanding any contract even during the subsistence of the contract: We have already referred to the definition of the terms 'landlord' and 'tenant' which applies both to subsisting tenancies as well as tenancies which might have come to an end. We may also refer to the provision in S. 7 (2) which lays down that where the fair rent of a building has not been fixed the landlord shall not claim anything in addition to the agreed rent, thus showing that the fair rent can be fixed even where there is an agreed rent. That is why we have earlier pointed out that the various English decisions which provide for fixation of rent only where the contractual tenancy has come to an end do not apply here. We may also refer to sub-sec. (3) of S. 10 which deals with cases where a landlord requires a residential or non-residential

building for his own use. Clause (d) of that sub-section provides that where the tenancy is for a term the landlord cannot get possession before the expiry of the term thus showing that in other cases of eviction covered by S. 10 eviction is permissible even during the continuance of the contractual tenancy if the conditions laid down in S. 10 are satisfied."

5. The criticism made about Krishnamurthy v. Parthasarathy, AIR 1949 Mad 780 in Manujendra v. Purnedu, AIR 1967 SC 1419 was stated by the Constitution Bench to be 'not justified'. This last mentioned decision was on 22nd September 1968 after the Full Bench of the Madras High Court decided the Raval and Company case AIR 1967 Mad 57 on 20th Jan. 1966. However this Full Bench decision appears to have not been placed before the Supreme Court when it decided Manujendra Dutt's case AIR 1967 SC 1419. In that case while examining the provisions of the Calcutta Thika Tenancy Act VI of 1953 Shelat, J. who delivered the judgment on his own behalf and Subba Rao, C. J. observed that the decision in Krishnamurthy v. Parthasarathy, AIR 1949 Mad 780 was 'clearly contrary to the decision of' the Supreme Court in Abbasbhai's case, AIR 1964 SC 1341 and Mangilal's case, AIR 1965 SC 101. Relying on the pronouncement of law by the Constitution Bench in Raval & Co. case, AIR 1974 SC 818 the Supreme Court in Puwada Venkateswara Rao v. C. V. Ramana, AIR 1976 SC 869 (one of the two decisions mentioned in the reference order) upheld the contention that the Andhra Pradesh Buildings (Lease and Rent Control) Act 15 of 1960 provided a procedure for eviction of tenants which was self-contained so that no recourse to the provision of Sec. 106, T. P. Act, 1882 was necessary. Beg, J. as he then was, said:

"5. We may also refer here to the observations of this court in Raval and Co. v. K. G. Ramachandran ((1974) 2 SCR 629 at p. 634 : (AIR 1974 SC 818 at p. 821)). There this court noticed Sri Hem Chand v. Smt. Sham Devi (ILR (1955) Punj 36) and pointed out that it was held there that 'the Act under consideration in that case provided the whole procedure for obtaining the relief of ejectment and that being so, provisions of S. 106 of the Transfer of Property Act had no relevance'. No doubt the decision mentioned with approval by this court related to another enactment. But the principle indicated by this court was the same as that applied by the Andhra Pradesh High Court".

5-A. The other decision mentioned in the reference order is Ratan Lal v. Vardesh Chander (1976) 2 SCC 103 : AIR 1976 SC 588 decided prior to the decision in Puwada Venkateswara Rao v. C. V. Ramana, AIR 1976 SC 869. That decision also, with respect, it appears to us lays down the same principle as enunciated by the Constitution Bench, as is clear from para 7 (at p. 591) of that decision where it is stated as follows:

"We agree that, if the rent control legislation specifically provides grounds for eviction in supersession, not in supplementation of what is contained in the Transfer of Property Act, the situation may conceivably be different. But, in the Delhi Rent Act, as in many other like statutes, what is intended to be done is not to supplant but to supplement, not to eliminate the statutory requirements of determination of tenancy but to superimpose a ban on eviction which otherwise may be available in conformity with the T. P. Act without fulfilment of additional grounds".

S. 4 (1) of the Kerala Buildings (Lease and Rent Control) Act, 1965, for brevity, the Act, requires every landlord to give the accommodation controller notice of vacancy whenever a building falls vacant, or is newly constructed for the purpose of letting out. He (the accommodation controller) may thereupon allot it to one of the persons mentioned in S. 4 (3) of the Act, and intimate the landlord of such allotment within fifteen days of receipt of notice of vacancy. Then a fictional or deemed landlord-tenant relationship comes into existence, (and this, from the date of receipt of notice of vacancy by the accommodation controller) between the landlord and the allottee. This is the combined effect of sub-sections (3), (5) and (6) (g) of Section 4. If the landlord does not receive any intimation regarding allotment, he is free to let the building to anyone. Under sub-sec. (2) of S. 4, if a tenant (which word as per Section 2 (6) means any person by whom or on whose account rent is payable and would, therefore, include both an allottee-tenant and a non-allottee-tenant) puts another person in occupation of the building and does not reoccupy it within three months the tenancy shall be deemed to have terminated.

6. Both the landlord and the tenant, be he an allottee or not, are entitled under S. 5 (1) of the Act to get the fair

rent of the building reckoned in the manner provided for in sub-ss. (2) and (3) of S. 5, and determined by the Rent Control Court, and thereafter the landlord cannot claim or receive anything in excess of fair rent. Even where fair rent has not been determined by the Rent Control Court the landlord cannot receive as rent anything more than the maximum rent that may be fixed by the Rent Control Court or the agreed rent whichever is less. This is the effect of S. 8 of the Act. Where fair rent has been determined, receipt of any rent in excess thereof, and where fair rent has not been determined, receipt of 'unconscionable rent' which words as per S. 2 (7) mean double the maximum of the fair rent that could be fixed by the Rent Control Court, are offences, punishable with imprisonment and/or fine under S. 29 of the Act so far as the latter mentioned offence is concerned, and with fine so far as the other offence is concerned.

7. The next important provision to be noticed in this connection is S. 11 of the Act. The lengthy section consisting of 17 sub-sections, many of which have several clauses with provisos and/or explanations added to it to control and/or to explain the scope of the main clause, starts with a non obstante clause as per which a tenant (again, be he an allottee-tenant or non-allottee-tenant) cannot be evicted except in accordance with the provisions of the Act. The forum to which the landlord can have recourse to is the Rent Control Court who is a persona designata as per S. 3 (1) of the Act. We do not think it necessary to enumerate and advert to the several grounds mentioned in S. 11 which would enable the landlord to seek eviction of a tenant.

It is sufficient to point out two salient features which would indicate that the legislative intent was to provide by this section a self-contained code which prescribes the grounds on which ejectment may be sought for and the procedure in that behalf. Second proviso to S. 11 (1) of the Act provides that where the tenant denies the title of the landlord or claims title in himself (this under S. 111 (g) (2) of the T. P. Act, 1882 entails determination of the lease by forfeiture) and on the Rent Control Court recording a finding that such denial or claim is bona fide, the landlord can sue for eviction in a civil court; however, that court can pass a decree for eviction only on one or the other of the grounds mentioned in S. 11 of the Act, and can pass such a decree 'notwithstanding that the court finds that such denial does not involve forfeiture of the lease', that is to say, even if the tenancy had not been determined by forfeiture under S. 111 (g) of the T. P. Act, 1882.

The second feature to be noticed is that which is indicated by sub-sec. (9) of S. 11 of the Act as per which the landlord can seek eviction on grounds mentioned in that section only after the expiry of the period of tenancy, if any, specified and agreed upon between the landlord and tenant, or in other words, only after the efflux of time limited by parties. If the provisions of T. P. Act 1882 would also govern the landlord-tenant relationship to which the provisions of the Act are attracted, in view of S. 111 (a) and (b) of the former Act, sub-sec. (9) would be redundant. On reading S. 11 of the Act as a whole in the context of the scheme of the Act relating to creation of tenancies and stipulation of rent, both of which are no more matters of bargain between parties, as shown above, it appears to us that we can, borrowing the language employed by Fazal Ali, J. in Brij Raj Krishna v. Shaw and Bros., AIR 1951 SC 115 with reference to S. 11 of Bihar Buildings (Lease, Rent and Eviction) Control Act, 1947 safely and appositely say :—

"S. 11 begins with the words 'Notwithstanding anything contained in any agreement or law to the contrary' and hence any attempt to import the provisions relating to the law of transfer of property for the interpretation of the section would seem to be out of place. Section 11 is a self-contained section and it is wholly unnecessary to go outside the Act for determining whether a tenant is liable to be evicted or not, and under what conditions he can be evicted".

8. In the above view and applying the test of 'supplant or supplement' the answer to the second point formulated earlier in para. 2 of this judgment is also in the negative, that is to say, S. 106 of the T. P. Act, 1882 is not attracted to tenancies which are governed by the provisions of the Kerala Buildings (Lease and Rent Control) Act, 1965.

9. Eviction cannot, therefore be opposed for want of quit notice. We dismiss this civil revision petition. There will be no order as to costs.

GOPALAN NAMBIYAR, Ag. C. J. :—

10. My only justification to add a few

words to the judgment on behalf of the Bench, of my learned brother Vadakkel, J. which I have myself signed, is to say a few words about the state of authorities as we have found them. We were taken through a welter of decisions of the Supreme Court. It is difficult to resist the impression or conclusion that they do not conflict with each other. We have attempted the task of reconciling the apparently irreconcilable decisions, as best as we can. AIR 1967 SC 1419, AIR 1965 SC 101, AIR 1963 SC 120, AIR 1976 SC 588— all rule that the provisions of the T. P. Act, are supplement to those of the Rent Control Legislations considered in these decisions, and that a notice to quit under S. 106 of the T. P. Act is necessary in addition to compliance with the requirement for eviction under the Rent Control Statutes.

In Raval and Co. v. K. G. Ramachandran, AIR 1974 SC 818 a Constitution Bench of 5 Judges of the Supreme Court explained the prior decisions in AIR 1967 SC 1419, AIR 1965 SC 101 and AIR 1963 SC 120. The earlier cases, it was said related to eviction by regular suit and not to summary proceedings under the Rent Control Statutes. The general observations in AIR 1967 SC 1419 were to be confined to the facts of the case. The casual and summary dismissal by that case of the Full Bench decision in Krishnamurthy v. Parthasarathy, AIR 1949 Mad 780 was deprecated. It was ruled (AIR 1974 SC 818) that the provisions of the Madras Buildings (Lease and Rent Control) Act were a complete and self-contained Code and that there was no scope for superimposing the provisions of the T. P. Act over the provisions of the Rent Control Act. This principle was expounded also by the Full Bench of the Madras High Court in Krishnamurthy's case AIR 1949 Mad 780. That was repeated again in AIR 1976 SC 869.

11. We have also taken note of the principle in 1974 (1) SCC 242 : (AIR 1974 SC 471) that it was against public policy to allow eviction on any ground other than what was contained in the Rent Control Act. In addition to these, we have scanned the provisions of the Act. The judgment delivered on behalf of the Bench reflects the working principle which we have evolved and crystallised from the decisions that we have surveyed and the provisions of the Act.

Petition dismissed.

AIR 1978 KERALA 172

FULL BENCH

GOPALAN NAMBIYAR, Ag. C. J. AND GEORGE VADAKKEL AND CHANDRASEKHARA MENON, JJ.

Koran, Petitioner v. Kamala Shetty, Respondent.

C. R. P. 2806 of 1976-H, D/- 30-3-1977.

Civil P. C. (1908), S. 11 — Principle of res judicata — General principle applies to proceedings before Land Tribunal under S. 80-B, Kerala Land Reforms Act (35 of 1969).

The principle of finality or conclusiveness of a prior decision or the general principle of res judicata is applicable even to quasi-judicial bodies like the Land Tribunals functioning under the Kerala Land Reforms Act. On principle this should be so, as these Tribunals are invested with the task of deciding important rights and have to do so on principle of natural justice and fairplay. In these circumstances, the rules of res judicata are applicable to them. Case law discussed. (Para 5)

Anno: AIR Comm., Civil P. C. (9th Edn.), S. 11, N. 28.

Cases Referred: Chronological	Paras
AIR 1975 SC 1898 : 1975 Lab IC 1439	5
1975 Ker LT 406	3
AIR 1974 SC 1132 : 1974 Lab IC 730	5
1974 Lab IC 790 : 1974 Ker LT 61	5
1973 Ker LT 1000	3
AIR 1971 Ker 11 : 1970 Ker LT 510	4
AIR 1965 SC 1150	7
AIR 1965 SC 1153	7
AIR 1964 SC 728	4
AIR 1964 SC 914	4
AIR 1957 SC 38	4
AIR 1953 SC 33	4
AIR 1916 PC 78 : 43 Ind App 91	4

T. P. Kelu Nambiyar and P. G. Rajagopal, for Petitioner; U. K. Kunikulaya, for Respondent.

GOPALAN NAMBIYAR Ag. C. J.:— This revision petition has come on before a Full Bench to consider two principal questions that appeared to arise for determination, viz. (1) the applicability of the principle of res judicata, and in particular, the principle of 'might and ought' embodied in Explanation IV to S. 11 of the C. P. C. to proceedings before the Land Tribunal under the Kerala Land Reforms Act; and (2) the question whether the status of a tenant who applies for purchase of kudikidappu has to

be judged with reference to the date of the commencement of Act 35 of 1969 i. e. 1-1-1970 or with respect to the date of making the application. The latter part of the first question does not actually arise on the facts; and the second question does not fall for consideration in view of our answer to the first part of the first question.

2. The revision is by the unsuccessful petitioner who applied for purchase of kudikidappu rights under S. 80-B of the Land Reforms Act. The application was allowed by the Land Tribunal, Kasaragod. An appeal from the order of the Tribunal was allowed by the Appellate Authority (Land Reforms), Kozhikode, and the application for purchase of kudikidappu was directed to be dismissed. The reason for the dismissal of the application was that two prior applications for purchase of the kudikidappu had been dismissed, O. A. No. 81 of 1970 which was dismissed on 15-11-1971, and O. A. 881 of 1971 dismissed on 11-11-1971. The latter application was dismissed on the ground that the applicant-petitioner had 3.66 acres of land on registry under the rules for assignment of Government lands for settlement of agricultural labourers which had been assigned in his favour in 1966, and therefore was disentitled under the Act to claim the status of a kudikidappukaran.

3. Counsel for the revision-petitioner contended that the assignment of Government lands to him had been cancelled on 11-8-1971 and this circumstance would make a difference which would enable him to maintain the present application and which would therefore enable him to steer clear of the bar of res judicata. He cited the decision of a learned Judge of this Court in Thomas v. Punnoose, (1973 Ker LT 1000) holding that neither the Land Reforms Act nor the Rules prohibited the filing of a second application and that the principles of res judicata embodied in S. 11 of the C. P. C. and other similar provisions do not apply to proceedings under the Act. An appeal was taken against the judgment of the learned Judge and a Division Bench, of which one of us (myself) was a member, sustained the judgment of the learned Judge on different grounds altogether and held that no question of res judicata would arise on the facts (vide the decision in Thomas v. Punnoose, 1975 Ker LT 406). The question of the applicability of the principle of res judicata should therefore be examined dehors the above decision.

4. In Kelappan v. Anandan, 1970 Ker LT 510 : (AIR 1971 Ker 11), a Division Bench of which I was a member, had surveyed somewhat exhaustively, the applicability of the principle of res judicata to suits. The principle laid down by us in the said decision was that where the question of res judicata arose for consideration in suits, in civil courts, the provisions of S. 11 of the C. P. C. were both exclusive and exhaustive, and no resort could be had to any general doctrine of res judicata outside what was embodied in the section. The decision again has no direct application to the question that falls for determination in this revision. In Smt. Raj Lakshmi Dasi v. Banamali Sen (AIR 1953 SC 33), the Supreme Court had occasion to consider how far the proceedings taken in a Land Acquisition Court, can be said to be conclusive or to constitute res judicata in respect of matters decided by it, when the same question came up for decision later, in other proceedings. It was ruled that the condition regarding the competency of the former court to try the subsequent suit is one of the limitations engrafted on the general rule of res judicata by S. 11 of the Civil P. C. and has application to suits alone; that when a plea of res judicata is founded on general principles of law, all that was necessary to establish was, that the court that heard and decided the former case, was a court of competent jurisdiction; and that beyond this, it was not necessary to further establish that it had jurisdiction to hear the latter suit; and that a plea of res judicata on general principles can successfully be taken in respect of judgments of courts of exclusive jurisdiction, like the revenue courts, land acquisition courts, administrative courts etc. In the course of its judgment, the Supreme Court referred to the classic observation of Sir Lawrence Jenkins who delivered the judgment of the Board in Sheoparsan Singh v. Ramnandan, 43 Ind App 91 (at p. 98) : (AIR 1916 PC 78) which reads as follows (at pp. 80-81 of AIR):

"In view of the arguments addressed to them, their Lordships desire to emphasize that the rule of res judicata, while founded on ancient precedent, is dictated by a wisdom which is for all time. 'It has been well said declared Lord Coke, interest reipublicae ut sit finis litium— otherwise, great oppression might be done under colour and pretence

ol law'. Though the rule of the Code may be traced to an English source, it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu commentators. Vijaneswara and Nilakantha include the plea of a former judgment among those allowed by law, each citing for his purpose the text of Katyayana, who describes the plea thus: 'If a person, though defeated at law, sue again, he should be answered, "you were defeated formerly".' This is called the plea of former judgment. And so the application of the rule by the Courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law".

The Supreme Court decision was concerned with the question of the applicability of the general principle of res judicata to courts and not to Tribunals. The applicability of the principle of res judicata to Tribunals fell to be considered by the Supreme Court in Burn and Co. v. Their Employees (AIR 1957 SC 38). The question arose whether an award given by an Industrial Tribunal on a matter in controversy between the parties after hearing, was to have no force if repudiated by either of them, and the matter comes up for consideration again before that Tribunal. Venkatarama Ayyar J. who spoke for the Court observed thus (at p. 43):—

"What then is the position? Are we to hold that an award given on a matter in controversy between the parties after full hearing ceases to have any force if either of them repudiates it under Section 19 (6), and that the Tribunal has no option when the matter is again referred to it for adjudication, but to proceed to try it de novo, traverse the entire ground once again, and come to a fresh decision. That would be contrary to the well-recognised principle that a decision once rendered by a competent authority on a matter in issue between the parties after a full enquiry should not be permitted to be reagitated. It is on this principle that the rule of res judicata enacted in S. 11, Civil P. C. is based. That section is, no doubt, in terms inapplicable to the present matter, but the principle underlying it, expressed in the maxim "interest reipublicae ut sit finis litium", is founded on sound public policy and is universal application. (vide Broom's Legal Maxims, Tenth Edition, page 218). "The rule of res judicata is dictated" observed Sir Lawrence Jenkins C. J. in Sheoparsan Singh v. Ramnandan Prasad Narayan Singh, 43 Ind App 91 : ILR 43 Cal 694 : (AIR 1916 PC 78), "by a wisdom which is for all time".

And there are good reasons why this principle should be applicable to decisions of Industrial Tribunals also. Legislation regulating the relation between Capital and Labour has two objects in view. It seeks to ensure to the workmen who have not the capacity to treat with capital on equal terms, fair returns for their labour. It also seeks to prevent disputes between employer ond employees, so that production might not be adversely affected and the larger interests of the society might not suffer. Now, if we are to hold that an adjudication loses its force when it is repudiated under S. 19 (6) and that the whole controversy is at large, then the result would be that far from reconciling themselves to the award and settling down to work it either party will treat it as a mere stage in the prosecution of a prolonged struggle, and far from bringing industrial peace the awards would turn out to be but truces giving the parties breathing time before resuming hostile action with renewed vigour."

Here, then, is a direct pronouncement by the Supreme Court that the general principle of res judicata or conclusiveness of a prior decision is founded on sound public policy and is of universal application and in particular is applicable to adjudication by tribunals also. The general principle laid down above was not in any way detracted from in the decision in Workmen of Balmer Lawrie and Co. v. Balmer Lawrie and Co. (AIR 1964 SC 728 : (1964) 5 SCR 344). There it was observed (at p. 731 of AIR):

"While dealing with the question about the revision of wage scales, it is necessary to remember that the technical considerations of res judicata should not be allowed to hamper the discretion of industrial adjudication. It is undoubtedly true that wage scales are devised and wage structures constructed as matters of long-term policy, and so, industrial adjudication would naturally be reluctant to interfere with the wage structures without justification or in a light-hearted manner. When a wage structure is framed, all relevant factors are taken into account and normally, it should remain in operation for a fairly long period; but it would be unreasonable to introduce considerations of res judicata as

such, because for various reasons which constitute the special characteristics of industrial adjudication the said technical considerations would be inadmissible. As the Labour Appellate Tribunal itself has observed, the principle of gradual advance towards the living wage which industrial adjudication can never ignore, itself constitutes such a special feature of industrial adjudication that it renders the application of the technical rule of res judicata singularly inappropriate. If the paying capacity of the employer increases or the cost of living shows an upward trend or there are other anomalies, mistakes, or errors in the award fixing wage structure, or there has been a rise in the wage structure in comparable industries in the region, industrial employees would be justified in making a claim for the re-examination of the wage structure and if such a claim is referred for industrial adjudication, the Adjudicator would not normally be justified in rejecting it solely on the ground that enough time has not passed after the making of the award or that material change in relevant circumstances had not been proved. It is, of course, not possible to lay down any hard and fast rule in the matter. The question as to revision must be examined on the merits in each individual case, that is brought before an adjudicator for his adjudication".

In the Associated Cement Staff Union v. Associated Cement Co. Ltd. Bombay (AIR 1964 SC 914 : (1964) 1 SCWR 265), this principle was again re-affirmed as follows (at p. 917 of AIR):

"It is true that too frequent alterations of conditions of service by industrial adjudication have been generally deprecated by this Court for the reason that it is likely to disturb industrial peace and equilibrium. At the same time the Court has more than once pointed out the importance of remembering the dynamic nature of industrial relations. That is why the Court has specially in the more recent decisions refused to apply to industrial adjudications principles of res judicata that are meant and suited for ordinary civil litigations. Even where conditions of service have been changed only a few years before, industrial adjudication has allowed fresh changes if convinced of the necessity and justification of these by the existing conditions and circumstances. Where, as in the present case, in a previous Reference the Tribunal had refused the demand for change, there is even less reason for saying that that refusal should have any such binding effect".

5. Consistent with the principle of the above decisions and in no way at variance with them, it was observed by the Supreme Court in Workmen of the Straw Board Manufacturing Co. Ltd. v. Straw Board Manufacturing Co. Ltd. (AIR 1974 SC 1132 at p. 1140) as follows:

"25. It is now well established that although the entire Civil P. C. is not applicable to industrial adjudication, the principles of res judicata laid down under S. 11 of the Civil P. C., however, are applicable, wherever possible, for very good reasons. This is so since multiplicity of litigation and agitation and reagitation of the same dispute at issue between the same employer and his employees will not be conducive to industrial peace which is the principal object of all labour legislation bearing on industrial adjudication. But whether a matter in dispute in a subsequent case had earlier been directly and substantially in issue between the same parties and the same had been heard and finally decided by the Tribunal will be of pertinent consideration and will have to be determined before holding in a particular case that the principles of res judicata are attracted".

The principle was repeated again in Punjab Co-operative Bank Ltd. v. R. S. Bhatia (AIR 1975 SC 1898) where it was stated (at p. 1899):

"5. The first point urged on behalf of the appellant is that the respondent was not a workman within the meaning of the Act and that the Labour Court committed an error in saying that there was no evidence led on this issue and resting its judgment on the principles of res judicata on the basis of the decision of Shri Kaul in I. D. No. 66/1962. In our opinion the Labour Court rightly applied the principles of res judicata to the issue whether the respondent was a workman or not within the meaning of the Act. The same parties in I. D. No. 66/1962 joined issue on the aforesaid question. A decision given by the competent Labour Court in that regard has rightly been held as a bar on the principles of res judicata in the trial of the same issue in the present proceeding."

There is thus sufficient authority to hold that the principle of finality or conclusiveness of a prior decision or the general principle of res judicata is applicable

even to quasi-judicial bodies like the Land Tribunals functioning under the Kerala Land Reforms Act. On principle it appears to us that this should be so, as these Tribunals are invested with the task of deciding important rights and have to do so on principles of natural justice and fairplay. In these circumstances, the rules of res judicata are applicable to them. We are, for the present content to understand the decision of a Division Bench of this Court in Workmen of the Cochin Lighterage Corporation v. Paul Abrao (1974 Ker LT 61), as a concession to the wide powers and the special nature of the jurisdiction of the Industrial Tribunal, rather than as ruling out altogether the applicability of the principle of res judicata to them. As that question is not directly before us, we need not express our final opinion.

6. The question whether the rule of "might and ought" embodied in Explanation IV to S. 11 of the C. P. C. can be regarded as part of general rule of res judicata and whether it can have application to proceedings before these Tribunals does not directly arise for consideration on the facts of the present revision petition. Counsel for the revision petitioner fairly conceded before us that the facts and circumstances which were present at the time of the filing of the prior application, O. A. 881 of 1971, were precisely the same as those at the time of filing the application which has given rise to the present revision petition. That being so, there is no need to investigate or to pronounce on the question as to whether the failure to put forward any circumstance or contention in the prior application would debar the petitioner from urging the same in the present application on the principle of "might and ought" embodied in Explanation IV to S. 11 of the Civil P. C.

7. As the matter was, to some extent argued before us, we may merely notice that after some vacillation of judicial opinion, the Supreme Court in Devilal Modi v. Sales Tax Officer, Ratlam (AIR 1965 SC 1150) and Gulabchand Chhotalal Parikh v. State of Gujarat (AIR 1965 SC 1153), has accepted the position that the principle of "might and ought" would have application in writ proceedings. (See the discussion in Seervai's Constitutional Law of India, Second Edition, Vol. II, p. 828). We need not for the purpose of this case examine the same.

8. In view of our conclusion that the present application under S. 80-B is barred by res judicata by reason of the prior order in O. A. 881 of 1971, there is no need to consider the second question set out in the opening paragraph of this judgment. We express no opinion on it.

We dismiss this revision petition with costs.

Petition dismissed.

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FULL BENCH

V. P. GOPALAN NAMBIYAR, C. J., V. BALAKRISHNA ERADI, GEORGE VADAKKEL, K. K. NARENDRAN AND G. BALAGANGADHARAN NAIR, JJ.

State of Kerala and another etc., Appellants v. Miss Rafia Rahim etc., Respondents.

Writ Appeals Nos. 309, 312, 314, 315, 317 to 319, 329, 331, 333, 334, 336, 342, 343 and 348 of 1977, D/- 24-2-1978.*

(A) Constitution of India, Art. 14 — Equality — Scheme of selection for admission to Medical Colleges on assessment of merit of students drawn from different universities with no uniformity of standards is objectionable and violative of Art. 14 — Different universities have different standards in the matter of their examinations and assessment. (Case law discussed). (Paras 5, 16)

Anno: AIR Comm., Const. of India (2nd Edn.), Art. 14, Notes 33-A and 34.

(B) Constitution of India, Art. 226 — Futile writ — Challenge against selection of students from different universities with no uniform standards, upheld — No effective relief, however, can be granted in favour of petitioners by way of quashing the selection.

Interference in jurisdiction under Article 226 should be in the interests of justice. The position disclosed in the case is that selections to the Medical Colleges have been made and the selected students have joined the classes. The academic term has advanced. The formulation of a new basis of selection and the making of a fresh selection in the light of the same, are bound to take time; and the newly selected candidates cannot be expected to reap any profit or derive any

*(Against judgment of single Judge of this Court in O. P. Nos. 3867 and 4203 of 1977, D/- 2-12-1977).

advantage from their late selection and admission to the course. The net result of quashing the selection would be that neither the selected candidates nor those to be substituted for them will benefit by the current year's course of instruction. To avoid such a national waste of budding talent, declining interference by way of quashing the selection is a right exercise of discretion. No effective relief can be granted on account of the futility and ineffectiveness of upsetting the selections and directing fresh admissions. The best scheme of selection in the circumstances would be the method of selection of candidates by holding a uniform Entrance Examination to secure uniformity of standards. (Paras 10, 16)

Anno: AIR Comm., Const. of India (2nd Edn.), Art. 226, N. 20.

(C) Constitution of India, Art. 226 — Parties — Petition challenging prospectus governing admission to medical college as discriminatory — Non-joinder of selected candidates — Invalidation of selection is a matter which vitally affects their interests, and the same cannot be done in writ proceedings to which they are not parties — Petitions dismissed. O. P. Nos. 3867 and 4203 of 1977, D/- 2-12-1977 (Ker), Reversed. (Paras 12, 13, 16)

Anno: AIR Comm., Const. of India, Art. 226, N. 43 (B).

(D) Constitution of India, Arts. 14 and 15 (4) — Admission to Medical Colleges — Reservation of seats for students, from geographical area "Malabar hill" a socially and educationally backward area, is valid — Geographical classification based on historical reasons is permissible under Art. 14. AIR 1964 Ker 316, Applied; O. P. Nos. 3867 and 4203 of 1977, D/- 2-12-1977 (Ker), Reversed. (Paras 26, 27)

Anno: AIR Comm., Const. of India (2nd Edn.), Art. 14, N. 34, Art. 15, N. 17-A.

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Govt. Pleader (In W. A. No. 309 of 1977), Advocate General (In W. A. No. 312 of 1977), P. K. Shamsuddin, A. A. Abdul Hasan, S. K. Abdulla and K. K. Abu (In W. A. Nos. 314, 315, 318, 319, 329, 334, 342, 343 of 1977), K. S. Rajamony and A. Shahul Hameed (In W. A. No. 317 of 1977), P. K. Appa Nair (In W. A. No. 331 of 1977), Chandrasekharan and Chandrasekhara Menon (In W. A. No. 333 of 1977), V. Sankara Menon (in W. A. No. 336 of 1977) and M. V. Bose (In W. A. No. 348 of 1977), for Appellants; G. Janardana Kurup (In W. A. No. 309 of 1977), Panicker and Potti (In W. A. No. 312 of 1977), Advocate General (for Nos. 1 and 2), K. P. Radhakrishna Menon, K. K. Ravindranathan and V. V. Ravindran (for No. 3), B. Moosakutty (for No. 4) in W. A. Nos. 314, 315, 318, 319, 329, 333, 334, 336, 342, 343 and 348); Panicker and Potti (for No. 1), Advocate General (for Nos. 2 and 3), C. M. Kuruvilla (for Nos. 4 and 5) in W. A. No. 317 of 1977 and Advocate General (for Nos. 1 and 2), B. Moosakutty (for No. 3), K. P. Radhakrishna Menon, K. K. Ravindranathan and V. V. Ravindran (for No. 4) in W. A. No. 331 of 1977, for Respondents.

GOPALAN NAMBIYAR, C. J.:— These appeals are against the decision of a learned Judge and raise the question of the validity of the prevailing system of admissions to the medical colleges of this State. The grounds of attack raised in writ petitions which have given rise to these appeals, may be classified under two broad heads: attack against the reservation of a certain proportion of seats to be filled up from the geographical limits of what is generally referred to as the "Malabar area" of this State; and

attack basically against the scheme of admissions to the medical colleges in this State on an assessment of the merit of students drawn from different Universities, stated to be with no uniformity of standards in the matter of syllabus or curriculum of studies, or assessment of results. The learned Judge, to state again broadly, upheld the challenge against the reservation of a proportion of seats to students from the Malabar area, and held that the said reservation was unconstitutional; against which, the State and party-respondent have preferred appeals. Regarding the regulation of admission of students drawn from different Universities with no uniformity of standards, and probably, if not apparently, with no uniformity of syllabus, the learned Judge held that the writ petitioners were well-founded in their submissions about the arbitrariness and inequality of the Rules regulating admissions. After examining the decisions to which reference will be made in the course of this judgment, the learned Judge concluded that the principle of the decisions supported the case of the petitioners. We may well extract the following observations of the learned Judge in paras. 13 and 19 of his judgment:

"13. All the same there is another aspect to the question. To compare the marks obtained by students of two different Universities valued by different examiners on answer papers of different patterns may not be the proper mode of determining comparative merit. Even in the case of candidates appearing for the same examination of the same University there may be a cause for complaint in the matter of marks awarded to the candidates. Quite often revaluation has shown that at least in some cases there is justification for the plea for such revaluation. Different examiners value the answer papers and though there is a Chief Examiner his role is quite limited. But these are inevitable and the marginal errors may have to be ignored. By and large the comparative merits of the candidates will be reflected in the marks they obtain in the examination to which all candidates are uniformly subjected to. But the same could not be said in the case of examinations conducted by two or more Universities. It is well-known that sometimes question papers are tough and sometimes valuation is liberal. Quite often valuation is guided by the percentage of pass expected in an examination. Moderation is also resorted to. While all these may work uniformly on all the candidates appearing for the same examination in the same University that could not be the case with regard to the candidates appearing for the same qualifying examination from another University writing different papers, which are valued by a different set of examiners. When comparison is between two candidates passing out from two Universities taking respective examinations of the Universities the equation of candidates in matters where near-accuracy is called for becomes difficult. May be the examinations are similar and the valuation also is similar, but the other factors cannot be ruled out. If admissions to courses like Medicine and Engineering is to be on the basis that the best talent is to be preferred, where students from more than one University passing the qualifying examination have to compete some method other than comparing their marks should be devised to determine their comparative talent."

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19. It is true that in all these cases the courts were attempting to sustain the existing rules on the basis that the rules provided for valid classification. The reasoning of the courts in these cases do support the case of the petitioners. The fact remains that courts which had occasion to consider the cases of students passing from different Universities have been of the view that by its very nature the examinations taken by students from different Universities need not necessarily be of the same standard. While pass in these examinations from these Universities may be recognised as equivalent the subtleties involved in the determination of comparative merit between candidates on the basis of marks cannot be justified. Therefore the complaint of the petitioners in these cases that the State Government ought not to have regulated the admission which ought to be on the basis of talent merely on the basis of marks obtained by the candidates in the examinations conducted by the two Universities appears to be reasonable. The said rule of admission has infringed the equality clause as contended by the petitioners."

2. There are altogether three Universities operating in this State, namely, the Kerala University, the Calicut University and the Cochin University. The last of these is not an affiliating University, but only what is called, a federal type of University for all the colleges

in the city of Cochin. The first and second are the Universities with colleges affiliated to each.

3. The learned Judge examined the question whether the prospectus regulating admissions (copy Ext. P2) was a State law or only an executive order. If it was the former, striking it down as violative of Article 14 could, under the present provisions of the Constitution, be done only by a Bench of Five Judges. The learned Judge held that it was only an executive or administrative order, and that he could hold that the selections ought not to have been made in accordance with it. Considering the objection as to nonjoinder of the selected students in the writ petitions the learned Judge was of the view that the same did not preclude the petitioners from obtaining any reliefs to which they might otherwise be entitled. (vide paragraph 21). This was because, in the first place, the writ petitioners had come to the court before the selections had been finalised and the list of selected candidates published, so that the selections were only, so to say, pendente lite. Secondly, there had been interim orders in some of the writ petitions, that the finalisation of the list was to be subject to the result of the writ petitions and that the candidates selected should be informed either before selection or immediately thereafter, that their selection was subject to the result of the writ petitions. In these circumstances, the learned Judge rejected the plea that the writ petitions should fail for non-joinder of parties. (vide para 21). Discussing the question of reliefs to which the petitioners were entitled, the learned Judge pointed out that the petitioners were asking for admissions to be made in the light of valid and properly framed rules, and remarked that the task of framing such rules is not easy, and is bound to take time, for collection of statistics and formulation of the appropriate principles. Having regard to the progress of the academic year, to the disturbance and dislocation likely to be caused in upsetting the selections already made, and to the futility of ordering a new selection under a set of rules to be formulated hereafter, so as to benefit the newly selected candidates in the course of the current academic year, the learned Judge felt that beyond declaring that the principle followed in the selection was inequitable, no practical relief could be granted to the petitioners on the facts. This was how the learned Judge concluded:

"Even when grievances urged by the parties before this Court are found to be genuine and it is the function of this Court to protect the rights of parties the circumstances of a case may render it impossible or impracticable to grant any relief to the parties. In such cases the Court after defining the rights of parties will do well to leave the matter there and the decision of the Court, though of no material consequence to the parties to the case, may furnish a guideline for future action. That is the situation here.

23. Possibly, the cases of such of those among the petitioners who would have had a case for selection because of the high marks obtained by them could be considered by the Government and relief granted to them. That the circumstances have contributed to unjust treatment has been indicated. What is to be done in the circumstances is a matter for the Governmnet to consider, for, in the absence of any specific rule in place of Ext. P2 no specific direction by the Court is possible."

It was in these circumstances, that this batch of writ petitions was dismissed. And the complaint of this batch of writ petitioners is that while they have won the battle, they have been denied the fruits of victory. We shall first take up for consideration, the series of appeals challenging the principle of selection of students drawn from different Universities with no uniform standards. As representative of this class of appeals, we may refer to the facts in W. A. No. 314 of 1977 which was the appeal in regard to which the main arguments were addressed.

W. A. No. 314 of 1977

4. The petitioner has passed the Predegree examination from the Calicut University in March 1977. She is from the Malabar area of this State, and has obtained a total of 392 out of 450 marks in the subjects, namely, Physics, Chemistry and Biology and an aggregate of 827 out of 1000 marks. Ext. P1 is a copy of her mark-list. Although she is a Muslim, regarded as a Backward community in this State, she is disentitled to the benefit of what is commonly referred to as the rule of communal reservation, as she is above the economic or income level prescribed for the same. According to Ext. P2 Prospectus, selection of pre-degree students on considerations of merit was

to be adjudged by the total number of marks obtained in the three subjects mentioned earlier, irrespective of the Universities from which the candidates passed their examinations. Herein lies the basis of the attack mounted by the writ petitioner. The challenge was that so long as the Universities have different standards and applied different yardsticks in assessing the merit and worth of the students, to regulate admissions on the basis of the results of the University examinations conducted by them, was bound to be productive of inequality and discrimination. To make good the case, the petitioner has alleged, at least as a bare and bald allegation, that the syllabus for the two Universities — Kerala & Calicut — is not the same; that the pattern of question papers for the examinations was different, the Kerala University allowing multiple choice in all the questions while the Calicut University allows such choice only in the essay question and not for the rest (vide the copies of the question papers produced, Exts. P3 and P4); and that the Kerala University allows a weightage of 5% of the marks for proficiency in sports and games and to the winner of inter-collegiate events — (vide Ext. P5). The allegation about difference in syllabus, bereft though of details, and bare and bald though it be, has not been denied in the counter affidavit. On the second allegation as to the difference in standards, certain important considerations appearing in the case, have appealed to us. Ext. P6 is a copy of the recommedations of the Indian Medical Council addressed to the Registrars of all Universities and the other educational functionaries of this country. The relevant part of the recommendations reads:

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II (b) Selection of students.

In States having more than one University/Board/Examining Body conducting the qualifying examination (or where there are more than one Medical College under the administrative control of one authority) competitive entrance examination should be held so as to achieve a uniform evaluation due to the variation on the standard of qualifying examinations conducted by different agencies."

Ext. P7 is a copy of the Minutes of the Meeting of the Inter-University Consultative Committee held on 27-9-1976. We see that it was attended by distinguished educationists including the Vice-Chancellors of the three Universities of this State. The relevant portion of the Minutes reads:

"ADDITIONAL ITEMS

1. The Committee considered along with the recommendations of the Indian Medical Council, the question of effecting changes in the requirements for admission to M. B. B. S. Course in the Medical Colleges in the State as well as the proposal for the conduct of a common Entrance Test for medical admissions. Dr. K. N. Pai, Dean, Faculty of Medicine, University of Kerala and Dr. (Mrs.) Omana Mathew, Dean, Faculty of Medicine, University of Calicut attended the meeting at this stage and gave to the Committee the benefit of their views.

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In this context, the committee recommended that a common Entrance Test be held for admissions to Medical Colleges in the State. The details of the proposed test may be worked out by the Government in consultation with the Deans of the Faculties of Medicine of the two Universities and the Principals of Medical Colleges in the State.

XX XX XX XX XX"

Exts. P8 dated 2-5-1977 is from the Secretary of the Medical Council of India, to the Registrars of all Universities, which states:

"Sir,

I am directed to forward herewith a copy of the revised recommendations of the Council on undergraduate Medical Education, (Undergraduate Medical Curriculum) as adopted by the Medical Council of India at its meeting held on 15th and 16th April, 1977, for your guidance and necessary action.

These recommendations have been framed after taking into consideration of the report of the Deans/Principals' Conference of April, 1976 and are for immediate implementation.

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The revised recommendation again, was to hold an enrtance examination. These proceedings of high academic bodies, which can safely be trusted to be aware of the developments in the academic sphere, and to bring to bear a dispassionate outlook on them, go a long way to confirm the writ petitioner's case of the inequity in the matter of admission of students drawn from different Universities with no uniform standards of instruction and examination. The writ petitioner would complete the picture of inequality by drawing attention to the

results disclosed by the selections this year. In Para 3 of the reply affidavit of the petitioner (in O. P. No. 3661 of 1977) it is stated that out of 45 candidates selected for the Electronics course only one candidate from the Calicut University could find a place on Statewise merit. Out of 97 candidates selected on basis of Statewise merit for admission to the M. B. B. S. Course in the Pre-degree quota, 83 are from the Kerala University, 10 from the Calicut, and 4 from other Universities. Among the Travancore-Cochin merit quota for Pre-degree holders, out of 17 candidates selected, 13 were from Kerala University and only 4 from Calicut University. Among the Malabar merit quota holders again, out of eleven candidates selected, eight were from Kerala University, and only three from the Calicut University. Even in the reserved quota of admissions for Muslims the proportion as between the Kerala and Calicut and other Universities was 10:5:1 in a total of sixteen. To crown the picture, we are told that the population ratio of the six districts brought under the Kerala University to the five districts under the Calicut University is 11 : 10 according to 1971 census; and that the percentage of passes for the Pre-degree examination for Kerala is sixty as against nearly forty two (41.95) for Calicut. These facts were marshalled and flaunted to show that all along the line, the Kerala University students have been dominating the picture and this was not — at least could not be — an accident borne out of superior merit of standard or calibre, but an inherent weakness and inequality of the system itself. We were reminded that not far back, as noticed by the learned Judge from the complaint in O. P. No. 4661 of 1974, the wind appeared to be blowing in an opposite or different direction; and the picture presented was one of the Kerala University adopting stricter standards and more rigorous tests and the Calicut University emerging more into the fore. The question is not whether one University is superior to the other or maintains higher standards in the matter of syllabus, examation and evaluation than the other, but whether the operation of different Universities with varying standards of their own is productive of inequality. We are satisfied that this has been proved to be so.

5. And now to the law. The legal position as crystallised from the decisions to which our attention has been drawn, supports the factual basis noticed earlier. Indeed, it would appear as if it was in the light of the observations made in some of the decisions — and certainly after some, at least, of such observations — that the Indian Medical Council made its recommendation stressing the need for uniformity of standards and assessment by the different Universities, and the academic bodies proceeded with their follow-up action. In D. M. Chanchala v. State of Mysore (AIR 1971 SC 1762), the students whose admission to the Medical Colleges of the State had to be regulated were drawn from three different Universities, namely, Karnataka, Mysore and the Bangalore Universities. All the three had Pre-University course examinations a pass in which made the student eligible for admission to the degree course. But while the Karnataka University required a pass in B. Sc. Part I, leading to the M. B. B. S., as the minimum qualification for admission to the Medical course, the other two required a pass in what is called the pre-professional examination, which was treated as equivalent to B. Sc. Part I leading to the M. B. B. S. degree of the Karnataka University. There were four Medical Colleges in the State; one at Mysore affiliated to the Mysore University, one at Bangalore affiliated to the Bangalore University, and the other two at Hubli and Bellary, affiliated to the Karnataka University. The four colleges together had 765 seats in the aggregate. There were, besides, privately-managed medical colleges at Manipal, Davangere, Belgaum and Gulbarga, with 120 seats in each of them, admission up to 10 per cent therein being under the control of the Government. The Government had framed Rules for admission to the Colleges. R. 2 (2) provided that out of the available number of seats, after deducting the number of seats set apart under R. 4, 80% of the seats were open to those who had passed the P. U. C. examination and 20% for graduates. Rule 4 set apart a total of 60 seats for different categories of persons, namely, students from Union Territories, and States where there were no medical colleges, students from relatively less-developed Commonwealth countries, cultural scholars and students under T. C. S. of the Colombo Plan and Special Commonwealth Assistance Plan, students from Nepal, repatriates from Burma, Ceylon, Mozambique, children of Defence Personnel and the like. Out of the 80 per cent, 15% was to be reserved

for Scheduled Castes, 3% for Scheduled Tribes, and 30% to the socially and educationally backward classes. Rule 9 with which we are intimately concerned, provided for distribution of seats among the several colleges. Clause (1) of the said Rule provided that seats from the general pool shall be distributed University-wise, that is, seats in the colleges affiliated to the Karnataka University shall be allotted to persons passing from colleges affiliated to that University, and seats in colleges affiliated to Bangalore and Mysore Universities shall respectively be allotted to persons passing from the colleges affiliated to the two Universities. There was an overriding provision, that not more than 20% of the seats in the colleges affiliated to any University, may, in the discretion of the Selection Committee be allotted to students passing from colleges affiliated to any other University in the State or elsewhere. It was pointed out by the Supreme Court that the Medical Colleges in the State were not University Colleges but were set up and had been maintained by the State Government from public funds, and as such the Government was entitled to lay down the requirements regarding eligibility for admission. Dealing with R. 9 (1) of the Rules for admission it was ruled that the principle of Universitywise distribution of seats could not be equated or compared with the district-wise reservation of seats which was invalidated by the Supreme Court in Rajendran v. State of Madras (AIR 1968 SC 1012). Dealing with the arguments presented against Universitywise distribution of seats, the Court observed:

(in Chanchala's case):

"21. It will be easily seen that the University-wise distribution of seats in the Government medical colleges has nothing in common with the district-wise or unitwise selection struck down in Rajendran's case, 1968-2 SCR 786 : (AIR 1968 SC 1012) and Periakaruppan's case, W. Ps. Nos. 285 and 314 of 1970, D/-23-9-1970 : (AIR 1971 NSC 171). In both the cases what was mainly objected to was that the selection would have to be made on the basis either of the place of birth or residence and the candidate was confined to the medical college at or nearest to such a place. Such a basis for selection was held to have no reasonable nexus with the object of the rules, namely, to select the most meritorious amongst the candidates to have the advantage of such education. In Periakaruppan's case, there was a further infirmity, in that, there were several committees for selection resulting in varying standards, thus defeating the very object of screening the candidates with a view to give chance to the best of them. Both these decisions are distinguishable as the basis on which the selection of candidates is sought to be made under the present rules is quite different in that it is neither districtwise nor unitwise, but is universitywise. Therefore, the infirmities found in the selection rules in those two cases and for which they were struck down cannot be relevant in any scrutiny of the present rules, much less can they be relied upon for an attack on them.

22. The three universities were set up in three different places presumably for the purpose of catering to the educational and academic needs of those areas. Obviously one university for the whole of the State could neither have been adequate nor feasible to satisfy those needs. Since it would not be possible to admit all candidates in the medical colleges run by the Government, some basis for screening the candidates had to be set up. There can be no manner of doubt, and it is now fairly well settled, that the Government, as also other private agencies, who found such centres for medical training, have the right to frame rules for admission so long as those rules are not inconsistent with the University statutes and regulations and do not suffer from infirmities, constitutional or otherwise. Since the universities are set up for satisfying the educational needs of different areas where they are set up and medical colleges are established in these areas, it can safely be presumed that they also were so set up to satisfy the needs for medical training of those attached to those universities. In our view, there is nothing undesirable in ensuring that those attached to universities have their ambitions to have training in specialised subjects, like medicine, satisfied through colleges affiliated to their own universities. Such a basis for selection has not the disadvantage of districtwise or unitwise selection as any student from any part of the State can pass the qualifying examination in any of the three universities irrespective of the place of his birth or residence. Further, the rules confer a discretion on the selection committee to admit outsiders up to 20 per cent of the total available seats in any one of these colleges, i. e., those who

have passed the equivalent examination held by any other university not only in the State but also elsewhere in India. It is, therefore, impossible to say that the basis of selection adopted in those rules would defeat the object of the rules as was said in Rajendran's case, 1968-2 SCR 786 : (AIR 1968 SC 1012) or make possible less meritorious students obtaining admission at the cost of the better candidates. The fact that a candidate having lesser marks might obtain admission at the cost of another having higher marks from another university does not necessarily mean that a less meritorious candidate gets advantage over a more meritorious one. As is wellknown, different universities have different standards in the examinations held by them. A preference to one attached to one university in its own institutions for post-graduate or technical training is not uncommon. Rules giving such a preference are to be found in various universities. Such a system for that reason alone is not to be condemned as discriminatory, particularly when admission to such a university by passing a qualifying examination held by it is not precluded by any restrictive qualifications, such as birth or residence, or any other similar restrictions. In our view, it is not possible to equate the present basis for selection with those which were held invalid in the aforesaid two decisions. Further, the Government which bears the financial burden of running the Government colleges is entitled to lay down criteria for admission in its own colleges and to decide the sources from which admission would be made, provided of course, such classification is not arbitrary and has a rational basis and a reasonable connection with the object of the rules. So long as there is no discrimination within each of such sources, the validity of the rules laying down such sources cannot be successfully challenged. (see Chitra Ghosh v. Union of India, 1970-1 SCR 413 at p. 418 : (AIR 1970 SC 35). In our view, the rules lay down a valid classification. Candidates passing through the qualifying examination held by a university form a class by themselves as distinguished from those passing through such examination from the other two universities. Such a classification has a reasonable nexus with the object of the rules, namely, to cater to the needs of candidates who would naturally look to their own university to advance their training in technical studies, such as medical studies. In our opinion, the rules cannot justly be attacked on the ground of hostile discrimination or as being otherwise in breach of Art. 14."

(underlining supplied)

The passage that we have underlined assumes as a well-known fact that different universities have different standards in the matter of their examinations and assessment. The principle of university-wise admission was recognised also in S. G. Pandit v. State of Maharashtra (AIR 1972 Bom 242). Rule 2 of the Rules for admission provided that except the seats for the nominees of the Government of India and the seats in the B. J. Medical College, Poona, and the Miraj Medical College, Miraj, all the seats at each medical college are earmarked for the students of the Universities to which the particular medical college is affiliated. For admission to the B. J. Medical College, Poona, and the Miraj Medical College, Miraj, the seats at the two colleges were to be pooled together and distributed between the two colleges in the proportion of the number of students registered for the pre-professional examination. The two Universities in the State were the Poona University, and the Shivaji University, Kolhapur. It was alleged that the Universitywise distribution of seats was arbitrary and irrational. The rule regarding pooling of seats in the Medical Colleges at Poona and Miraj as such was not attacked. (Mark this). But the mode of allocation of seats between the two Universities on the basis of students registered at these Universities was challenged. This, it was complained, had no relation to the object of securing the best students into the Medical Colleges. The submission was rejected. The Court observed:

"The Government of Maharashtra wants to provide fair opportunities to students of the Universities by equitably allotting the seats available at Poona and Miraj. The nature and object of classifying the students into two classes as students of Poona University and Shivaji University cannot be, therefore, assailed as contravening Art. 14 or 15 of the Constitution. The classification is based on intelligible differentia and is reasonable having regard to the existence of these two Universities and their history. The basis adopted by the Government has a relevant connection with the object

sought to be achieved by the Government, viz., of allocating certain seats in the Poona B. J. Medical College to the students of Shivaji University because the Government is not in a position to provide more seats in the Miraj Medical College for the time being." (para 12) In the result, the challenge to the rule was repelled. Counsel for the appellant cited the decision in Subhashini v. State (AIR 1966 Mys 40) which upheld the Universitywise distribution of seats; and in H. J. Siddappa v. State of Mysore (AIR 1967 Mys 67) which followed the above ruling. We do not think it necessary to examine these decisions in detail.

6. The learned Advocate-General who appeared for the State in these appeals contended that the principle of distribution of seats was unobjectionable and cannot be characterised as inequitable, or violative of the equality clause in the Constitution. He contended that the object was to draw the best talent into the Medical Colleges of the State, irrespective of the University from which the talent was drawn. Stated in that form, the principle is perhaps unobjectionable; but where each University operates under conditions which cannot be said to be equal, the principle of selection is itself bound to create inequalities and work out injustice. This is what has been pointed out by the Indian Medical Council and the Academic bodies of the Universities in Exts. P-6, P-7 and P-8. The learned Advocate-General endeavoured to show by reference to Pradeep Tandon's case (AIR 1975 SC 563) and Chanchala's case (AIR 1971 SC 1762) and S. G. Pandit's case (AIR 1972 Bom 242) that there was nothing wrong in pooling students from different Universities and assessing them on considerations of merit. He emphasised that 20% of the admissions were regulated on this principle in Pradeep Tandon's case and also in Chanchala's case, and there was pooling together of the seats in the two medical colleges at Poona and Miraj in S. G. Pandit's case. No objection was taken in those cases to the inequities perpetrated or inequalities brought about by different Universities working under different conditions and standards. We are not therefore prepared to read these cases as authorities for the proposition that pooling together of students drawn from different Universities, with different standards of grading and assessment of their performance, is unobjectionable in principle. The decision in Rajendran's case (AIR 1968 SC 1012) has no application. In that case the districtwise distribution of seats was held to be offensive and violative of Art. 14, as it was found to have no nexus to the principle of selecting the best talent for admission to the colleges, and was even calculated to defeat that purpose. In State of A. P. v. U. S. V. Balaram, (AIR 1972 SC 1375) it was ruled that it is open to the State to prescribe the sources from which the candidates are declared eligible for applying for admission to the Medical Colleges; but once a common Entrance Test has been prescribed as basis for selection, the further provision that 40% of the seats will be allotted to candidates with Higher Secondary Course was discriminatory. It was pointed out that after a common Entrance Test there was no place for any further classification, and assuming there was, the scheme of classification actually adopted had no relation to the object of securing the best talent for admission.

7. Periakaruppan's case (AIR 1971 SC 2303) was concerned with the attempts made by the Tamil Nadu State to evolve a scheme of selection after the districtwise distribution of seats was struck down in Rajendran's case (AIR 1968 SC 1012). There were, at the relevant time, eight Medical Colleges in the State, three in the city of Madras, one in Madurai, one in Chingleput, one in Coimbatore, one in Thanjavur, and one in Tirunelveli. The total seats available in the City Colleges was 500; the seats for the colleges in Madurai, Chingleput, Coimbatore, Thanjavur and Tirunelveli were 200, 50, 100, 200 and 75 respectively. After Rajendran's case, selection was made on Statewise basis in the years 1968-69 and 1969-70, but in 1970-71, the selections were directed on a unit-wise basis. For this purpose the three City Colleges formed one unit, and the remaining five colleges formed a unit each. There were thus six units in all, with separate Selection Committees for each. The intending applicants could apply to any one of the Committees, but were advised to apply to the one nearest to their place of residence; and if they applied to more than one Committee the Government would forward their applications to one of them. We skip the numerous other details of the selection, which was invalidated, only to notice the complaint made against the constitution of several Selection Committees to assess the candidates. Observed the Court:

"It was said that it was not possible for one selection committee to interview all the applicants. Therefore several committees had to be constituted. In the past when applicants were interviewed by several committees there were complaints that the standard adopted by one committee differed from that adopted by others and therefore the applicants' ability was not tested by a uniform standard. Further it was said that when selections were made by several committees there was delay in preparing a consolidated list. We are unable to accept these grounds as being real grounds for classification. The grievance when selections were made by several committees in a Statewise selection the standard adopted by various committees differed, would continue even when selections are made by several committees in a unitwise selection. Whether the selection is made by selection committees on Statewise basis or unitwise basis, the standard adopted by various committees is bound to vary. Hence in principle it makes no difference. (Para 11)

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The complaint of the petitioners is that unitwise distribution of seats is but a different manifestation of the districtwise distribution sought in 1967-68 has some force though on the material on record we will not be justified in saying that the unitwise distribution was done for collateral purposes. Suffice it to say that the unitwise distribution of seats is violative of Arts. 14 and 15 of the Constitution. The fact that an applicant is free to apply to any one unit does not take the scheme outside the mischief of Arts. 14 and 15. It may be remembered that the students were advised as far as possible to apply to the unit nearest to their place of residence." (Para 12)

We draw attention to the above paragraphs only to show how the assessment by different selection committees with no uniform standard of assessment was held to contravene Art. 14.

8. The history of the case-law that we have sketched is enough to show the battle of wits waged between those concerned in devising a scheme of selection, and the candidates for admission, out to expose in each case, the inequity of the scheme. It is interesting to note the number of occasions when the battle has been fought in the courts, especially in the southern States of Tamil Nadu, Karnataka and Kerala. We think it appropriate to echo the words of the Supreme Court in Chitralekha's case, (AIR 1964 SC 1823), quoted again in para. 14 of Periakaruppan's case (AIR 1971 SC 2303):

"In the field of education there are divergent views as regards the mode of testing the capacity and calibre of students in the matter of admissions to colleges. Orthodox educationists stand by the marks obtained by a student in the annual examination. The modern trend of opinion insists upon additional tests, such as interview, performance in extra-curricular activities, personality test, psychiatric tests etc. Obviously, we are not in a position to judge which method is preferable or which test is the correct one. If there can be manipulation or dishonesty in allotting marks at interviews, there can equally be manipulation in the matter of awarding marks in the written examination. In the ultimate analysis, whatever method is adopted its success depends on the moral standards of the members constituting the selection committee and their sense of objectivity and devotion to duty. This criticism is more a reflection on the examiners than on the system itself. The scheme of selection, however perfect it may be on paper may be abused in practice. That it is capable of abuse is not a ground for quashing it. So long as the order lays down relevant objective criteria and entrusts the business of selection to qualified persons, this Court cannot obviously have any say in the matter."

9. The appellant objected to the learned Advocate-General seeking to justify the scheme of distribution of seats as just and fair, as the Government itself had not filed any appeal against this batch of writ petitions against the declaration made by the learned Judge that the scheme of selection and distribution of seats was violative of Art. 14. But the learned Judge had dismissed this batch of writ petitions. An appeal by the Government against the order of dismissal was out of the question. In the circumstances, we think it is permissible, on grounds analogous to the principle embodied in O. XLI, R. 22 of the Civil P. C., to support the judgment of the learned Judge even on grounds which had been decided against the Government. In that sense, the learned Advocate-General was right in seeking to sustain the scheme of selection as valid and proper. But, on the merits, we are against him on this point, and are in agreement with the learned Judge.

10. We turn to the question of the relief to be granted to the petitioners. We have extracted from paras. 22 and 23 of the learned Judge's judgment and detailed the circumstances under which the learned Judge stated that beyond judicially recognising the injustice involved in the selection, no practical relief can be granted in favour of the writ petitioner. All things considered, we think the learned Judge was right in his conclusion. Interference in our jurisdiction under Art. 226 should be in the interests of justice. The position disclosed in the case is that selections to the Medical Colleges have been made and the selected students have joined the classes. The academic term has advanced. The formulation of a new basis of selection and the making of a fresh selection in the light of the same, are bound to take time; and the newly selected candidates cannot be expected to reap any profit or derive any advantage from their late selection and admission to the course. The net result of quashing the selection would be that neither the selected candidates nor those to be substituted for them will benefit by the current year's course of instruction. To avoid such a national waste of budding talent, we think it was a right exercise of discretion by the learned Judge in declining interference by way of quashing the selection. We do not think it necessary to interfere with this part of the learned Judge's judgment.

11. Precedent is not wanting for this course. In Rajendran's case (AIR 1968 SC 1012), having held against the validity of the district-wise scheme of selection, the Court observed:

"It is urged that the selected candidates whose number is in the neighbourhood of 1100 have not been made parties in these cases and therefore the cases should be rejected on that ground alone. Learned counsel for the petitioners/appellant, however, accepted that so far as the present selections are concerned, they would not press for quashing them, for in any case it would be too late for these petitioners/appellant to get admission in medical colleges this year. They therefore pray that the points raised may be decided for the future and the selection made this year may not be disturbed. On that basis it is urged on behalf of the petitioners and the appellant that it would not be necessary to make the candidates selected for this year parties. In view of this statement at the bar we propose to decide the points raised in these cases but shall not disturb the selections made this year". (para 6)

We are aware of the recent decisions in A. Pandurangam Rao v. State of Andhra Pradesh (AIR 1975 SC 1922) where the selection of District Judges was quashed after the Judges had functioned for quite some time; and in C. Channabasavaiah v. State of Mysore (AIR 1965 SC 1293) where the entire selection was quashed. We shall be noticing, while dealing with the next objection raised, the course pursued, and the observations made by the Supreme Court in Periakaruppan's case (AIR 1971 SC 2303), which are pertinent to this aspect also.

12. The objection was repeated before us by the learned Advocate-General that the writ petition must fail for non-joinder of the selected candidates. The learned Judge was not inclined to regard the objection as fatal. This writ petition — and many others — were filed before the selection to the Medical Colleges was made and the selected candidates had appeared on the scene. Interim orders had been obtained in most, if not all of them, that the selections would be subject to the result of the writ petition. In one of the writ petitions, for instance, — O. P. No. 3867 of 1977 (Ker) which is the subject-matter of W. A. No. 312 of 1977 filed by the State — the interim order passed in C. M. P. No. 16325 of 1977 (Ker) is to the effect that the selection and admission would be subject to the result of the writ petition and the selected candidates should be expressly informed that this would be so. But this would not be a sufficient substitute for the obligation to make the affected candidates parties to the proceeding and to afford them specific and pointed notice of the same. The invalidation of the selection is a matter which vitally affects their interests, and the same cannot be done in writ proceedings to which they are not parties. In one of the writ petitions no orders were passed on the application filed for impleading the selected candidates (See C. M. P. No. 17721 of 1977 in O. P. No. 3791 of 1977) (Ker). In Periakaruppan's case (AIR 1971 SC 2303), the Supreme Court observed:

"32. For the reasons mentioned above we are of the opinion that the selections impugned in these petitions cannot be held to have been made validly inasmuch as the seats were distributed on unitwise basis and further that the interviews were not held in accordance with the

rules. But despite coming to that conclusion we are unable to set aside the selections already made. The selected candidates have not been made parties to these petitions. They have already joined the course and are undergoing training. Their selection cannot be set aside without giving them an opportunity to put forward their case. It is true that the petitioners had filed applications to permit them to have recourse to O. 1, R. 8, C. P. C. for the representation of the persons interested in opposing these applications but no order has been passed on those applications and it is now too late to have recourse to that procedure even if that procedure is permissible under law. We are told by the learned Advocate General of Tamil Nadu that 24 seats still remain to be filled up. He has assured us on behalf of the State that these seats will be filled up in accordance with the orders of this Court. There are about 80 persons, who we are told are in the waiting list. Some of the unsuccessful applicants had moved the High Court of Madras for relief similar to that sought by the petitioners herein. But it appears their writ petitions have been dismissed. Some out of them have intervened in these petitions. Other non-selected candidates have evinced no interest in challenging the selections made. Under the circumstances, it is reasonable to assume that they have abandoned their claim and it is too late for them to press their claim. Under these circumstances, after discussion with the Counsel for the parties we have come to the conclusion that these petitions should be allowed subject to the following conditions:

33. The State of Tamil Nadu shall immediately constitute a separate expert committee consisting of eminent medical practitioners (excluding all those who were members of the previous committees) for selection to the 24 unfilled seats. The selection shall be made on Statewise basis. The Committee shall interview only the candidates who are shown in the waiting list, the persons who unsuccessfully moved the High Court of Madras and the two petitioners before this Court. They shall allot separate marks under the five heads mentioned in the rule. The committee shall take into consideration only matters laid down in the rule, exclude from consideration all irrelevant matters and thereafter prepare a gradation list to fill up the 24 seats mentioned earlier. It is ordered accordingly. We thnik this is a fit case where the petitioners should get their costs from the State of Tamil Nadu.

Order accordingly."

13. Counsel for the writ petitioner invited our attention to General Manager, South Central Railway, Secunderabad v. A. V. R. Siddhanti (AIR 1974 SC 1755 Para 20) where, under different circumstances, the Supreme Court observed:

"As regards the second objection, it is to be noted that the decisions of the Railway Board impugned in the writ petition contain administrative rules of general application, regulating absorption in permanent departments, fixation of seniority, pay etc. of the employees of the erstwhile Grain-Shop departments. The respondents-petitioners are impeaching the validity of those policy decisions on the ground of their being violative of Arts. 14 and 16 of the Constitution. The proceedings are analogous to those in which the constitutionality of a statutory rule regulating seniority of Government servant is assailed. In such proceedings the necessary parties to be impleaded are those against whom the relief is sought, and in whose absence no effective decision can be rendered by the Court. In the present case, the relief is claimed only against the Railway which has been impleaded through its representative. No list or order fixing seniority of the petitioners vis-a-vis particular individuals, pursuant to the impugned decisions, is being challenged. The employees who were likely to be affected as a result of the readjustment of the petitioner's seniority in accordance with the principles laid down in the Board's decision of October 16, 1952, were, at the most, proper parties and not necessary parties and their non-joinder could not be fatal to the writ petition". (para. 20) The decision has no application. Differing from the learned Judge, we hold that the writ petition (and the others in this batch) in so far as it seeks to impugn the selection already made should fail for non-joinder of the selected candidates.

14. The learned Advocate-General raised the contention that unless the discrimination is found to be intentional and hostile it cannot be struck down under Art. 14 of the Constitution. He cited to us the decisions in Andhra Industrial Works v. Chief Controller, Imports (AIR 1974 SC 1539, para 19) and Twyford Tea Co. v. Kerala State (AIR 1970 SC 1133, para 19) and many other cases. We do not think it necessary to

examine these cases in detail. It was pointed out by the Supreme Court in The State of West Bengal v. Anwar Ali Sarkar (AIR 1952 SC 75 at p. 89) that if the impugned measure is discriminatory it cannot but be hostile.

15. It remains for us to consider the question whether the impugned Rules for selection contained in the Prospectus constitute a "State Law" within the meaning of Art. 366 (26-A) (newly added), of the Constitution. The Division Bench of this Court in State of Kerala v. Jacob Mathew (1964 Ker LT 298) : (AIR 1964 Ker 316) held that a similar "Rule" is a law for purposes of Art. 14. The purpose of examining the question is only to see that, if it is a State-law, it is struck down, as required by the Article 228-A (3) of the Constitution, only by a Bench of not less than five Judges. It was to obviate any such objection that the appeal was heard by this Full Bench. The question is therefore academic and need not be dealt with. We express no opinion on the question.

16. As a result of our discussion, we are of the opinion, that the scheme of selection for admission to the Medical Colleges on an assessment of merit of students drawn from different Universities with no uniformity of standards is objectionable and violative of Art. 14 of the Constitution. We grant a declaration to the writ petitioner to that effect. We deny effective relief to the writ petitioner on account of non-joinder of the selected candidates, and the futility and ineffectiveness of upsetting the selections and directing fresh admissions at this stage. We consider that the best scheme of selection in the circumstances would be the method of selection of candidates by holding a uniform Entrance Examination to secure uniformity of standards, as recommended by the Indian Medical Council — vide Exts. P-5 and P-8 — and as endorsed by the University Authorities (vide Ex. P-7). We direct the State Government to forthwith devise a scheme of selection by holding such an Entrance Examination and publish the same within three months from today, so that the candidates, wishing to apply for selection to the Medical Colleges of this State for the next academic year, have due notice of the scheme of selection. The object being to secure uniformity of standards for assessment and evaluation of students drawn from different Universities, our direction should not be understood as unalterably and inelastically fixing the limits for Governmental action. Methods for securing uniformity of syllabus, pattern of examination, and mode of evaluation in the different Universities, would well be within the province of the Government to undertake. We allow this writ appeal to the limited extent indicated above. There will be no order as to costs.

W. A. No. 334 of 1977

17. The appellant herein is a candidate from the Travancore-Cochin area having obtained a total of 400 out of 450 marks. The last candidate admitted for the Malabar merit quota obtained only 396 marks and the complaint made is that the system of grading and selection of candidates drawn from two different Universities with different standards is productive of inequality. We have examined the merits of this contention in W. A. No. 314 of 1977. For reasons stated in that judgment, we are unable to give any effective relief to this writ petitioner also, beyond the limited relief granted in the said appeal. This appeal is also allowed to the same limited extent as W. A. No. 314 of 1977 with no order as to costs.

W. A. No. 331 of 1977

18. This writ appeal is also allowed to the same limited extent as the other two writ appeals. There will be no order as to costs.

W. A. Nos. 315, 318, 319, 329, 342 and 343 of 1977

19. These writ appeals were left to abide the fate of W. A. No. 314 of 1977. We allow them to the same limited extent to which we allowed W. A. No. 314 of 1977 and grant the same limited relief to the appellants in those writ appeals.

W. A. Nos. 333 of 1977, 336 of 1977 and 348 of 1977

20. These are also appeals whose fate is determined by the decision in W. A. No. 314 of 1977. In the light of our decision in the said writ appeal, we allow these writ appeals also to the same limited extent and in the same manner as Writ Appeal No. 314 of 1977. There will be no order as to costs in these writ appeals.

W. A. Nos. 309 and 312 of 1977

21. We shall now take up the two appeals by the State dealing with reservation of seats for the geographical area of the "Malabar District" as defined by the States' Reorganisation Act. W. A. No. 309 of 1977 is against O. P. No. 4203

of 1977 and W. A. No. 312 of 1977 is against O. P. No. 3867 of 1977. We may briefly notice the scheme of reservation that was assailed. 20% of the general seats were to be filled up on the basis of merit. This was allocated between the Malabar and the Travancore-Cochin areas of this State in the ratio of 5 : 8. This was by G. O. (P) 208 of 1966/Edn. Educational (Special) Department dated 2-5-1966. By the said G. O. the Government accepted, broadly and in the main, the recommendations of the Kumara Pillai Commission appointed by the State for making recommendations on the question of reservation for admission to the educational institutions. Recommendation No. 4 and the Government decision thereon are as follows:

"xx xx xx xx

(iv) Recommendation No. 4

In the Medical, Engineering (including Polytechnics), Agricultural and Veterinary Colleges 20% of the General seats may be allocated between the Malabar area and the T. C. Area in the ratio of 5 : 8 on the basis of merit.

(vide para 33 of the report)

The statistics of area, population number of educational institutions and number of students in the Travancore-Cochin area and Malabar area furnished in the report show that the Malabar area is educationally backward. There is nothing unconstitutional in making a classification on geographical basis, (i.e. on the basis of 'residence'). Hence the Commission's recommendation regarding reservation on area-basis is acceptable. The educational backwardness in Malabar is due, to a considerable extent, to the presence, in that region, of a large number of Ezhavas, Muslims and other persons belonging to the socially and educationally backward classes for whose advancement reservation is being made under Art. 15 (4). Government also accept the recommendation to reduce the existing quantum of seats for regional allocation from 50% in the case of Professional Colleges and 40% in the case of Polytechnics uniformly to 20% as reasonable and appropriate. The population of the respective areas is more or less in the ratio of 5 : 8. The High Court of Kerala has observed in "Joseph Thomas' Case" (AIR 1958 Ker 33) that "the distribution of seats between the two areas on the basis of population is sustainable." In the circumstances Government accept the recommendation. "Malabar area" means the Malabar District as defined in S. 5 (2) of the States Reorganisation Act."

22. As recommendation No. 5, the Kumara Pillai Commission recommended that only those residing in the Malabar area for three years prior to the date of application or candidates who have been educated for the qualifying examinations in educational institutions in the Malabar area will be eligible to apply for admission to the seats allotted for that area. Adverting to this recommendation, the Government ordered:

"Only candidates, whose parents (if both parents are dead, the guardian) have resided in the Malabar area or T.C. area, as the case may be for three years within a continuous period of five years immediately preceding 1-11-1956 or who have owned or possessed landed property or house in the respective areas prior to 1-11-1956 or candidates who have been educated for the qualifying examination in educational institutions in the Malabar area or T. C. area, as the case may be, will be eligible to apply for admission to the seats allotted for the respective area. This will apply to the Medical, Engineering (including Polytechnics), Agricultural and Veterinary Colleges. All applicants shall produce the necessary certificate of "residence" or "ownership or possession of landed property or house" from a revenue officer not below the rank of a Taluk Tahsildar and the certificate of "region of education" from the head of the educational institution concerned, Malabar area means the Malabar district as defined in S. 5 (2) of the State Reorganisation Act."

It is this scheme of reservation that was subjected to attack in the two writ petitions which were allowed by the learned Judge, who held that the reservation was unconstitutional.

23. The reservation for the geographical area of the Malabar District has a history behind it. It is enough to notice the decision in Joseph Thomas v. State of Kerala (1957 Ker LT 971): (AIR 1958 Ker 33), which has succinctly explained the principle and the basis of the reservation. A Division Bench of this Court while repelling the attack made against the Government order providing for such reservation, stated:

"It is wellknown that Malabar is educationally more backward than Travancore-Cochin and whatever be the reason for the backwardness — the indifference

of the Government of Madras or the smaller scale of Christian Missionary enterprise — there can be no doubt that a great leeway has to be made up before parity is established and identity of treatment will not work out in injustice. On the basis of population also the distribution is sustainable, the population of Malabar being 5169373 and that of Travancore-Cochin, 8396572." (para. 10)

The above decision thus makes it clear that the reservation was in favour of a well-defined geographical area of the State, and it was based on either of two historical reasons, first, the apathy and the continued neglect of the Malabar district by the British Government under whose administration it remained so long as it was part of the Madras State, viz. till 1-11-1956; or second, the lesser degree of Christian Missionary enterprise in the cause of education in the Malabar area. We regret to observe that this clear formulation of the principle and basis of the reservation was completely lost sight of by the petitioners in the two writ petitions which have given rise to these appeals. In O. P. No. 3867 of 1977 (Ker), the reservation is attacked as one on the ground of place of birth, and as opposed to Art. 15 (4) of the Constitution — vide para 8. Paragraph 9 again, attacks the reservation as unsustainable on the ground of social and educational backwardness and as offending Art. 15 of the Constitution. Paragraph 10 sings the same strain of absence of social and educational backwardness in what has been described as "citizens residing in the Malabar area"; and proceeds to add the general allegation:

"Prior to the re-organisation of States in 1956 if there was any social or educational backwardness in the Malabar area, it is submitted that that has been tapered off and now there exist no circumstances to classify the citizens in that area socially or educationally backward when compared with the citizens of Travancore-Cochin area of the State. The reservation, therefore, on the basis of areas is unconstitutional, void and violative of Art. 15 of the Constitution." (para. 10)

In para 13 after referring to the reservation in favour of the Malabar area and the mark-lists supplied to some of the candidates, there is again a bare allegation that if these two factors were taken into account in making the selection, the petitioners' fundamental rights under Arts. 14 and 15 of the Constitution would be infringed. This is how Art. 14 has been brought into the picture. We think the allegations travel very far from the real basis of the principle of reservation for the Malabar area of this State as expounded by the Division Bench ruling referred to supra. The allegations in the writ petition which have given rise to the other appeal, are no better. On the fourth and final day of the arguments before us, an application for amendment — C. M. P. No. 2157 of 1978 was moved in W. A. No. 312 of 1977 alleging additional facts and grounds attacking the reservation. We rejected the petition, but did not preclude the writ petitioners/respondents from urging any of their contentions. It was argued for the writ-petitioner that the allegation in paragraph 10 of the petition which we have extracted, about the need for reservation for the Malabar area having tapered off, has not been specifically denied in the counter-affidavit. We have made our comment on the allegation. The Government's counter-affidavit has referred to the prior decision of this Court, to the Kumara Pillai Commission Report, and to the Government Order accepting the same; from which, it is clear that the petitioner's allegations have not been accepted.

24. We think it necessary also to refer to the decision in Joshi v. M. B. State (AIR 1955 SC 334), where it was emphasised by the Supreme Court that citizenship and domicile represented two different conceptions. The Court there sustained the exemption of Madhya Bharat students from payment of capitation fee for admission to the Medical Colleges as a reasonable classification based on considerations of residence or domicile, and not on place of birth, and therefore not violative of Art. 15 (1) of the Constitution. The Court stated:

"But that apart, what has to be noted is that whether the expresssion used in "domicile of origin" or "domicile of birth", the concept involved in it is something different from what the words "place of birth" signify. And if "domicile of birth" and "place of birth" cannot be taken as synonymous, then the prohibition enacted in Art. 15 (1) against discrimination based on place of birth cannot apply to a discrimination based on domicile." (para. 6)

25. In State of Kerala v. Jacob Mathew (1964 Ker LT 298): (AIR 1964 Ker 316), the scheme of reservations for

admission to the Medical Colleges in this State again came up for judicial review. A learned Judge, in the first instance, had quashed the scheme of reservations vide Jacob Mathew v. State of Kerala (AIR 1964 Ker 39). On appeal, a Division Bench sustained the reservation in favour of Muslims, Ezhavas and Latin Catholics on the ground that they constituted socially and educationally backward classes of citizens. In the course of the judgment, the Division Bench stated:

"20. We must, however, point out that the paucity of up-to-date data has been a source of considerable worry. It is impossible to say that our conclusion has not been influenced, to some extent at any rate, by our own experience of life and work in this State.

21. An enduring conclusion, however, should not be based on data that is not absolutely up-to-date or on judicial experience which such data may disprove or modify. We think it is essential that the State should immediately embark upon a fact finding enquiry into matters that are relevant and frame appropriate orders in the light of that enquiry. We direct the State to do so.

22. It may not be possible to have the enquiry completed before the beginning of the academic year 1964-65. But there is no reason why it should not be completed before the beginning of the academic year 1965-66."

In accordance with the suggestion or direction thus given in the judgment, the State appointed a Commission presided over by Shri C. Kumara Pillai, a Retired Judge of this Court to recommend which sections of the people required special treatment under Art. 15 (4) having regard to their present social and educational conditions. The Commission was to enquire into the social and educational conditions of the people and report on what sections of people in the State of Kerala (Other than Scheduled Castes and Scheduled Tribes) should be treated as socially and educationally backward and therefore deserving of special treatment by way of reservation of seats in educational institutions. We have set out earlier, recommendations 4 and 5 of the Commission and the Government orders thereon. These deal with the reservations in favour of the geographical area of the Malabar District. The Commission found that the Malabar area was educationally backward and recommended that the principle of allocation of seats between Malabar and Travancore-Cochin area on the basis of population be continued for some more years (page 74). In its final form, the recommendation made was that the allocation be allowed for a period of 10 years (see page 76). The G. O. (P) 208/66 dt. 2-5-1966 noticed in the opening paragraph of the judgment in these two appeals was passed in pursuance of the recommendations of the Commission. The complaint made by the petitioners is that the period of 10 years for which the reservation was made in favour of the Malabar area has expired on 2-5-1976; and thereafter, without any data or materials, or consideration and assessment, the Government have merely, by two executive orders, directed that the reservation in favour of the Malabar area be continued. The learned Judge observed:

"8. The object of reservation under Art. 15 (4) or a classification giving preferential treatment to a particular class is to protect the interest of the specific section in whose favour the special provision is made. By its very nature it could not be perennial. The provisions enabling the weaker section to obtain preferential treatment are intended to bring them to a par with other classes. Therefore such provisions have necessarily to be transitory. Consequently there must be a take off stage, when, by reason of the protection given, the community, class or section reaches the normal level. Essentially therefore a decision reached as to the educational backwardness of a class of people is bound to be reviewed from time to time with a view to assess the position of such class or section after they had obtained the benefit of protection of the special provision for a reasonable period. In the absence of such review it is possible that continuance of such special provision to benefit them would be conferring a privilege or a benefit to the detriment of the rest. This is sufficient to underline the absolute need for a periodical review without which there will be no justification to maintain status quo in regard to the provisions of reservation and other beneficial treatment. I am particularly referring to reservation only in this context because that alone is relevant for the purpose of this case though promotion of educationally weaker sections conceives of many benefits other than reservation of seats.

9. Educational backwardness of the people of the Malabar area — I am using this term to denote those of the Malabar area whom the rule of allocation or reservation benefits — was assessed by the Kumara Pillai Commission in 1965 based on statistics made available to the Commission then. Recommendation of the Commission was that the rule of allocation based upon its recommendation should be applied for a period of 10 years. Evidently it was conceived by the Commission that in the normal course the Malabar area will reach the take-off stage in a period of 10 years from then. Government also has accepted this view by specifying the benefit of allocation of 20 per cent of seats as for a period of 10 years. Without anything more one may assume that on the expiry of a period of 10 years if nothing further was shown the special provision for reservation must come to an end. The Government could well anticipate that the period of 10 years envisaged in its order accepting the report of the Kumara Pillai Commission with modifications would expire before the commencement of the academic year 1976-77. Prudence should have dictated the need for devising some machinery for assessing the situation again unless it be that the Government was convinced that as conceived by the Kumara Pillai Commission the period of 10 years was sufficient to bring the Malabar area in line with Travancore-Cochin area. If that view was not taken by the Government the one and only course available to the Government was to take proper steps to study the problem again possibly by the appointment of a fresh commission unless it be that some other equally efficacious process was known to it. Having heard counsel for the State I could say without fear of contradiction that absolutely nothing was done excepting to extend the period for one more year for the academic year 1976-77 by an executive order of the Government and again a further year by another similar executive order of the Government passed in May 1977. It is strange that Government should assume that the matter is one where Government could pass an order extending the period of special treatment. To so extend is not an exercise depending on the volition of the Government. Existence of circumstances justifying such action alone could warrant such action. Such circumstances are not indicated by any material in the files. The background of the order for the current year as reflected in the files were made available to me for perusal. But I find therein nothing but a mechanical decision to extend the special provision in regard to allocation of seats between Malabar and Travancore-Cochin as if it is a matter of course. If by reason of a classification the special treatment has been extended to Malabar area and there is no material to justify such special treatment as indicated here this Court is constrained to state that such special treatment would be discriminatory and illegal. If candidates who, on the basis of their merit as reflected by the marks are entitled to admission do not get admission only because of the application of a rule which is not supportable on the basis of reasonable classification it is the duty of this Court to declare any such rule as invalid. It is not contended that it is by any statutory rule that the provision for allocation of seats between Malabar and Travancore-Cochin areas has been extended for the current year. Evidently it is not. It is merely an executive order. Therefore, there is nothing barring this court from striking down that order if it is discriminatory."

The learned Judge allowed the two Original Petitions which have given rise to these appeals and directed that the petitioners therein are entitled to admission to the Medical Colleges and shall be admitted forthwith. The writ-petitioner/respondent in W. A. No. 312 of 1977 has secured 401 marks in subjects. The writ-petitioner-Respondent in the other Writ Appeal has secured 401 marks.

26. We notice that the discussion by the learned Judge in the Judgment has also proceeded on the basis of Art. 15 which is not the real basis or principle underlying the reservation for the geographical area of the Malabar district. That a geographical classification based on historical reasons is permissible under Art. 14, has been well-recognised by judicial decisions. A geographical or territorial reservation even unrelated to historical reasons has also been sustained. The learned Advocate-General cited to us the decisions in Kumari Chitra Ghosh v. Union of India (AIR 1970 SC 35 — paras. 6 to 8), Khandige Sham Bhat v. Agricultural Income-tax Officer, Kasaragod (AIR 1963 SC 591), Gopal Narain v. State of Uttar Pradesh (AIR 1964 SC 370) and Kishan Singh v. State of Rajasthan (AIR

1955 SC 795, 797) as cases where reservations on a territorial basis, were, for various reasons, and for different purposes, upheld as not violative of Art. 14. He also cited the decision in O. M. Chanchala v. State of Mysore (AIR 1971 SC 1762 — para 43) where a reservation in favour of a politically backward class was upheld under Art. 14 although it could not fall within the purview of Art. 15 (4). The principle of the decision was commended to us to show that Art. 15 (4) is not the sole repository of effecting reservations for purposes of admission to educational institutions; and that, a reasonable classification having relation to the object of maintaining the excellence of educational standards, and attracting variegated and best talents in the educational institutions, has been upheld as not violating Art. 14. The principle of these decisions supports the contentions of the learned Advocate-General. We are of the opinion that, on principle, the reservation of seats in favour of the geographical area of the Malabar district, especially for the reasons explained by the Division Bench of this Court in State of Kerala v. Jacob Mathew (1964 Ker LT 298): (AIR 1964 Ker 316) is valid and must be sustained.

27. We cannot accept the contention of the respondents/writ petitioners or the finding of the learned Judge, that the recommendations of the Kumara Pillai Commission and the acceptance of the said report by the Government were to last only for a period of 10 years, and that after the lapse of the said period, there was no continuing justification for extending the benefit of the reservation without independent reflection and assessment. The learned Advocate-General made available to us the relevant file to show that the question of appointing a fresh Commission to go into the question of reservations was considered and decided upon by the Cabinet of Ministers and the maintenance of status quo was ordered in view of the unavoidable delay in the appointment of the Commission and the submission of its report. In the light of the material disclosed, we are not prepared to say that there was no advertence of the mind of the Government at all to the question. That apart, in considering the question of the educational backwardness of a particular class of people, or a particular tract of territory of this State, we cannot forget that the evolution of human society and its march from backwardness to progress must essentially be a slow and gradual process. It is not as if, by a Governmental or executive fiat, a class of people or a bit of territory has been condemned to backwardness, and with the lifting of the ban by efflux of time or otherwise, they automatically spring back into a progressive or forward class of people or tract. It is useful to recall the observations made by this Court in State of Kerala v. Jacob Mathew (1964 Ker LT 298): (AIR 1964 Ker 316) at para 9:

"9. In these regions of human life and values the clear-cut distinctions of cause and effect merge into each other. Social backwardness contributes to educational backwardness; educational backwardness perpetuates social backwardness; and both are often no more than the inevitable corollaries of the extremes of poverty and the deadening weight of custom and tradition."

A contention was mooted in that case that there was no longer any justification for regarding Ezhavas as socially and educationally backward in view of the Travancore Temple Entry Proclamation of 1112 M.E., the Cochin Temple Entry Proclamation of 1123 M.E., the Madras Temple Entry Authorisation Act of 1947, and Art. 17 of the Constitution, all of which have bettered the status and altered the ancient character of the Ezhava community, so as to disentitle them any longer to be regarded as backward. In repelling the contention, the Division Bench observed (at p. 318 of AIR):

"It is true that at certain times, and in certain countries, society has given the lead to law. In India, however, it has been the other way about. In his introduction to "Some Aspects of Indian Law Today" Mr. M. C. Chagla says:

"It is true that at certain times society has given the lead to law; but in India at least it is the other way about. Law has given the lead to society, and law has placed before society ideals and values to which people should conform."

13. Conformity in such cases does not synchronise with the promulgation of statutory enactments or constitutional documents. Time has to play its part, and time alone transmutes the ideals of the law into the realities of everyday life. No one can say that the introduction of progressive measures is the end, and not the beginning, of a process of amelioration. Habits of thought die hard

and slow, and occupations like toddy tapping carry their social stigma from one generation to another and through decades of conduct and behaviour."

We are accordingly of the opinion that there was no justification for the learned Judge to hold that the reservation of seats in favour of the Malabar area of this State for admission to the Medical Colleges cannot stand scrutiny under Art. 14 of the Constitution. We would point out that the writ-petitioners — and we venture to think, the learned Judge himself — seem to ignore that on the reasoning that the reservation cannot be continued after the expiry of ten years (from 1966), without independent review, the entire scheme of reservations including that in favour of the socially and educationally backward classes, will have to fail, as these were also ordered to be made by the same G. O. for the identical period of ten years alone, and on the basis of the same assessment — or lack of it — thereafter.

28. For the writ-petitioners/respondents it was strongly contended that the Government orders on recommendation No. 5 of the Kumara Pillai Commission for implementing the reservation in favour of the geographical area of Malabar had no relation or nexus to residence in the Malabar area and was meant to defeat the very purpose of the reservation. We think there is no substance in this contention. The three tests accepted by the Government after considering recommendation No. 5 of the Kumara Pillai Commission, namely, (1) residence of the parents or guardian in the area for three years within five years before 1-11-1956; (2) ownership or possession of landed property or house in the area prior to 1-11-1956; or (3) education in the qualifying examination in the educational institutions of the area, are related to the object sought to be achieved, of providing guidelines for admission on considerations of residence, or nexus with the area or territory involved. It is well settled that the mere possibility of abuse is not a ground for striking down a provision as discriminatory, although it may well provide an occasion for relieving against individual cases of abuse (vide Pannalal Binjraj v. Union of India (AIR 1957 SC 397)).

29. We allow these appeals and set aside the judgment of the learned Judge and direct that the two writ petitions, O. P. Nos. 3867 of 1977 and 4203 of 1977 (Ker) shall stand dismissed. We make no order as to costs. We consider it essential that the Government should form an enduring conclusion in regard to the continuance of the existing scheme of reservations in this State in regard to the admissions to educational institutions, by immediately embarking upon a fact-finding enquiry. Following the course adopted by this Court in Jacob Mathew's case (1964 Ker LT 298): (AIR 1964 Ker 316), we direct the State to do so.

30. Regarding the admission of the writ-petitioners/respondents, directed by the learned Judge, we only wish to state that as the appeals have been allowed and the direction issued by the learned Judge has been vacated, the respondents in these appeals would not be entitled to admission on the strength only of the directions issued by the learned Judge. Whether they are entitled to admission or to retain the seats if already offered to them, de hors the said direction, is not for us to say.

W. A. No. 317 of 1977

31. This appeal is by the 3rd respondent in O. P. No. 3867 of 1977 (Ker) against which the State has filed W. A. No. 312 of 1977. The appellant got 396 marks in the special subjects and got admission in the Medical College in the Malabar quota. He got the last among the 11 seats reserved for the Malabar area. The learned Judge directed the admission of the writ petitioner/respondent, as a result of which, the appellant herein stands in danger of being displaced.

32. For reasons stated while dealing with W. A. No. 312 of 1977, we hold that the reservation of seats in the Medical Colleges for the geographical area of the Malabar District, is valid and constitutional. We accordingly allow this appeal and direct that O. P. No. 3867 of 1977 (Ker) will stand dismissed. There will be no order as to costs. The petitions for stay and direction are dismissed.

Order accordingly.

AIR 1978 KERALA 195
= 1978 TAX. L. R. 2163

FULL BENCH

V. P. GOPALAN NAMBIYAR, C. J., V. BALAKRISHNA ERADI V. KHALID, K. K. NARENDRAN AND G. BALAGANGADHARAN NAIR, JJ.

K. P. Govindan and others, Appellants v. State of Kerala and others, Respondents.

W. A. Nos. 354, 365, 368, 370, 412, 413, 419, 420, 422, 449, 470, 472, 473, 477, 478, 499, 502, 507 to 510, 532 to 535 of 1976, 5, 11, 20, 21, 23, 69, 117, 123, 124 of 1977 and O. P. Nos. 3330 5241 and 3966 of 1975 and 4597 of 1976, D/- 30-3-1978.

(A) Kerala General Sales Tax Act (15 of 1963) (as amended by Act 22 of 1974), Sch. I, Serial No. 72 — Amendment imposing tax on 'tapioca' is not violative of Art. 304 (a) — (Constitution of India, Art. 304 (a)). AIR 1963 SC 928, Disting. (Para 3)

Anno: AIR Comm. Const. of India (2nd Edn.), Art. 304, N. 3.

(B) Kerala General Sales Tax Act (15 of 1963) (as amended by Act 22 of 1974), Sch. 1, Serial No. 72 — Amendment is not violative of Art. 301 or Art. 304 (b) — (Constitution of India, Arts. 301, 304 (b)).

The amendment transferring item "tapioca" to Sch. 1 from Sch. 3 and thus subjecting it to tax by withdrawing exemption is not violative of Article 301 or Art. 304 (b). (Case law discussed). (Para 6)

Violation of Art. 304 (b) can arise only if there are any restrictions on the freedom of trade under Art. 301. A violation of Art. 301 is involved only if the impugned law directly and immediately affects the movement part of the trade. As the persons complaining of violation of Art. 301 and Art. 304 (2) on account of imposition of tax on 'tapioca' by the amendment have not, besides stating that the demand from or supply of "tapioca" to certain outside State centres had considerably decreased, placed any record or material showing details and particulars of despatch of quantities or consignments of "tapioca" to demonstrate that as a result of the amendments the movement part of the trade had been directly and immediately affected in consequence of the amendment, it cannot be said that the amendment is violative of Art. 301 or Art. 304 (b). (Para 6)

Anno: AIR Comm. Const. of India, Art. 301, N. 5; Art. 304, N. 4.

(C) Kerala General Sales Tax Act (15 of 1963) (as amended by Act 22 of 1974), Sch. 1, Serial No. 72 — Amendment imposing tax on "tapioca" is not violative of Art. 14 — (Constitution of India, Art. 14).

The withdrawal of exemption for tapioca and its subjection to tax under Sch. I, does not violate Art. 14. The power of exemption from tax in respect of commodities, and the withdrawal of the exemption, are alike powers to be exercised by the Government with due regard to revenue raising purposes. (Para 7)

Anno: AIR Comm. Const. of India (2nd Edn.), Art. 14, N. 42.

Cases Referred: Chronological Paras

1977 Tax LR 1650 : AIR 1977 SC 548 — 4
1976 Tax LR 1293 : AIR 1976 SC 182 — 3
1975 Tax LR 107 : 1974 Ker LT 876 : AIR 1975 SC 152 — 2
1975 Tax LR 1361 : AIR 1975 SC 583 — 4
1974 Tax LR 1995 : AIR 1974 SC 1505 — 5
1972 Tax LR 2606 : 1971 Ker LT 910 — 2
1971 Tax LR 512 : 1971 Ker LJ 4 — 3
AIR 1970 SC 1912 — 3
AIR 1969 SC 147 — 4
AIR 1966 SC 1686 — 3
AIR 1964 SC 925 — 2
AIR 1964 SC 1006 — 3
AIR 1963 SC 928 — 3, 4
AIR 1962 SC 1406 — 2, 4
AIR 1961 SC 232 — 2

In W. A. No. 354 of 1976 etc. K. Sukumaran, K. P. Dandapani and Sumathi Dandapani, for Appellants; Advocate-General and Govt. Pleader, for Respondents. In the other W. As. and O. Ps. Nos. Advs. M/s. T. L. Ananthasivan, K. Prabhakaran, P. K. Jose, K. Mohammed Naha, P. T. Augustine A. K. Sreenivasan, N. R. K. Nair, T. K. M. Unnithan and K. P. Alikunju.

GOPALAN NAMBIYAR, C. J.:— The removal of "Tapioca" from item 10 of the III Sch. of the Kerala

General Sales Tax Act, 1963, by Act 22 of 1974 (with effect from 1-7-1974) and its insertion as a specific item in entry No. 72 of Sch. I by the same Act have been challenged in these cases as violative of Arts. 301 and 14 of the Constitution. Section 5 of the Act is the charging section, which imposes the tax at the rates and only at the points specified, against the goods enumerated in the First or the Second Schedules; and in the case of other goods, at the rate of 4% at all points of sale. (We leave out as unnecessary the minimum limits of turnover subject to which the tax has been imposed). Section 9 of the Act grants exemption to a dealer who deals in the goods specified in the III Sch. to the Act, from payment of tax in respect of the sale and purchase of such goods. Till 1974, item 10 of the III Sch. read:

"10. Vegetables (other than green ginger), whether roots, green fruits or leaves, used for human consumption including tapioca, yam, potatoes, lime, sabola and tomatoes, except their manufactured products.

Explanation:— The term "vegetables" shall not include any goods of the description specified in the First or Second Schedule."

By the Amending Act of 1974 referred to supra, the word 'Tapioca' was omitted from the inclusive part of the explanation to item 10 of the III Sch. and instead of treating it as an item exempted from taxation under the III Sch. it was lifted into the First Sch. as one of those items to be taxed at the last purchase point in the State at the rate of 2%. The entry reads as follows:

(For entry, see below)

2. There is in force the Kerala Tapioca (Manufacture and Export Control) Order, 1966, on and from 1-7-1966 in the State. From 1-5-1966 an administrative surcharge was levied on Tapioca by Notification G. O. Ms. No. 18/66/Food dated 15-4-1966. The said notification was struck down by this Court as violative of Art. 301 of the Constitution — vide K. P. Govindan v. State of Kerala (1971 Ker LT 910): (1972 Tax LR 2606). The decision was affirmed on appeal by the Supreme Court — vide State of Kerala v. K. P. Govindan (1974 Ker LT 876): (1975 Tax LR 107). It is thereafter that the Kerala General Sales Tax Act was amended in the fashion noticed. Our attention was called to the allegations made in paras. 2 to 14 of O. P. No. 4597 of 1976 regarding the conditions of the tapioca trade and industry. Attention was drawn to the large scale production in the State of tapioca of both the edible and the non-edible varieties, the importance of tapioca as a staple food crop and an important raw material in the starch industry, and the traditional trading centres for tapioca in the Tamil Nadu State for the starch industry in Salem and Dharmapuri. We have given these our careful attention. But we have found them far short of the averments needed to establish a contravention of Art. 301 of the Constitution. We should regard it as firmly and sufficiently well established that in order to violate Article 301 of the Constitution the offending provision of law must directly and immediately affect the movement part of the trade. This, we think, has been well established by the Atiabari Tea Co. Ltd.'s case (AIR 1961 SC 232), Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan (AIR 1962 SC 1406), and the Khyerbari Tea Co. Ltd.'s case (AIR 1964 SC 925) — not to refer to the numerous decisions that have followed in their wake. For the sake of convenience, we might reproduce Article 301 of the Constitution, and also Art. 304:

Sl. No.	Description of the goods	Point of levy	Rate of tax (per cent)
xx	xx	xx	xx
72	Tapioca	At the point of last purchase in the State by a dealer who is liable to tax under section 5.	2

"301. Freedom of trade, commerce and intercourse — Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free."

304. Restrictions on trade, commerce and intercourse among States—

Notwithstanding anything in Art. 301 or Art. 303, the Legislature of a State may by law—

(a) impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and

(b) impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within that State as may be required in the public interest:

Provided that no Bill or amendment for the purposes of Cl. (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President."

It is not contended that the consent of the President has been obtained for the Legislative amendments in question either previous to the amendments or subsequent thereto. The contention of the learned Advocate-General has been plainly and simply that there is no contravention of Art. 301 and therefore no case for any Presidential assent.

3. Counsel for the appellants invited our attention to Firm A. T. B. Mehtab Majid and Co. v. State of Madras (AIR 1963 SC 928) where Rule 16 (2) of the Madras General Sales Tax Rules was struck down as invalid as contravening Art. 301 of the Constitution. Observed the Court (At p. 931):—

"10. It is therefore now well settled that taxing laws can be restrictions on trade, commerce and intercourse, if they hamper the flow of trade and if they are not what can be termed to be compensatory taxes or regulatory measures. Sales tax, of the kind under consideration here, cannot be said to be a measure regulating any trade or a compensatory tax levied for the use of trading facilities. Sales tax, which has the effect of discriminating between goods of one State and goods of another, may affect the free flow of trade and it will then offend against Art. 301 and will be valid only if it comes within the terms of Art. 304 (a)."

It was pointed out that the tax was levied on sale of hides and skins which had been tanned from outside the State from the dealer, who, in the State, is the first seller of the hides or skins. The result was that the dealer in such hides and skins tanned from outside the State had to pay the tax on the amount for which such hides and skins are sold by him. Under the impugned Rules he had also to pay a similar tax in respect of hides and skins tanned within the State, again on the amount for which they are sold. The tax was necessarily different on account of the existence of substantial disparity in the price of raw hides and skins and hides and skins after they had been tanned, despite the rate of tax being the same for both the varieties. Therefore, it was ruled that the impugned rule discriminated against the imported hides and skins purchased from outside the State, and hence contravened Art. 304 (a) of the Constitution. We do not think the decision is of any assistance to counsel for the appellants. There is no case for the appellants or for any of the writ petitioners of any violation of Art. 304 (a). As for Article 304 (b) the same can arise only if there are any restrictions on the freedom of trade under Art. 301. Nor are we able to derive much of assistance from State of Madhya Pradesh v. Bhailal Bhai (AIR 1964 SC 1006) where it was pointed out that the tax payable at the point of sale by the importer in Madhya Bharat directly impeded the freedom of trade and commerce guaranteed by Art. 301 of the Constitution. Reliance was placed on the decision of the Supreme Court in the Kallyani Stores case (AIR 1966 SC 1686); but the ratio of that decision has been explained in the Kerala Luxury Tax on Tobacco Act case — State of Kerala v. A. E. Abdul Kadir (AIR 1970 SC 1912). After remand by the Supreme Court in the above case, the Luxury Tax Act was sustained by a Division Bench of this Court in Abdul Kadir v. State of Kerala (1971

Ker LJ 4): (1972 Tax LR 512). The decision was sustained by the Supreme Court — see Abdul Kadir v. State of Kerala (AIR 1976 SC 182): (1976 Tax LR 1293).

4. Counsel for the appellants drew our attention to the observations of Mathew, J. in G. K. Krishnan v. State of Tamil Nadu (AIR 1975 SC 583): (1975 Tax LR 1361) (at para 27):

"That apart, taxing powers of the Union and States are separate and mutually exclusive. It is rather strange that power to tax given to States, say, for instance, under Entry 54 of List II to pass a law imposing tax on sale of goods should depend upon the goodwill of the Union executive. It is said that a tax on sale does not impede the movement of goods. But Shah, J. said in State of Madras v. Nataraja, (1968) 3 SCR 829: (AIR 1969 SC 147): "that tax under Central Sales-tax on inter-State sale, it must be noticed, is in its essence a tax which encumbers movement of trade and commerce." However, Bachawat, J. in his separate judgment in that case said that Art. 301 makes no distinction between movement from one part of the State to another part of the same State and movement from one State to another, that if a tax on intra-State sale does not offend Article 301, equally, a tax on inter-State sale cannot do so, and that neither tax operates directly or immediately on the free flow of trade or free movement as the tax is on the sale, the movement being incidental or consequential. What is guaranteed by Art. 301 is freedom of trade, commerce and intercourse. Freedom of movement of goods from one place to another is a very important facet of freedom of trade and commerce. That is perhaps the reason why the Court, in the Automobile case (1963) 1 SCR 491: (AIR 1962 SC 1406) restricted the freedom of trade and commerce guaranteed under Art. 301 to the movement part of it. Whether there is any warrant for respecting the concept of freedom of trade and commerce to the movement part of it is a matter upon which we are not called upon to make any pronouncement. A tax on sale of goods might encumber sale and purchase and, to that extent, restricts the freedom of trade and commerce. That apart, as Shah, J. said, if tax on inter-State sale is in essence "a tax which encumbers movement of trade and commerce", a tax on intra-State sale, if it involves movement from one part of the State to another part of the same State, would encumber the movement part of it and is a restriction on the freedom of trade and commerce. Generally speaking, selling and buying involves delivery of the goods sold and bought. If that be so, it would mean that imposition of sales tax by a State on intra-State sale, at any rate, when the sale involves movement of goods will be restriction of trade and commerce and unless the law imposing it has received the previous sanction of the President, the law would be bad as a tax on sales is neither regulatory nor compensatory. If the President were to refuse his consent, the State will be bereft of that source of revenue which the Constitution has expressly given to the State. It is unnecessary to pursue the matter further, as we think the tax imposed by the notification is compensatory in character and could not therefore, restrict the freedom of trade and commerce according to the decision in Automobile case." We find nothing in the above observations to depart from the current of settled authority that a violation of Art. 301 is involved only if the impugned law directly and immediately affects the movement part of the trade as was ruled in three at least of the Supreme Court decisions noticed earlier. We do not think the trend of these rulings has been departed from. The learned Advocate-General invited our attention to the recent decision of the Supreme Court in V. G. Naidu and Sons v. State of T. N. (AIR 1977 SC 548): (1977 Tax LR 1650). In that case, the validity of the levy of Sales Tax on raw hides and skins and on dressed hides and skins again came up for consideration, as an aftermath of A. T. B. Mehtab Majid and Co.'s case (AIR 1963 SC 928). It was pointed out that the Legislature had taken into account the higher price of dressed hides and skins as compared to the price of raw hides and skins; and also taken further note of the fact that no tax under the Act had been paid in respect of those hides and skins. It calculated the price of

hides and skins in the dressed condition to be double that of raw hides and skins; and in order to obviate and to prevent discrimination it prescribed the rate of tax for sale of dressed hides and skins which was one-half of that levied in respect of raw hides and skins. In these circumstances, the attack levelled on the imposition of sales tax on item 7 (b) of the Second Schedule of the Madras General Sales Tax Act, as contravening Art. 304 (a) of the Constitution was repelled.

5. The learned Advocate-General also invited our attention to the decision of the Supreme Court in State of T. N. v. Sitalakshmi Mills (AIR 1974 SC 1505): (1974 Tax LR 1995). But the exposition was more concerned with Art. 302 and Art. 303, than with Article 301.

6. Beyond stating that as a result of the amendments carried out to the Sales Tax Act the trade with Salem and Dharmapuri had fallen, and that the demand from or supply to, these trading centres for the non-edible variety of Tapioca from Kerala had considerably decreased, counsel could place very little record or material to show that the consequence deplored was the result of the amendments complained of. In the course of arguments, attention was called to a letter written by the Railway Authorities to one of the petitioners in the writ petitions enquiring why the despatch of wagon loads of Tapioca had fallen compared to the previous years. What would have been of interest to us is not the eager enquiry of the Railway Authorities, but the reply, if any, of the writ petitioners. This was not even read out. It might have been of interest to know if there was any reply that the consignment of wagon loads had fallen on account of the increased burden of Sales Tax piled on the camel's back. Nor have we even been treated to the accounts of the petitioners in regard to their business or despatch of the quantities or consignments of Tapioca, or other records showing the details and particulars of these, to demonstrate that as a result of the amendments complained of the movement part of the trade had been directly and immediately affected. In the circumstances, we are unable to accept the arguments of counsel that there has been a violation of Art. 301 of the Constitution as a result of the amendments complained of.

7. The challenge based on Art. 14 cut no ice. The only ground urged was that 'tapioca' having been originally shepherded into the inclusive part of the term 'vegetable' in entry 10 of the III Sch. the omission of it alone, from that part, and its transference to Sch. I as item 72, was discriminatory. We are quite unable to agree. The power of exemption from tax in respect of commodities, and the withdrawal of the exemption, are alike powers to be exercised by the Government with due regard to revenue raising purposes. We are unable to hold that the withdrawal of exemption for tapioca and its subjection to tax under Sch. I, violates Art. 14 of the Constitution.

We dismiss these writ appeals and these writ petitions with no orders as to costs.

The petitions for stay and direction are dismissed.

Writ appeals and petitions dismissed.

AIR 1978 KERALA 199

V. P. GOPALAN NAMBIYAR, C. J. AND M. P. MENON, J.

Susan Thomas, Petitioner v. Govt. of Kerala and others, Respondents.

Original Petns. Nos. 4597, 4633 of 1977 and 42 of 1978, D/- 6-4-1978.

Constitution of India, Art. 14 — Geographical discrimination — Admission to educational institutions (including medical colleges) in Kerala State — Reservation of seats in favour of candidates from Malabar area — Reservation is valid and permissible geographical classification. AIR 1978 Ker 176 (FB), Foll; AIR 1958 Ker 33, Ref. (Para 6)

Anno: AIR Comm., Const. of India, (2nd Edn.), Art. 14, N. 15, 34.

Cases Referred: Chronological Paras

AIR 1978 Ker 176 (FB) 1, 6
AIR 1958 Ker 33: 1957 Ker LT 971 4

G. Janardhana Kurup, for Petitioner; Govt. Pleader for the State. K. P. Radhakrishna Menon, for Respondents.

FV/GV/C522/78/VBB

GOPALAN NAMBIYAR, C. J.:— These three writ petitions attack the validity of the reservations in favour of the Malabar area of this State for the purpose of admission to educational institutions, and, with particular reference to these O. Ps., to the medical colleges of the State. The validity of the said provision was recently examined by a Full Bench of five Judges of this Court in W. A. Nos. 309 and 312 of 1977 (reported in AIR 1978 Ker 176) and the reservation in respect of the Malabar area was upheld as a valid and permissible geographical classification based on historical reasons under Art. 14 of the Constitution. It was pointed out in that judgment that the writ petitions which were dealt with in the appeals had wrongly attacked the reservations on the basis of Art. 15 (4) of the Constitution, and that judgment of the learned Judge also appeared to have proceeded on that basis. However, the Full Bench did not preclude the appellants from urging their attack against the reservations with reference to Art. 14 of the Constitution. This the appellants did; and after elaborate arguments ranging for over four days, the appeals were allowed and reservation was upheld.

2. The attempt of the petitioners in the present Original Petitions is to cover the same ground over again. The justification for what was rightly characterised by my learned brother as an "audacious attempt", is that in the cases disposed of by the Full Bench previously, Art. 14 had not been expressly pleaded and therefore the appellants had no occasion to place the relevant materials for directing their attack on the basis of Art. 14. It was stated that in these writ petitions a wealth of material had been placed before the Court.

3. We are satisfied that there is absolutely no justification for this contention. However, as in the previous appeals dealt with by the Full Bench, where we dealt with the grounds of attack raised by the writ petitioners on their merits irrespective of the pleadings in these writ petitions too, we have examined the so-called additional material placed before us by the writ petitioners. We are satisfied that it is wholly insufficient.

4. It is a permissible irony that while in the previous cases before the five [redacted] it was not, and the deficiency is made good now by pleading as well as material. The fact is that on the earlier occasion we permitted arguments on Art. 14, despite deficient pleading — or even the lack of pleading — and the arguments ranged for four days. In effect, what is now urged by the writ petitioners is that since the pronouncement of the Division Bench of this Court in Joseph Thomas v. State of Kerala, 1957 Ker LT 971 : (AIR 1958 Ker 33), considerable leeway has been made to establish parity in the educational sphere between the Malabar and Travancore-Cochin areas, and disparity between the two areas had been bridged. The statistics and the figures supplied by the petitioners in their affidavits which were read out to us in extenso do not justify this contention. On the other hand, they show that there still exists an appreciable gap in the percentage of literacy as between the Travancore-Cochin area and the Malabar area. We are not satisfied, and it has not been established, that the mere reference to the functioning of certain social and educational institutions in the Malabar area (such as the Muslim Educational Society, the Nair Service Society and the Sree Narayana Dharma Paripalana Sangham) in greater volume and measure than what prevailed before, makes any difference to the situation. Attention was called to the Nettur Damodaran Commission Report. For more reasons than one we find the Report unhelpful. This Report has not yet been accepted by the Government. Besides the scope of investigation of that Commission was limited. It was not concerned with the question of reservations to be made in the matter of admissions to educational institutions.

5. In their affidavits the petitioners purport to give statistics as to the percentage of literacy in Malabar, how it has progressed since the re-organisation of States, and how it stands higher than the percentage of literacy in most of the other States in this country. But strangely enough, the petitioners did not choose to give the percentage of literacy in the Travancore-Cochin area of the State, but have left it for a process of arithematical inference by disclosing the percentage of literacy in the State (60.42), and the percentage of literacy in Malabar (52.45).

6. In the result, we are satisfied that no additional material has been placed [redacted]

basis of Art. 14 of the Constitution. The so-called additional material does not warrant any different conclusion. Following the Full Bench ruling in W. A. Nos. 309 and 312 of 1977 (reported in AIR 1978 Ker 176), we dismiss these original petitions with no order as to costs.

Petitions dismissed.

AIR 1978 KERALA 201
FULL BENCH

V. P. GOPALAN NAMBIYAR, C. J.,
P. SUBRAMONIAN POTI AND
KUMARI P. JANAKI AMMA, JJ.

Mohammad Khan, Appellant v. State Bank of Travancore, Respondent.

M. F. A. No. 53 of 1977, D/- 1-1-1978.

(A) Kerala Agriculturists' Debt Relief Act (11 of 1970), S. 8 — Order refusing to amend decree during execution proceedings — Not appealable — (Civil P. C. (1908), S. 2 (2) — "Decree" meaning — Effect of amendment by Act (104 of 1976)).

It is true that if an adjudication by a court satisfies the definition of a decree in S. 2 (2) of the Civil P. C. and an appeal is provided for against a decree of such court under the Civil P. C. an appeal would lie against such a decision even if there is no specific provision made in that behalf in the relevant statute. (Para 5)

The Kerala Agriculturists' Debt Relief Act 11 of 1970 does not provide for an appeal against an order under S. 8 though S. 21 enumerates the orders under some other sections of the Act as appealable. An order refusing to amend the decree during the execution proceedings would have been appealable as a decree when the definition of "decree" was wide enough to include an order under S. 47, C. P. C. The express omission of orders under S. 47 of the Civil P. C. from the definition of decree in S. 2 (2) has rendered orders under S. 47 not appealable since the commencement of the Code of Civil Procedure Amendment Act 104 of 1976. The order impugned in the present case having been passed subsequent to such amendment no appeal would lie against it. (Para 7)

Anno: AIR Comm., C. P. C. (1908) (9th Edn.), S. 2 (2), N. 1.

GV/GV/C597/78/GDR

(B) Kerala Agriculturists' Debt Relief Act (11 of 1970), S. 2 (4) (a) Proviso — Debt — Execution of debt under Cl. (a) — Scope — Any sum payable to a subsidiary Bank whose right to recover arose because of take-over of assets of a Banking Company after 1-7-1957 is not excluded.

Any sum payable to a subsidiary Bank would not be taken in by the definition of debt provided it does not fall within Cl. (A) or (B) of the proviso. If it falls within either of these clauses even if it is a sum due to a subsidiary Bank it it would be a debt. Clause (A) of the proviso concerns any assignment made and Cl. (B) to any transfer effected by operation of law, subsequent to the first day of July, 1957. Where the right of a subsidiary Bank to recover the sum arose because of the take-over of the assets of a Banking Company subsequent to 1st July, 1957, the sums due to a subsidiary Bank thereunder would not be excluded from the scope of "debt" and the debtors would be entitled to claim the benefit of the Act. (Para 10)

(C) Kerala Agriculturists' Debt Relief Act 11 of 1970), S. 2 (4) (l) — Exclusion of debts due to Banking Company — Debt which was at one point of time due to a Banking Company but no longer due to such company on the date of commencement of Act — Cannot be excluded. 1968 Ker LT 973, Overruled.

The Kerala Agriculturists' Debt Relief Act 11 of 1970, just as its predecessor, is a measure intended to relieve agriculturist debtors from the rigour of enforcement of their debts. Provisions are made in the Act for reducing the interest of the debt recoverable by the creditors and also for repayment of the debt over a long period of time. Though normally one should assume that such benefit must be extended to all debtors irrespective of the question who the creditors are that may work hardship in some instances. Therefore in the larger interests of the economy of the country amounts due to Banking companies are excluded from the operation of the Act except to the extent that the debtor could take advantage of the payment in instalments. Even here it is only a debt exceeding Rs. 3,000/- borrowed under a single transaction that is excluded. Smaller amounts borrowed by debtors who belong to the poorer classes are still within the purview of "debt" in the Act. (Para 12)

Thus, the benefit of the provisions of the Act is not intended to be denied to a

debtor unless it be that in the process of scaling down it is the Banking company which will be affected. Merely because the debt was due to a banking company at one point of time but such Banking Company was no longer the creditor on the date of commencement of the Act the provision as to scaling down would not be affected. Therefore the exclusion by S. 2 (4) (l) is of any debt due to any Banking company at the time the Act commenced its operation. The creditor should possess the status postulated of him in the clause at the commencement of the Act. The mere fact that the debt was due to a Banking company some point of time prior to the commencement of the Act is not sufficient to apply Section 2 (4) (l). (Paras 12, 16)

Similarly it cannot be said that even if the debt was due to a Banking company at the commencement of the Act such debt would not fall within S. 2 (4) (l) of the Act if the debt was not one borrowed from a Banking Company. 1968 Ker LT 973, Overruled; 1966 Ker LT 253 and the decision in C. R. P. No. 940 of 1963 (Ker), Followed. (Para 15)

Cases Referred: Chronological Paras

AIR 1968 Ker 3 : 1967 Ker LT 416 (FB) 14
1968 Ker LT 973 14, 15
1966 Ker LT 253 13
1965 Ker LT 674 4
(1963) C. R. P. No. 940 of 1963 (Ker) 13
AIR 1953 Trav-Co 591 : 1953 Ker LT 883 4
AIR 1948 PC 12 4, 6

T. P. Varghese, for Appellant; K. C. John, for Respondent.

SUBRAMONIAN POTI, J.:— This appeal was referred by a Division Bench of this court to the Full Bench since two important questions arise for decision in this appeal and the Division Bench considered that it was desirable that the matter be examined and pronounced upon by a larger Bench.

2. When the State Bank of Travancore, a subsidiary Bank within the meaning of Cl. (k) of S. 2 of the State Bank of India (Subsidiary Banks) Act, 1959 took out execution of the decree in O. S. No. 28 of 1963 in the Sub Court of Kottayam as decree-holder the judgment-debtor filed a petition under S. 8 of the Kerala Agriculturists' Debt Relief Act 11 of 1970 seeking amendment of the decree in terms of the provisions of the said Act. The judgment-debtor claimed to be an agriculturist entitled to the benefit of the provisions of the Act relating to the scaling down of the debt. The subordinate Judge assumed that the petitioner was an agriculturist. He found that the decree-holder State Bank of Travancore was a Banking Company. Since any debt exceeding three thousand rupees borrowed under a single transaction and due before the commencement of Act 11 of 1970 to any banking company was excluded from the definition of the term 'debt' under S. 2 (4) (l) of the Act, but the proviso to S. 2 (4) (l) enabled such a debt to be repaid in 8 equal half yearly instalments, the learned Judge found that the judgment-debtor was entitled only to that benefit. He was found not entitled to the benefit of S. 5 of the Act relating to the restriction on interest payable under the provisions of the Act. The learned Judge found that no question of scaling down arose and consequently he dismissed the petition by the judgment-debtor. That is the order challenged in the appeal to this Court.

3. Whether an appeal would lie against such an order was one of the two questions urged in the case. Section 21 of the Kerala Agriculturists' Debt Relief Act 11 of 1970 is the provision concerning appeals. That section provides that an appeal shall lie against any order passed under sub-sec. (i) of S. 7 or S. 9 or S. 11 or S. 13 or S. 14 or S. 16 or S. 20 to the court to which appeals ordinarily lie from the decisions of the court which has passed the order. An order under S. 8 is not one of the orders against which an appeal is provided for under S. 21. Whether, nevertheless, an appeal could be taken against such an order is the question. The second contention arose out of the plea by the appellant that it was wrong to treat the State Bank of Travancore as a Company. The finding of the court below that it is a Banking company is said to be incorrect. If that be the case, it is said, S. 2 (4) (l) would not apply and the decree-debt would not be a debt excluded from the definition of the term 'debt' in S. 2 (4). The Act must, therefore, operate to enable the petitioner to seek scaling down of the debt in the execution proceedings.

4. Let us first examine the question whether this appeal is maintainable. Velu Pillai J., in Varkey Mathew v. Velayudhan Pillai (1965 Ker LT 674) held that an order refusing to amend a decree under corresponding provision in S. 7 of the Kerala Agriculturists' Debt Relief Act 31 of 1958 was appealable under S. 96

of the Civil P. C. since the order amounted to a decree. In reaching this decision the learned Judge purported to follow the dictum of the Privy Council in Adaikappa Chettiar v. Chandrasekhara Thevar (AIR 1948 PC 12). A Full Bench of the Travancore-Cochin High Court had occasion to consider a similar question in Itty Sankaran v. Ittiyathi Kochukutty (1953 Ker LT 883) : (AIR 1953 Trav-Co 591). The question arose in connection with a right of appeal against an order under S. 16 of the Travancore Debt Relief Act 2 of 1116. That was a provision enabling a debtor who was unable to pay his debts to seek settlement of his debts in the manner provided in the section. There was no provision in that Act for an appeal against an order under S. 16 of the Act. After exhaustively examining the authorities on the question the majority of the Full Bench held that the provisions of the Debt Relief Act were self-contained and in the absence of provision for an appeal in the Act in regard to any order no right of appeal could be assumed. On the question whether an appeal would lie because of the nature of the order though reference was made to the following oft-quoted dictum of the Privy Council in Adaikappa Chettiar v. Chandrasekhara Thevar (AIR 1948 PC 12), the order in question was found not to fall within the definition of decree.

"The true rule is that where a legal right is in dispute and the ordinary courts of the country are seized of such dispute the courts are governed by the ordinary rules of procedure applicable thereto and an appeal lies, if authorised by such rules, notwithstanding that the legal right claimed arises under a special statute which does not in terms confer a right of appeal."

5. If an adjudication by a court satisfied the definition of a decree in S. 2 (2) of the Civil P. C. and an appeal is provided for against a decree of such court under Civil P. C. an appeal would lie against such a decision even if there is no specific provision made in that behalf in the relevant statute. The question therefore would be whether the adjudication by the court which is sought to be appealed against satisfies the definition of a decree as the term is defined in S. 2 (2) of the Civil P. C. That definition prior to its amendment by Civil P. C. Amendment Act 104 of 1976 reads thus :

"2 (2) "decree" means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within S. 47 or S. 144, but shall not include :—

(a) any adjudication from which an appeal lies as an appeal from an order; or

(b) any order of dismissal for default.

Explanation.— A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final".

After the amendment the definition reads as follows :

"2 (2) "decree" means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within S. 144, but shall not include—

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) Any order of dismissal for default.

Explanation : A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."

The effect of the amendment is to take away the words "the determination of any question within S. 47" from the scope of the definition of the term 'decree'.

6. In the case before the Privy Council in Adaikappa Chettiar v. Chandrasekhara Thevar (AIR 1948 PC 12) one of the two orders in regard to which appealability was considered was an order of 9th Feb., 1939 not made in execution proceedings, but made in a suit. Referring to this the Privy Council said thus :

"The order of 9th Feb., 1939 was not made in execution proceedings but it was made in a suit and, in their Lordships' opinion, it amounted to the formal expresssion of an adjudication which so far

as regards the court expressing it, conclusively determined the rights of the parties with regard to one of the matters in controversy in the suit, namely, whether the judgment-debtor was an agriculturist and entitled therefore to have his debt discharged or reduced under the Act. In their Lordships' opinion the order was a decree within the meaning of S. 2 (2), Civil P. C., and an appeal lay under S. 96 of the Code."

7. We have already adverted to the fact that the Kerala Agriculturists' Debt Relief Act 11 of 1970 does not provide for an appeal against an order under S. 8 though there is an enumeration of the orders under some other sections of the Act as appealable. There is also the fact that the order challenged in this appeal is not any adjudication in a suit. It is an adjudication in execution proceedings. Such adjudication would have been appealable as a decree when the definition of 'decree' was wide enough to include an order under S. 47. If it had thus been a decree within the meaning of S. 2 (2) we would have been called upon to consider whether notwithstanding the absence of a provision for appeal in the enactment, the order of the court below also should be considered as an appealable order. But the express omission of orders under S. 47 of the Civil P. C. from the definition of decree in S. 2 (2) has rendered orders under S. 47 not appealable since the commencement of the Civil P. C. Amendment Act 104 of 1976. The order impugned in this case was passed subsequent to such amendment. Hence we hold that no appeal would lie against the order of the learned Subordinate Judge.

8. We do not find, as we will presently show, any reason to support the finding of the learned Subordinate Judge that the State Bank of Travancore is a Banking Company. Since we find that there is a case for the appellant on this aspect of the controversy and we feel interests of justice permit of such a course we have acceded to the request of counsel to convert the appeal into a civil revision petition. C. M. P. No. 875 of 1978 filed for this purpose is allowed. The appeal is converted into a civil revision petition and is disposed of as such.

9. The assumption of the learned subordinate Judge that the State Bank of Travancore is a Banking Company is erroneous. Rightly counsel for the respondent made no attempt to sustain the finding. A Banking Company is defined in S. 2 (2) of Act 11 of 1970 as meaning a banking company as defined in the Banking Regulations Act, 1949. The definition of a Banking Company in the Banking Regulation Act reads:

"5 (c) "banking company" means any company which transacts the business of banking in India;

Explanation: Any company which is engaged in the manufacture of goods or carries on any trade and which accepts deposits of money from the public merely for the purpose of financing its business as such manufacturer or trader shall not be deemed to transact the business of banking within the meaning of this clause."

The State Bank of Travancore is not a 'Company' much less a Banking Company. It is a subsidiary bank which has been defined in S. 2 (k) of the State Bank of India (Subsidiary Banks) Act as any 'New Bank'. Section 3 of the said Act defines 'New Banks' as banks enumerated thereunder constituted by the Central Government and one of them is the State Bank of Travancore. Thus the respondent bank is one established by the Central Government in accordance with the State Bank of India (Subsidiary Banks) Act, 1959 and it is not a Company.

10. But according to counsel for the respondent this does not settle the controversy in this case. It is pointed out by counsel Sri K. C. John that what is excluded in S. 2 (4) (1) from the scope of the debt is only "any debt exceeding three thousand rupees borrowed under a single transaction and due before the commencement of this Act to any banking company" and that, though at the commencement of the Act the debt was due to the State Bank of Travancore which was not a banking company, it was at one time due to a Banking Company, the Kottayam Orient Bank whose assets and liabilities were taken over by the State Bank of Travancore and hence the debt was due to a Banking Company some point of time prior to the commencement of the Act. This according to counsel would be sufficient to apply S. 2 (4) (1) and he seeks to sustain the order of the subordinate Judge on this approach. This calls for an examination of the scope of exclusion of debts under S. 2 (4) (a) as well as (1). Section 2 (4) defines 'debt' to mean any liability in cash or kind, whether secured or unsecured, due from or incurred by an agriculturist on or before the commencement of this Act,

whether payable under a contract, or under a decree or order of any court, or otherwise, but excludes items enumerated as (a) to (n). An item so excluded is Item (a):

" "(a) any sum payable to—

(i) the Government of Kerala or the Government of India or the Government of any other State or Union territory or any local authority; or

(i) the Government of Kerala or the State Bank of India or any subsidiary bank within the meaning of Cl. (k) of S. 2 of the State Bank of India (Subsidiary Banks) Act, 1959 or the Travancore Credit Bank (in liquidation) constituted under the Travancore Credit Bank Act, IV of 1113:

Provided that the right of the bank to recover the sum did not arise by reason of:—

(A) any assignment made or

(B) any transfer effected by operation of law, subsequent to the 1st day of July, 1957, or

(iii) a corporation owned or controlled by the Government of Kerala; or the Government of any other State or the Government of India or a Government company as defined in the Companies Act, 1956; or

(iv) the Tea Board constituted under the Tea Act, 1953, or the Coffee Board constituted under the Coffee Act, 1942, or the Rubber Board constituted under the Rubber Act, 1947, or the Cardamom Board constituted under the Cardamom Act, 1964; or

(v) any co-operative society, including a Land Mortgage Bank, registered or deemed to be registered under the Co-operative Societies Act for the time being in force";

and item (l) so excluded is:

"any debt exceeding three thousand rupees borrowed under a single transaction and due before the commencement of this Act to any banking company.

Provided that in the case of any debt exceeding three thousand rupees borrowed under a single transaction and due before the commencement of this Act to any banking company any agriculturist debtor shall be entitled to repay such debt in eight equal half-yearly instalments as provided in sub-sec. (3) of S. 4, but the provisions of S. 5 shall not apply to such debt;"

Therefore any sum payable to the State Bank of Travancore which is a subsidiary Bank would not be taken in by the definition of debt provided it does not fall within Cl. (A) or (B) of the proviso. If it falls within either of these clauses even if it is a sum due to the State Bank of Travancore it would be a debt. Cl. (A) of the proviso concerns any assignment made and cl. (B) to any transfer effected by operation of law, subsequent to the first day of July, 1957. It is by operation of law subsequent to first day of July, 1957 that the right of the State Bank of Travancore to recover the sum arose. That is because of the take-over of the assets of a Banking Company subsequent to 1st July, 1957. In the case of right to recover arising by reason of take-over of the assets and liabilities of other banks subsequent to 1st July, 1957 the sums due to the State Bank of Travancore thereunder would not be excluded from the scope of 'debt'. The debtors would be entitled to claim the benefit of the Act in such cases notwithstanding the fact that the creditor is the State Bank of Travancore. Therefore cl. (a) of S. 4 of the Act does not operate to exclude the debt from the purview of the Act. Even a debt not so excluded may be excluded by the further cls. (b) to (n). If cl. (l) applies the debt in question will be excluded from the definition of the debt under the Act for that reason, though a limited benefit contemplated by the proviso to cl. (l) may be available even in such a case. That is how the question of scope of sub-section 2 (4) (l) becomes relevant in this case.

11. If the words 'any debt due before the commencement of the Act to any Banking Company' in S. 2 (4) (l) refer to any debt which was at one point of time due to a Banking Company but was no longer due to such company on the date of commencement of the Kerala Act 11 of 1970 the respondent succeeds. That according to counsel is the plain meaning of the section. "Before the commencement of this Act," it is said, cannot be read to mean at the commencement of this Act and therefore it is pointed out that to construe this sub-section as referring to a debt due at the commencement of the Act to a Banking Company would be erroneous.

12. The Kerala Agriculturists' Debt Relief Act 11 of 1970, just as its predecessor, is a measure intended to relieve agriculturist debtors from the rigour of enforcement of their debts. Provisions

are made in the Act for reducing the interest of the debt recoverable by the creditors and also for repayment of the debt over a long period of time. Though normally one should assume that such benefit must be extended to all debtors irrespective of the question who the creditors are that may work hardship in some instances. That explains the need for exemption. Exclusion of any debt or debts due to a widow subject to certain conditions and limitations, exclusion of debts which represent the price of goods purchased for the purpose of trade, and exclusion of any liability in respect of wages or remuneration due as salary or otherwise for services rendered are some of the clauses which indicate the purpose behind the exclusion. Similar is the purpose of excluding debts due to Banking Companies. The economy of this country depends to a large extent upon the soundness of our Banking system. Banks, it may be remembered, are dealing with customers' money and reduction of the liability of debtors of Banks would have direct impact upon the soundness of such Banking system. Therefore in the larger interests of the economy of the country amounts due to Banking companies are excluded from the operation of the Act except to the extent that the debtor could take advantage of the payment in instalments. Even here it is only a debt exceeding Rs. 3000/- borrowed under a single transaction that is excluded. Smaller amounts borrowed by debtors who belong to the poorer classes are still within the purview of 'debt' in the Act. We are referring to this to furnish the background for the construction of the term 'debt' due before the commencement of the Act'. It may be that at one time a debt was due to a banking company, but on the date of commencement of the Act and thereafter the creditor is not a Banking company. The right to recover the debt might have passed on to the hands of individuals by assignment made by the company or it may be that the banking company has ceased to exist before the commencement of the Act. Consistent with the purpose could it have been intended that nevertheless such a debt was taken to be a debt liable to be scaled down under the Act? We think not. In the background of the scheme of the Act we feel that the benefit of the provisions of the Act was not intended to be denied to a debtor unless it be that in the process of scaling down it is the Banking company which will be affected. Merely because the debt was due to a banking company at one point of time but such Banking Company was no longer the creditor on the date of commencement of the Act the provision as to scaling down would not be affected. Therefore the exclusion by S. 2 (4) (1) is of any debt due to any Banking company at the time the Act commenced its operation. That appears to us to be the clear meaning of this provision. We find support for this view in earlier decision of this court and we may now advert to it.

13. S. 2 (c) of the Kerala Debt Relief Act 31 of 1958 defined 'debt' and cls. 1 to 11 of S. 2 (c) excluded certain categories from the definition of debt. Cl. 11 of S. 2 (c) exempted any debt exceeding Rs. 1500/- borrowed under a single transaction "and due before the commencement of this Act to any banking company as defined in the Banking Companies Act, 1949." A case arose where a decree-holder though a Banking company at the time the debt was originally incurred ceased to be a Banking company before the commencement of Act 31 of 1958. The question whether the debt was due before the commencement of Act to a Banking company arose for decision in C. R. P. No. 940 of 1963 (Ker). Referring to this Vaidyalingam, J., said thus:

"In my opinion the view expressed by the learned Subordinate Judge that in order to claim exemption the creditor must be able to establish that the amount is due to a banking company on the date of the commencement of the Act, is perfectly justified. Otherwise the position will be very anomalous; because it may be that the debt may have been incurred in favour of a banking company 20 years back and the debt may have been assigned to several persons, and on the date when the Act came into force no debt will be due to the banking company but an individual may be entitled to recover the debt, even in such a case also, if the contention of the petitioner is accepted, inasmuch as the debt originated as a debt due to a banking company 20 years ago, nontheless the individual who becomes entitled to the debt, originally due to the banking company, on the date of the commencement of the Act will be entitled to payment of the amount, not in 17 equal half yearly instalments as provided in S. 4 of the Act, but as per the special instalments provid-

ed for in the proviso to cl. (xi) of S. 2 (c). I am not inclined to accept this contention of the learned counsel for the petitioner."

A similar question arose in the decision in Little Flower Co. Ltd. v. Paulose (1966 Ker LT 253). That was a case where the debt was due to a banking company and the banking company ceased to be such banking company on 24-5-1958, before the commencement of the Kerala Act 31 of 1958. The question was whether cl. 11 of S. 2 (c) would apply. A Division Bench of this court considering this question said thus :—

"Reading the definition of the term "debt" in S. 2 (c) of the Act, and the provisions of the exemption enacted by cl. (xi) thereof, we are of the opinion, that in order to fall within the definition of the term 'debt' it is necessary to show not only that the debt was due from or incurred by an agriculturist before the commencement of the Act, but also that it subsisted on the date of the commencement of the Act. Otherwise no relief can be had under the Act. Even so, we are further of the opinion that in order to attract the exemption provided by cl. (xi) of S. 2 (c) of the Act, it is necessary to show that the creditor had the status postulated of him in the clause at the commencement of the Act. In other words, in the present case, it is necessary to show that the creditor was a Banking Company on the date of the commencement of the Act. As admittedly, the petitioner before us had ceased to be a Banking Company on the date of the commencement of the Act, the exemption provided by S. 2 (c) (xi) of the Act is unavailable."

The decision of Vaidyalingam J., was also noticed by the Division Bench. We respectfully agree with the view taken by Vaidyalingam J., and later by the Division Bench. We are also of the view that the creditor should have the status postulated of him in the clause at the commencement of the Act.

14. Our attention has been drawn by learned counsel for the respondent to a decision of a Division Bench in Ouseph v. Orient Union Bank Ltd., (1968 Ker LT 973) where the Division Bench considered more or less a similar question. We notice from the decision of the Division Bench that the attention of the court was not drawn either to the decision of Vaidyalingam J., or to the decision of the Division Bench which had been reported. There again the question concerned the scope of S. 2 (c) (11) of Act 31 of 1958. In that case a mortgage debt had ripened into a decree and the mortgagee-decree-holder assigned his decree to a Banking company. When the Bank sought to execute the decree the judgment-debtors raised the plea that they were entitled to relief under Act 31 of 1958 and the decree was liable to be scaled down under the provision of the Act. It is evident that that was a case where at its inception the debt was not due to a Banking company but on the date of commencement of the Act, the debt had become due to a Banking company. The court found that notwithstanding the fact that the debt was one due to a Banking company at the commencement of the Act it would not be excluded from the definition of debt in S. 2 (c) (11) because the debt was not one originally borrowed from a Banking company. In reaching this conclusion the Division Bench noticed certain observations of a Full Bench of this Court in Catholic Bank of India Ltd. v. Jacob (1967 Ker LT 416) : (AIR 1968 Ker 3). That was a case where the vires of S. 2 (c) (11) of the Act was challenged on the ground that the provision was discriminatory and was violative of Art. 14 of the Constitution. While repelling that contention the classification was upheld by the Full Bench mainly on the ground that a Banking company in advancing money to a person would not ordinarily take advantage of the borrower's dire need for money and exploit such situation with a view to impose extortionate terms with regard to interest, that an agriculturist who borrows money from a Banking company, especially one who borrows more than Rs. 1500 under a single transaction would be richer than an ordinary agriculturist and the transaction would savour more of a commercial borrowing. In the light of the observations of the Full Bench the Division Bench took the view that unless the debt is that borrowed from a Banking company S. 2 (c) (11) would have no application.

15. It may be noticed that irrespective of the rate of interest agreed to under a contract S. 5 relieves a debtor from the obligation to pay any amount in excess of one half of the principal till the date of commencement of the Act. If any excess amount had been paid or credited towards interest such

amount was to be credited towards the principal and the balance and future interest alone was recoverable. Thus the scheme of S. 5 is not only to reduce the rate of interest where the rate of interest is high but to relieve the debtor from his obligations to pay more than half the principal as interest irrespective of the rate of interest. It is therefore evident that the Act is really an ameliorative measure limiting the total liability and spreading repayment over a fairly long period. We have already indicated the social purpose behind excluding Banking companies from the category of creditors to some extent under the Act. Consistent with that object it will not be possible to say that even if the debt was due to a Banking company at the commencement of the Act such debt would not fall within S. 2 (4) (l) of the Act if the debt was not one borrowed from a Banking Company. We should, therefore, with great respect, disagree with the decision of the Division Bench in Ouseph v. Orient Union Bank Ltd. (1968 Ker LT 973). We overrule the said decision.

16. We are therefore of the view that merely because the debt was due to the Kottayam Orient Bank Limited at one time though not due to a Banking company on the date of the commencement of the Act it cannot be said that S. 2 (4) (l) would apply. That would mean that the debtor is entitled to the benefit of S. 5 of the Kerala Agriculturists Debt Relief Act 11 of 1970. We hold so. We allow the Civil Revision Petition setting aside the order of the court below and directing the court to pass appropriate orders in accordance with our finding that the judgment-debtor is entitled to the benefit of Act 11 of 1970 as he is a debtor under the Act. The Civil Revision petition is allowed. No costs.

Revision allowed.

AIR 1978 KERALA 208

P. SUBRAMONIAN POTI AND T. KOCHU THOMMEN, JJ.

Joseph Philip, Appellant v. Varkey Mathai and others, Respondents.

A. S. No. 61 of 1974; C.M.P. No. 16423 of 1977, D/- 21-2-1978.

Arbitration Act (10 of 1940), Ss. 17, 30, 33 — Setting aside of an award — Award alleged to be a nullity — Award cannot be declared to be null and void without setting it aside in terms of S. 17 read with Ss. 30 and 33 — In the circumstances, application for setting aside the award on ground even of nullity has to be filed within 30 days as prescribed under Art. 119 of the Limitation Act — Residuary Article of Limitation Act, not applicable — Application for setting aside the award on the ground of nullity long after limitation expired — No application for condonation of delay — Award not liable to be set aside — (Limitation Act (1963), Arts. 119 & 136).

(Paras 6, 7)

Anno: AIR Man. (3rd Edn.), Arbitration Act, S. 17, Notes 2, 3; S. 30, Notes 7, 17, 33; S. 33, Notes 5, 7, 8.

Cases Referred: Chronological	Paras
AIR 1956 Cal 321 (FB)	8
AIR 1954 Bom 293	8

P. K. Kesavan Nair and K. N. Narayana Pillai, for Appellant; Jose Vithayathil, P. N. Sankaranarayana Pillai and M. P. Narayana Panicker, for Respondents.

KOCHU THOMMEN, J.:— This appeal arises from the order of the learned Subordinate Judge, Ernakulam, dated 15th March 1973 rejecting the appellant's application for setting aside an award dated 19-11-1969 on the ground that the application was barred by limitation.

2. The appellant is the 1st respondent in Arb. O. P. No. 6 of 1970 on the file of the lower court. He and the present 3rd respondent (2nd respondent in the O.P.) were parties to the award. Present respondents 1 and 2 (the petitioners in the O.P.) were the arbitrators.

3. The arbitrators filed the award on 13-3-1970 in terms of S. 14 (2) of the Arbitration Act, 1940 (the 'Act'). Notice of the filing of the award was issued by the court on 8-4-1970 and it was served on the 1st respondent (appellant here) on 18-4-1970. He engaged counsel on 4-6-1970 to represent him in the proceedings before the lower court. His objection to the award with a prayer to set aside the same was filed on 22-7-1970. The sequence of events shows that the application to set aside the award was filed long after the expiry of the period of limitation under Art. 119 of the Limitation Act, 1963 — that is, 30 days from the date of service of the notice of the filing of the award. The court therefore refused to set aside the award. It pro-

nounced judgment according to the award and a decree was passed in terms thereof.

4. The main objections raised by the present appellant in the lower court were that the award was a nullity because no agreement existed between the parties for a reference of any dispute to arbitrators; that there was in any case no dispute which needed a reference to arbitration; that the notice of the passing of the award was not served on the appellant; and, that the award was not filed in court in accordance with law. For these reasons the appellant requested the court below to set aside the award.

5. In the present appeal, counsel for the appellant contends before us that the award is a nullity and Art. 119 of the Limitation Act, 1963, has therefore no application. Such award, according to him, is liable to be set aside within three years from the date on which the right to apply accrued in terms of Art. 137 of the Limitation Act.

6. Assuming that the award is a nullity for the reasons alleged by the appellant, the question is whether a declaration to that effect can be made under the Act otherwise than in terms of S. 17, read with Ss. 30 and 33 of the Act. In other words, can an award be declared to be null and void except by means of setting it aside in accordance with the above provisions. If the answer is that even a void award needs to be avoided in terms of the above provisions, the period of limitation within which such application would lie is not the period prescribed under the residuary article of the Limitation Act but the period of 30 days as prescribed under Art. 119 of the Limitation Act.

7. Section 17 of the Act says that the court is bound to pronounce judgment according to the award and pass a decree in terms thereof after the time for making an application to set aside the award has expired or an application having been made was rejected by the court. If no application was made within the period of 30 days as prescribed under Art. 119 of the Limitation Act and the delay was not condoned by the court in terms of S. 5 of the said Act, the court has to proceed to pronounce judgment.

8. Sections 30 and 33 mention the grounds on which an award is liable to be set aside and the application for setting aside the award on any one of the grounds mentioned is specifically referred to in S. 33. If no application is made within the time stipulated as aforesaid that is, within 30 days from the date of service of the notice of the filing of the award, as provided under Art. 119 of the Limitation Act (and not under Art. 137 as wrongly contended on behalf of the appellant), the consequences mentioned under S. 17 will immediately follow: See Saha and Co. v. Ishar Singh Kripal Singh and Co. (AIR 1956 Cal 321, 330) (FB); A. R. Savkur v. Amritlal Kalidas (AIR 1954 Bom 293).

9. As stated above, the application for setting aside the award, albeit on the alleged ground of nullity, was filed long after the period of limitation expired; and no application for condonation of delay was made to the court below. The award is therefore not liable to be set aside.

10. Counsel for the appellant however submits before us that although his contention that the period of limitation is three years as provided under Art. 137 of the Limitation Act is found to be unsustainable, this Court has nevertheless the power to entertain a motion for condonation of delay, and for that purpose a petition has been filed (C. M. P. No. 16423/77). In our view condonation of delay is a matter of discretion of the court to which an application to set aside the award has to be made, and with that discretion this Court is loath to interfere, especially when no such request was made to that court. C. M. P. No. 16423/77 is therefore dismissed.

11. In the circumstances and for the reasons stated above, we are satisfied that the learned subordinate Judge was perfectly justified in rejecting the application for setting aside the award.

12. The appeal therefore fails and we dismiss the same with costs.

Appeal dismissed.

AIR 1978 KERALA 209

V. BALAKRISHNAN ERADI AND K. K. NARENDRAN, JJ.

Mrs. Rosy Joseph and others, Petitioners v. Union Bank of India, Ernakulam Branch, Respondent.

C. R. P. No. 3356 of 1976-I, D/- 16-2-1978.

Civil P. C. (5 of 1908), Ss. 16 (c), 20 — Suit to recover money by sale of mort-

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gaged property — Property situate within jurisdiction of Cochin Court — Defendants residing within jurisdiction of Ernakulam Court — Suit covered by Section 16 (c) — Suit should be filed in Cochin Court and not in Ernakulam Court — AIR 1974 Ker 27, Overruled.

The provision contained in S. 20 permitting suits to be instituted in courts within the local limits of whose jurisdiction the defendant actually and voluntarily resides, etc., is expressly stated to be subject to the limitations laid down in Ss. 16 to 19. Hence in a case which is directly governed by S. 16 (c), S. 20 cannot be called in aid and it is not permissible for the plaintiff to institute the suit in any court other than the one within the local limits of whose jurisdiction the mortgaged properties are situate. Where the mortgaged property is situate within the jurisdiction of Cochin Court, a suit to recover money by sale of the mortgaged property against defendants residing within the jurisdiction of Ernakulam Court should therefore be instituted in the Cochin Court and not in Ernakulam Court. AIR 1974 Ker 27, Overruled. (Paras 3, 4)

Anno AIR Comm., C. P. C. (1908) 9th Edn., S. 16, N. 7 and S. 20, N. 2.

Cases Referred: Chronological Paras

AIR 1974 Ker 27 : 1973 Ker LT 413 1, 2, 3

M. K. Narayana Menon, D. S. Warrier, C. D. Jose, for Petitioners; T. L. Ananthasivan, P. K. Jose, P. J. Johny, T. V. Ananthan, for Respondent.

BALAKRISHNA ERADI, J.:— This civil revision petition has been referred to a Division Bench by Kochu Thommen J. as it was felt by the learned Judge that the dicision in Narayan Pillai v. Gopala Pillai (1973 KLT 413) : (AIR 1974 Ker 27) requires reconsideration.

2. The revision petitioners are defendants 1 to 3 in O. S. No. 222 of 1975 on the file of the First Additional Subordinate Judge, Ernakulam. That is a suit filed by the 1st respondent-Union Bank of India for recovery of a sum of Rupees 28,153.75 with interest by sale of the plaint A schedule immovable properties on the basis of a transaction of mortgage by deposit of title deeds. In the written statement filed by the defendants they contended inter alia that the properties covered by the mortgage sought to be enforced in the suit being situated within the local limits of the jurisdiction of the Subordinate Judge's Court, Cochin, the suit ought to have been filed only in that court under S. 16 of the Civil P. C. and that the Sub Court, Ernakulam, had no jurisdiction to entertain the suit. The said question relating to the jurisdiction of the court was considered as a preliminary point by the Subordinate Judge and by the order now sought to be revised, it was held that the Sub Court, Ernakulam, where the suit was instituted had jurisdiction to entertain the suit. In coming to the conclusion the Subordinate Judge has relied solely on the decision of a learned Single Judge of this Court reported in Narayana Pillai v. Gopala Pillai (1973 Ker LT 413) : (AIR 1974 Ker 27). In that case a subscriber in a chitty had filed the suit against the stake-holder and another person and even though it is stated in the judgment that some properties had been given as security by the stake-holder, it is not clear from the judgment whether the suit was one for enforcement of the said security by sale of any immovable properties. However, from the nature of the contentions advanced in the case, it would appear that such a relief must also have been claimed by the plaintiff in that suit. The properties given as security were situated within the jurisdiction of the Subordinate Judge's Court, Mavelikara, but the suit was filed in Quilon. A preliminary objection was raised by the defendants that the Sub Court, Quilon had no jurisdiction to entertain the suit. The Subordinate Judge, Quilon overruled the said contentions of the defendants and held that his court had jurisdiction. The matter was thereupon carried up to this court by the 2nd defendant by filing a civil revision petition. Raghavan C. J. dismissed the civil revision petition upholding the view taken by the lower court that the Sub Court, Quilon had jurisdiction to entertain the suit. The reasoning on which the learned Judge came to the said conclusion is contained in the following passage extracted from page 414 of the report (1973 Ker LT 413) : (at p. 27 of AIR):

"There are three defendants in this suit; and it cannot be disputed that the suit against the first defendant was properly laid in the court at Quilon. The contract was with the first defendant: that was at Quilon: the breach of that contract was also at Quilon. If so, for the sake of argument, even if it is accepted that the Mavelikara Court had also jurisdiction since the properties given as security were at Mavelikara, still the

jurisdiction of the Quilon Court is not taken away. In such a case where there are two courts which have jurisdiction, the plaintiff has the right to choose the court in which he should institute his suit: the defendant cannot insist on the choice of the forum. This proposition is well founded and well established. In this view of the matter also, the suit was properly instituted in the Quilon Court."

3. It is contended before us by the learned Advocate appearing for the revision petitioner that in a suit for enforcement of a mortgage by sale of an immovable property, there is no choice given to the plaintiff under the provisions of the Civil P. C. as to the forum in which the action has to be instituted. Counsel urged that such a suit is governed by the provision contained in Cl. (c) of S. 16 and that under the said clause it is explicit and mandatory that the suit shall be instituted only in the court within the local limits of whose jurisdiction the immovable property forming subject-matter of the mortgage is situate, the only exception made being in respect of cases covered by the proviso to the said section. That proviso covers only suits to obtain compensation for wrong to immovable property or other relief in respect of immovable property where the relief sought can be entirely obtained through the personal obedience of the defendant. The present suit is obviously not one falling within the scope of the proviso. The provision contained in S. 20 permitting suits to be instituted in courts within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business etc. or where the cause of action, wholly or in part, arises, is expressly stated to be subject to the limitations laid down in Ss. 16 to 19. Hence in a case which is directly governed by S. 16 (c), S. 20 cannot be called in aid and it is not permissible for the plaintiff to institute the suit in any court other than the one within the local limits of whose jurisdiction the mortgage properties are situate. The decision in Narayana Pillai v. Gopala Pillai (1973 Ker LT 413) : (AIR 1974 Ker 27) in so far as it has taken a view inconsistent with the legal position as explained above cannot be regarded as laying down the correct law.

4. On an application of the aforesaid principles it must follow that the court below was wrong in holding that it had jurisdiction to entertain the present suit. The only proper court where the suit can be instituted under S. 16 (c) of the Civil P. C. is the Subordinate Judge's Court, Cochin, within the local limits of whose jurisdiction the plaint A schedule properties which form the subject-matter of the mortgage are admittedly situate. The order of the court below is accordingly set aside and there will be a direction to the lower court to return the plaint forthwith to the plaintiff for presentation to the proper court.

5. Having regard to the fact that the suit was instituted early in 1975, it is necessary that after its presentation into the Subordinate Judge's Court, Cochin it should be given an expeditious disposal by that court. There will accordingly be a direction that after the plaint is presented into the Sub Court, Cochin and the suit is registered there the Subordinate Judge, Cochin, should give the suit precedence in the matter of trial and should finally dispose of the same within a period not exceeding six months from the date of its presentation into that court.

6. The C. R. P. is allowed as above. The parties will bear their respective costs.

Revision allowed.

AIR 1978 KERALA 211

G. BALAGANGADHARAN NAIR, J.

Sankara Menon, Appellant v. Gourikutty Amma and others, Respondents.

Second Appeal No. 711 of 1974, D/- 22-5-1978.*

(A) Civil P. C. (5 of 1908), Sec. 105 — Scope — Expression "any order" — Applies to both appealable or non-appealable orders.

The expression "any order" is general and there is nothing that restricts it to appealable or non-appealable orders. That it comprehends both types of orders is further apparent from sub-section (2) which contains a special provision excluding appealable orders of remand from challenge in appeals from decrees. AIR 1960 SC 941, Rel. on. (Para 7)

Anno: AIR Comm. C. P. C. (9th Edn.), S. 105, N. 2.

*(Against order of Sub J., Trichur in A. S. No. 42 of 1970.)

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(B) Civil P. C. (5 of 1908), Sec. 105 — "Affecting the decision of the case" — Order refusing to set aside abatement affects the decision of the case — It can be questioned in second appeal.

The effect of an order refusing to set aside abatement is to dismiss the suit. It cannot be said that such an order falls outside S. 105 and does not affect the decision of the case, for it prevents the plaintiff from prosecuting his claim and obtaining a decision in his favour. AIR 1933 All 294 Foll. (Case law discussed). (Para 16)

Anno: AIR Comm. C. P. C. (9th Edn.), S. 105. N. 6.

Cases Referred : Chronological	Paras
1964 Ker LT 32	15, 16
AIR 1960 SC 941	7
AIR 1933 All 294 : 1933 All LJ 561	11, 16
AIR 1933 Cal 498	12, 13, 15, 16
AIR 1933 Lah 152	14
AIR 1925 All 426 : 23 All LJ 444	10
AIR 1925 Cal 473	12, 16
AIR 1925 Cal 766	14
AIR 1919 Mad 971 (1)	15
AIR 1917 All 434 : 35 Ind Cas 209 : 14 All LJ 610	10, 12
AIR 1915 All 483 : 13 All LJ 1089	10
(1912) 10 All LJ 130 : ILR 34 All 592	12
(1905) 9 Cal WN 584	12
(1903) ILR 25 All 280	12
(1903) ILR 27 Bom 162	9, 15, 16
(1903) ILR 26 Mad 604	12
(1902) ILR 24 All 464	12
(1900) ILR 22 All 430	12
(1895) ILR 22 Cal 984	12

JUDGMENT:— The facts necessary for the disposal of this appeal are the following:

The appellant who was the second defendant and his mother, who was the first defendant in a suit for redemption of a mortgage. Ext. P1 dated 20-3-1090 had appealed to the Subordinate Judge's Court, Trichur from the decree of the Munsiff, Trichur dated 17-2-1969 by which the plaintiffs and defendants 3 to 10, 18 to 21, 26, 40, 41, 49 to 52 and 58 were allowed to redeem their shares in the suit property. I am not extracting the further provisions of the somewhat curious decree but might only note that as there was no prayer for partition in this suit and it was not known who would obtain shares in the property, the court provided that "the various sharers will seek appropriate directions in the court passing the final decree in O. S. 87 of 1957, subject of course to such directions, if any, that may be found just and proper, in the circumstances of the case, by this Court while passing the decree." O. S. 87 of 1957 is a suit for partition of the tarwad properties including the suit property, of the parties in the present case: While the appeal was pending in the Subordinate Judge's Court respondents 15 to 18 filed an application I. A. 1980 of 1972 on 23-10-1972 alleging that respondents 64 and 65 (defendants 55 and 56) had died in 1970 and 1969 respectively, that as their legal representatives had not been brought on record the appeal had abated and praying that they (the applicants) be therefore awarded their costs. In the wake of this motion the appellants made three applications on 6-11-1972 : I. A. 2045, 2046 and 2047 of 1972. I. A. 2046 was to substitute the wife and children of respondent 65 as his legal representatives and to record the other members of the tarward as the legal representatives of respondent 64 who had left no wife or children surviving him. I. A. 2045 was to set aside the abatement caused by the omission to implead the legal representatives in time. In the affidavit sworn by the first appellant (the present appellant's mother) she stated that they came to know about the deaths of respondents 64 and 65 only from I. A. 1980 of 1972, that there was no communication with these respondents who were long settled in England and that even the dates of their deaths are not given in I. A. 1980 of 1972 nor are otherwise known. By I. A. 2047 the appellants prayed for condoning the delay in applying to set aside the abatement and supported the prayer by a similar affidavit. Subsequently on 29-1-1973 respondents 15 to 18 filed another application, I. A. 154 of 1973 with a similar prayer as in I. A. 1980 of 1972. This application was grounded on the statement that although respondent 61 (defendant 52) had died on 2-10-1972 his legal representatives had not been brought on record till then. The appellants thereupon filed two applications on 7-2-1973, I. A. 203 to implead the legal representatives of respondent 61 and I. A. 202 to set aside the abatement. In the supporting affidavit which was also sworn by the first appellant she stated that the omission to implead the legal representatives occurred because she was old and ailing and was an inpatient in the District Hospital, Trichur for heart trouble of which she had not yet fully recovered.

2-3. The court below disposed of all these five applications by a common order dated 25-6-1973. As the parties were agreed that the legal representatives of the 64th respondent were the members of the tarward who were already on the party array none needed to be impleaded, the court held that there was no abatement of his rights in the property. It dismissed I. A. Nos. 202 and 203 of 1973 which concerned the 61st respondent, holding that there was no evidence that the first appellant was ill and that her old age was no ground to set aside the abatement. With respect to the 65th respondent, the court expressed the view that normally it would have been possible to believe that the appellants had no knowledge of his death as he was in England and out of contact with them but the court held against them on the ground that they must have had knowledge of his death in 1969 as an application had been made in O. S. 87 of 1957 with notice to their advocate in that case for impleading his legal representatives. The court discounted the appellants' plea that they had no information from their advocate in O. S. 87 of 1957 on this point, in the view that notice to the advocate is notice to the party. On this reasoning the court dismissed I. A. Nos. 2045, 2046 and 2047 of 1972 in so far as they concerned the rights of the 65th respondent.

4. On the basis of these findings the court subsequently heard the appeal and holding that the abatement of the appeal as against the two respondents operated as abatement of the entire appeal the court dismissed it by the judgment dated 7-11-1973, while expressing the view that on the merits it "would have been inclined to hold that the suit itself is not maintainable before the final allotment of shares by the prospective decree in O. S. 87 of 1957." The first defendant died before the decision of the court below and this appeal has been filed by the second defendant.

5. Counsel for the appellant challenged the order of the court below dated 25-6-1973 dismissing I. A. Nos. 2045, 2046 and 2047 of 1972 partially and I. A. Nos. 202 and 203 fully. While seeking to meet this contention on the merits counsel for certain of the respondents objected that this contention was not open to the appellant in the appeal from the decree. Before taking up this objection I shall consider the merits of the appellant's contention against the order dated 25-6-1973.

6. The 61st respondent died on 2-10-1972 and I. A. Nos. 202 and 203 were filed on 7-2-1973, within sixty days of the abatement. The ground alleged by the first appellant for her default to bring the legal representatives on record in time was her old age and confinement for heart trouble in the District Hospital—grounds which have not been countered. The affidavit thus stands and the applications therefore deserve to be allowed. As to the 65th defendant, the court held against the appellants fixing them with constructive knowledge of his death on the ground that their advocate in O. S. 87 of 1957 had notice of the impleading application filed within time in that case, rejecting the appellants' plea that the advocate had not communicated that information to them, on the reasoning that notice to the advocate is notice to the party. It was urged for the appellant that as the court below has not disbelieved or discarded the appellants' plea of absence of communication from their advocate in O. S. 87 of 1957, the ground of lack of timely knowledge of the death of the 65th defendant should have been accepted and the applications allowed. Whether the lawyer had conveyed this information to the appellants is a matter of proof and it is not a question that properly admits of decision on the theory of constructive knowledge. The appellant should in the circumstances be allowed an opportunity to give evidence that neither he nor the first appellant had information from the advocate nor had they knowledge of the the 65th respondent's death otherwise, until I. A. 1980 of 1972 was filed in court.

7. Turning to the objections raised by the respondents, the first contention was that the order of 25-6-1973 being appealable under O. 43, R. 1 (k), C.P.C., it can be challenged only in an appeal therefrom and not in an appeal from the decree. Alternatively counsel contended that the order is not appealable as O. 43, R. 1 (k) covers only orders refusing to set aside abatement of a "suit" and not of an appeal as in this case. In any case, counsel argued that the order cannot be challenged under S. 105, C.P.C. in the appeal from the decree. It is unnecessary to decide whether Cl. (k) applies only to orders in suits and not in

appeals—on which there is a difference of judicial opinion—for if Sec. 105 can otherwise be invoked, it is immaterial whether the order is appealable or not. Sub-section (1) of S. 105 starts by enacting that save as otherwise provided, orders are not appealable and proceeds to say in the second limb of the sub-section that "where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal." The expression "any order" is general and there is nothing that restricts it to appealable or non-appealable orders. That it comprehends both types of orders is further apparent from sub-section (2) which contains a special provision excluding appealable orders of remand from challenge in appeals from decrees. The position is also well settled by judicial decisions of which it is necessary only to note Satyadhyan v. Smt. Deorajin Debi, AIR 1960 SC 941. The Supreme Court traced the evolution of Section 105 and noticed how the expression "such order" which occurred in S. 591 of the Code of 1877 and was retained in the subsequent Code of 1882, was substituted by the words "any order" in S. 105 of the present Code. After pointing out that the expression 'such order' in S. 591 gave rise to a contention in some cases before the Privy Council that the Section applied to non-appealable orders only, that the contention was overruled by the Privy Council and that this view was adopted by the legislature by changing the words 'any such order' to "any order", the Supreme Court held (at p. 946):

"It is clear therefore that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay an appeal was not taken could be challenged in an appeal from the final decree or order." The same view has been taken in several cases both before and after this pronouncement. The respondents' contention on this point thus fails.

8. The most important point raised by the contesting respondents was however that the error, defect or irregularity if any in the order of 25-6-1973 holding that the appeal has abated on the deaths of respondents 61 and 65, cannot be questioned in this appeal as it did not affect the decision of the case. It was pointed out that the words "affecting the decision of the case" mean affecting the decision of the case on the merits while the position here was a dismissal of the appeal not on the merits but on the ground of abatement, a situation outside the scope of S. 105. In support of this contention counsel relied upon a number of authorities which require to be noticed to see whether they support him.

9. Balabai v. Ganesh, (1903) ILR 27 Bom 162, which is the earliest of the cases cited, involved no question of dismissing a suit on abatement; what happened there was that the lower appellate court dismissed a suit holding that a person who had come on record as the legal representative of the plaintiff was not his nearest heir. On appeal the High Court set aside this decision holding that the lower appellate court was wrong in going into this question. It was further held that even if the order of the trial Court in recognising the legal representative fell within S. 367 of the Code of 1882 (corresponding to O. 22, Rule 5) the defendant who was the appellant before the lower appellate court had failed to show how the order had affected the decision. This case has obviously no application.

10. So is the next case, Niddha Lal v. Collector of Bulandshahr, 35 Ind Cas 209: (AIR 1917 All 434) which held that an order setting aside abatement under Order 22, Rule 9 and restoring a suit to file cannot be challenged under Sec. 105 in an appeal from the decree as the order did not affect the decision of the case. A later Allahabad case, Babu Ram v. Banki Behari Lal, AIR 1925 All 426 cited for the respondents also took the same view that an order setting aside abatement is not liable to attack under Section 105 as it does not affect the merits of the case. The court put it on the same footing as an order setting aside ex parte decree and relied upon 13 All LJ 1089: (AIR 1915 All 483) which had held so.

11. Before turning to the decisions of certain other High Courts it is better to notice Badri Prasad v. Amjid Ali, AIR 1933 All 294. The trial court refused to set aside abatement of the suit caused by the death of one of the defendants and in appeal the plaintiff sought to get the abatement set aside, but the lower appellate court confirmed the trial court's decision and dismissed the appeal. In

the second appeal the plaintiff's prayer to set aside the abatement was resisted by the respondent, one of the grounds of the resistance being that it could not be done under Section 105. In rejecting this objection the court held:

"It is true that no second appeal lies from an order, but an order may be questioned in a second appeal if it 'affects the decision of the case'. What affects the decision of the case has been stated in many decided cases under different circumstances. An order setting aside the abatement does not affect the merits of the case, because the result is that the parties are before the court and the court adjudicates in the presence of the parties. Every one of the parties is present there to represent his case, and therefore, the decision is not affected. But where an abatement is not set aside the result is that certain parties are dismissed from the case, and so far the parties go out of the case, the other party has no remedy left. The decision therefore is given not on the merits but on a purely technical ground. We are of opinion that in second appeal the order refusing to set aside the abatement may be questioned."

This decision definitely supports the appellant.

12. Of the two Calcutta cases, Mohamad Nuru v. Manohar Saran, AIR 1925 Cal 473 (it is also reported at page 766 of the same volume) and Maiyarjan Bibi v. Abdul Shek, AIR 1933 Cal 498, the former requires greater notice. In AIR 1925 Cal 473 the trial court by its judgment set aside the abatement caused by the deaths of the plaintiff and defendant and granted the plaintiff a decree. The first appellate court dismissed on the merits the appeal by the substituted defendants and on the objection about the setting aside of the abatement, the court observed that it could not be challenged in an appeal from the final decree. This view was contested by the defendants on the further appeal in the High Court, contending that the expression "decision of the case" means any question which will influence the ultimate decree to be passed by the court. After noting that (1903) ILR 26 Mad 604 and (1912) ILR 34 All 592 supported this contention, the court observed that it was however confronted with its decisions which assign to the expression "affecting the decision of the case" the meaning "affecting the merits of the case or affecting the decision of the case with reference to its merits". Reference was made to (1895) ILR 22 Cal 984 and (1905) 9 Cal WN 584 and two decisions of the Allahabad High Court (1902) ILR 24 All 464 and (1903) ILR 25 All 280. The court then observed:

"If we were untrammelled by authorities we might have felt disposed to reconsider the meaning of the expression but as they stand we feel ourselves bound to follow them."

The court also rejected the appellant's contention which was supported by (1900) ILR 22 All 430 that an order setting aside the abatement can be questioned in the appeal from the decree where the order is passed in the judgment on the ground that that circumstance is immaterial, as the relevant principle is whether the order is one which affects the decision of the case with reference to its merits and the character of the order remains the same whether it is passed along with the decree or before the decree as happened in Niddha Lal v. Collector of Bulandshahr, 14 All LJ 610: (35 Ind Cas 209): (AIR 1917 All 434). While holding that the order setting aside the abatement cannot be questioned in the appeal, the court made the following observations:

"By denying the right of appeal against an order restoring a suit or setting aside an abatement while granting it in the case of refusal to pass such order the legislature may be taken to have intended that it is desirable in the interests of justice, that a case should be tried on the merits where the trial court is of opinion that it should be so tried and so such opinion should not be subject to revision by another court. By allowing such a decision of the trial court to be challenged in appeal after the termination of the trial, may be after enormous expense of time and money occasioned by the act of the court, is to defeat the intention of the legislature and put the party winning on the merits to unnecessary loss for which he is not responsible."

This was not a case where the court refused to set aside abatement and yet it is important for the observations which I have just extracted, as I shall be explaining below.

13. Maiyarjan Bibi v. Abdul Shek, AIR 1933 Cal 498, has little application. The question there involved concerned the effect of substitution of some of the

several legal representatives of a plaintiff and the right of the defendant to challenge it in the appellate court in the appeal from the decree. The court held that where the omission is bona fide, there is no abatement and that so far as the Calcutta High Court was concerned "it is well settled that an order allowing a substitution or setting aside an abatement passed by a trial court cannot be questioned in an appeal from a decree in view of the provisions of S. 105 C.P.C." There was no abatement or setting aside or refusal to set aside abatement in that case.

14. Bhola Ram v. Arjan Das, AIR 1933 Lah 152, the only decision of the Lahore High Court brought to my notice was a case of setting aside abatement and followed AIR 1925 Cal 766.

15. It remains now to consider Kalliani Amma v. Madhavi Amma, 1964 Ker LT 32, a decision of this Court. On the death of the sole plaintiff his wife and children were brought on record as additional plaintiffs 2 and 3 and certain legatees under his will were brought on record as additional defendants 2 to 9. There was dispute between these two sets of parties about the validity of the will and the trial court finding the will to be valid and genuine dismissed the suit. On appeal by plaintiffs 2 and 3 the appellate court set aside this finding and declared them to be the heirs of the original plaintiff. Defendants 2 to 9 thereupon filed a second appeal contending that the appeal by plaintiffs 2 and 3 to the lower appellate court claiming to be the legal representatives was incompetent. The learned Judge held that the order of the trial court was one under Order 22, Rule 5 and that

"the decision as to the right to represent the estate is one which cannot affect 'the decision of the case' within the meaning of Section 105, C.P.C. The dispute between the rival representatives is but an interlude, which does not affect the merits of the case against the defendant against whom the relief is sought."

The learned Judge relied upon AIR 1933 Cal 498, (1903) ILR 27 Bom 162 and AIR 1919 Mad 977 (1).

16. Among the decisions which I have discussed at some length, the only case that applies is AIR 1933 All 294 which alone was concerned with an order refusing to set aside abatement. The effect of such an order is to dismiss the suit and it is impossible to hold that such an order falls outside Section 105 and does not affect the decision of the case, for it prevents the plaintiff from prosecuting his claim and obtaining a decision in his favour. Such an order cannot be equated with an order setting aside abatement—indeed the Code itself draws a distinction between them as pointed out in AIR 1925 Cal 473 — and the cases cited for the respondents are cases which involved orders setting aside abatement or orders of determination under Order 22, Rule 5. 1964 Ker LT 32 on which the respondents placed particular reliance involved an order under Order 22, Rule 5; so also AIR 1933 Cal 498 and (1903) ILR 27 Bom 162, two of the cases followed therein on which also the respondents relied. In 1964 Ker LT 32 the contest in the first appellate court was between the rival claimants to the estate of the deceased plaintiff and the order in favour of one party can hardly be said to affect the decision of the case. In my view the cases quoted by the respondents have no application; the only case that applies is AIR 1933 All 294 and I follow that decision. In that view the appellant is entitled to contest the order dated 25-6-1973.

17. I set aside the order dated 25-6-1973 rejecting I. A. Nos. 202 and 203 of 1973 and I. A. Nos. 2045, 2046 and 2047 of 1972. I. A. Nos. 202 and 203 of 1973 are allowed and I. A. Nos. 2045, 2046 and 2047 of 1972 to the extent they concern the 65th respondent are remanded to the lower court for disposal after affording the appellant an opportunity to give evidence. The court will thereafter dispose of the appeal in the light of its finding.

The judgment and decree are set aside and the appeal is remanded to the lower appellate court for fresh disposal in accordance with law and in the light of the observations made above. The court-fee paid on the memorandum of appeal will be refunded to the appellant's counsel. I make no order as to costs.

Order accordingly.

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FULL BENCH

V. P. GOPALAN NAMBIYAR, C. J. P. SUBRAMONIAN POTI AND KUMARI P. JANAKI AMMA, JJ.

Govindan Gopalan, Petitioner v. Raman Gopalan, Respondent.

C.R.P. No. 1273 of 1977, D/- 10-3-1978.

Kerala Land Reforms Act (1 of 1964) (as amended by Kerala Act 35 of 1969), Ss. 125 (3), 101 (3) — Question of tenancy — Determination by Land Tribunal — Operates as res judicata in subsequent suit — General principles of res judicata attracted — 1975 Ker LT (SN) 74 and S. A. 30 of 1974 (Ker), Overruled; 1975 Ker LT 475 held no good law in view of 1969 Amendment Act — (Civil P. C. (1908), S. 11).

The rule of res judicata in so far as suits inter se are concerned is contained in S. 11, C.P.C. But even in suits decisions made by quasi-judicial tribunals can be res judicata based on general principles provided such tribunals had the jurisdiction to decide the issues involved. (Para 12)

Under the provisions of the Kerala Land Reforms Act, as amended by Article 35 of 1969, a Land Tribunal has exclusive jurisdiction to decide the question of tenancy as to make its decision res judicata in a subsequent proceedings before a Civil Court. The provisions of Ss. 101 (3) and 125 (3) of the Kerala Land Reforms Act clearly indicate that while dealing with the question of tenancy under the Act, the Land Tribunal is no longer deciding a jurisdictional fact but an issue which is exclusively within the competence of the Tribunal. The fact that an appeal lies against the decision of the Civil Court which has merely to accept the decision of the Land Tribunal on the question referred to it does not affect the exclusive jurisdiction of the Land Tribunal to decide the question of tenancy or reduce it to a Tribunal of limited jurisdiction. The result is that the decision of the Land Tribunal as to the existence of a tenancy will be res judicata in a subsequent civil suit or proceedings and will be a bar for a further decision on the same point by the Land Tribunal or a court in a subsequent suit or proceedings. If the question of tenancy has been decided by a Land Tribunal after the coming into force of the Land Reforms Amendment Act, 35 of 1969 as provided in the Act, there need not be a reference to the Land Tribunal under Sec. 125 (3) of the Act if the identical issue is raised in subsequent proceedings. (Para 14)

Anno: AIR Comm. C.P.C. (9th Edn.), S. 11, N. 5-A.

Cases Referred: Chronological Paras

AIR 1978 Ker 172: ILR (1977) 2 Ker 1: 1977 Ker LT 358 (FB) 2, 10, 11
1977 Ker LT 865 9
1975 Ker LT 475 5, 6, 8
1975 Ker LT (SN) 74 2, 14
1974 Lab IC 790: 1974 Ker LT 61 13
(1974) C. R. P. No. 339 of 1974 (Ker) 7
(1974) S. A. No. 30 of 1974 (Ker) 6
1970 Ker LT 888 5
1969 Ker LT 822 5
AIR 1968 SC 1370 13
1967 Ker LT 184 5
AIR 1965 SC 1153 12
AIR 1962 SC 287: (1962) 3 SCR 440 5, 13
AIR 1962 SC 1621 3
AIR 1961 SC 1457 12
AIR 1954 Mad 788 (FB) 5
AIR 1953 SC 33 12
(1877) 2 AC 519, Lockyer v. Ferryman 12

C. V. Vasudevan, K. G. Devarajan and C. N. Sasidharan, for Petitioner; K. S. Rajamony and A. Shahul Hameed, for Respondent.

JANAKI AMMA, J.:— The respondent filed O.P. No. 47 of 1973 before the Munsiff's Court, Kottarakkara for redemption of a mortgage under S. 11 of Kerala Act 11 of 1970. The revision petitioner contended that he was a tenant in respect of the land. He filed I.A. 1891 of 1974 under S. 125 (3) of the Kerala Land Reforms Act requesting the Court to refer the question of tenancy to the Land Tribunal. The revision petitioner had also filed O. A. 16 of 1974 before the Land Tribunal, Chadayamangalam under Section 72-B of the Land Reforms Act for purchase of the landlord's right. The Land Tribunal allowed the petition; but the appellate authority reversed the finding. The order of the appellate authority was upheld by this Court in C.R.P. No. 2471 of 1976. When I. A. 1891 of 1974 came up for hearing, the respondent contended that in view of the order in C.R.P. No. 2471 of 1976, there was no necessity to refer the matter again to the Land Tribunal as the said order was res judicata. The objection was upheld. The above decision is challenged in the revision petition.

2. The Division Bench of this Court which heard the revision petition was

for upholding the order of the Munsiff as it was in conformity with the decision in Koran v. Kamala Shetty (ILR 1977 (2) Ker 1 : 1977 Ker LT 358 (FB)). A Full Bench of this Court held in that case that the general principles of res judicata are applicable to decisions by Land Tribunals. The Division Bench, however, felt that some of the observations in A. S. No. 222 of 1975 supported the case of the revision petitioner (for a short note on the case see 1975 Ker LT (SN) 74). Hence the reference to the Full Bench.

3. A. S. No. 222 of 1975 arose out of a suit for recovery of possession of certain property on the basis of title. Defendants 1 to 5 claimed that they were in possession under a registered lease deed of 1957. One of the issues raised was the jurisdiction of the Civil Court to try the case in view of S. 125 (3) of Act I of 1964 as amended by Act 35 of 1969. S. 125 reads:

"125. Bar of jurisdiction of civil courts—

(1) No civil court shall have jurisdiction to settle, decide or deal with any question or to determine any matter which is by or under this Act required to be settled, decided or dealt with or to be determined by the Land Tribunal or the appellate authority or the Land Board or the Taluk Land Board or the Government or an officer of the Government:

Provided that nothing contained in this sub-section shall apply to proceedings pending in any court at the commencement of the Kerala Land Reforms (Amendment) Act, 1969.

(2) No order of the Land Tribunal or the appellate authority or the Land Board or the Taluk Land Board or the Government or an officer of the Govt. made under this Act shall be questioned in any civil court, except as provided in this Act.

(3) If in any suit or other proceeding any question regarding rights of a tenant or of a kudikidappukaran (including a question as to whether a person is a tenant or a kudikidappukaran) arises, the civil court shall stay the suit or other proceeding and refer such question to the Land Tribunal having jurisdiction over the area in which the land or part thereof is situate together with the relevant records for the decision of that question only.

(4) The Land Tribunal shall decide the question referred to it under sub-sec. (3) and return the records together with its decision to the civil court.

(5) The civil court shall then proceed to decide the suit or other proceedings accepting the decision of the Land Tribunal on the question referred to it.

(6) The decision of the Land Tribunal on the question referred to it shall, for the purposes of appeal, be deemed to be part of the finding of the civil court.

(7) No civil court shall have power to grant injunction in any suit or other proceeding referred to in sub-sec. (3) restraining any person from entering into or occupying or cultivating any land or kudikidappu or to appoint a receiver for any property in respect of which a question referred to in that sub-section has arisen, till such question is decided by the Land Tribunal, and any such injunction granted or appointment made before the commencement of the Kerala Land Reforms (Amendment) Act, 1969, or before such question has arisen, shall stand cancelled.

(8) In this section, 'civil court' shall include a Rent Control as defined in the Kerala Buildings (Lease and Rent Control) Act, 1965."

The trial court held that S. 125 (3) relating to reference to Land Tribunal applies only to suits instituted after 1-1-1970, the date of commencement of the amended Act. The court upheld the lease set up by defendants 1 to 5. The appeal was against the above decree. It so happened that after the institution of the suit, defendants 1 to 5 filed O. A. 203 of 1970 before the Land Tribunal, Kasaragod for fixation of fair rent of the properties and also O. A. 17 of 1971 before the same Tribunal under S. 72-B of the Land Reforms Act for purchase of the right, title and interest of the landlords. The appellants filed objections. As there was an order of stay issued by this Court, the petition could be taken up only after the disposal of the suit by the Munsiff. A preliminary order was passed holding that the petitioners were cultivating tenants which was followed by a final order on 29-10-1975 declaring the purchase price. The amount was deposited in due course. A contention was raised in appeal that in view of the grant of certificate of purchase the appellants lost their right, title and interest in the property. The Division Bench followed the decision of the Supreme

Court in Ujjam Bai v. State of Uttar Pradesh (AIR 1962 SC 1621). The Bench observed:

"We are afraid that Sri Rama Shenoi's contentions have no legal force. In the first instance the jurisdiction that is exercised by the Land Tribunal to decide a question whether a person is a tenant or not when an application for purchase of landlord's rights comes before it, is the jurisdiction to decide a jurisdictional factor. If the tenancy is disputed, for the Tribunal to proceed further in the matter, it has to come to a decision whether there is tenancy or not. This jurisdiction all tribunals have and is specifically so stated in S. 101 (3) of the Act. But such a decision is not conclusive in the sense, a civil court's jurisdiction to go into the question is ousted. Whether a person is a tenant or not can still be raised in the civil court in a properly framed suit. But then the civil court will have to decide it strictly in accordance with S. 125 (3) to (6). In regard to proceedings for fixation of fair rent or purchase before a Land Tribunal, in the matter of determination of the question of tenancy which might incidentally arise therein, the Tribunal's jurisdiction is of limited nature. It is well settled that a Tribunal of limited jurisdiction cannot confer on it jurisdiction by a wrong decision on a jurisdictional fact."

4. The Division Bench held that in spite of a decision by a Land Tribunal as to the existence or otherwise of a tenancy in proceedings for fixation of fair rent or in proceedings relating to purchase of landlord's right if the question as to the existence of tenancy again comes before the civil court, the Civil Court is still competent to decide that question; but for deciding the question the Civil Court should follow the procedure in S. 125 (3) to (6) of the Kerala Land Reforms Act. The Bench, however, held that the question did not arise in the case inasmuch as the applications before the Land Tribunal were filed pendente lite and the decision of the Land Tribunal could only be subject to the decision of the Civil Court. The case was remanded for fresh disposal after following the procedure in S. 125 (3) of the Land Reforms Act.

5. A. S. No. 222 of 1975 was decided on 10-8-1976. Even earlier, another Division Bench of this Court had occasion to consider the effect of a finding by a Land Tribunal in a subsequent civil suit between the same parties in the case in Thomas v. Radhakumari Devi (1975 Ker LT 475) decided on 12th Dec. 1974. That was a suit filed by the plaintiffs for a declaration of the leasehold right in respect of the plaint schedule property and consequential reliefs. The tenancy right was disputed. It so happened that there was an application for fixation of fair rent before the Land Tribunal which was dismissed holding that the plaintiffs were not lessees. The decision was confirmed in appeal and also in revision by the High Court. The trial court held that in view of the above decision, the plaintiffs were precluded from claiming any right based on the tenancy. In appeal, the District Judge held that the claim of tenancy was barred by res judicata in view of the decision of the Land Tribunal. S. A. 672 of 1972 was filed against the decision. A Bench of this court overruled the contention and held that the decision of the Land Tribunal could not operate as res judicata in the absence of the necessary condition of the competency of the Tribunal to try the subsequent suit. The Division Bench held:

"It is only in respect of disputes or matters exclusively within the jurisdiction of a Tribunal that its decision would be binding on the parties in a subsequent civil proceeding and not its decision on incidental disputes or matters which arise in the course of adjudicating on the disputes and matters falling exclusively within its jurisdiction— see Venkatarama Rao v. Venkayya, AIR 1954 Mad 788 (FB); Bhagvan Dayal v. Reoti Devi, 1962 (3) SCR 440: (AIR 1962 SC 287); Gopalakrishnan Nair v. P. Amma, 1970 Ker LT 888. No doubt under S. 101 (3) of the Kerala Land Reforms Act the Land Tribunal is competent to decide the question whether a person is a tenant or not in deciding the question of fixing fair rent of the property. But the jurisdiction of the Land Tribunal to decide the question is not an exclusive one. Whether a person is a tenant in lawful possession, or a trespasser, is essentially a question for a civil court to decide, not, in the last resort, for a tribunal of limited jurisdiction like the Land Tribunal constituted under (Kerala) Act 4 of 1961 unless there is an express or implied bar to cognizance within the meaning of S. 9 of the Civil P. C."

It would appear that the suit and the application for fair rent in the above

case were filed before the Kerala Land Reforms Act was amended substituting S. 125 in its present form. According to the law as interpreted prior to the amending Act of 1969, the question whether a person was a tenant was essentially for the civil court to decide (See Kumaran v. Ramachandra Iyer, (1969 Ker LT 822) and Gopala Krishnan Nair v. Land Tribunal, Chengannur (1967 Ker LT 184)) Therefore, the reasoning in Thomas v. Radhakumari Devi (1975 Ker LT 475) has no application after the amendment of 1969.

6. Other decisions by single Judges were also referred to in the course of the hearing. In S. A. No. 30 of 1974 (Ker) the suit was for declaration of plaintiff's title and recovery of possession of a building. The defendant contended that he was a kudikidappukaran and not liable to be evicted. There was a prior decision of the Land Tribunal wherein his application for purchase of kudikidappu right under S. 80-B of the Land Reforms Act was turned down by the Land Tribunal. It was contended that the above order was binding on the parties. The trial court as also the appellate court decreed the suit. The question arose as to whether the procedure prescribed under S. 125 (3) should have been followed by the trial court. The learned single Judge (Shri Bhaskaran, J.) who disposed of the second appeal set aside the decision of the courts below and remanded the case to the trial court for fresh disposal after referring the question of kudikidappu to the Land Tribunal as provided in S. 125 (3). Although the judgment made reference to the question whether the finding would amount to res judicata, there was no formal opinion expressed on the point.

7. C.R.P. No. 339 of 1974 (Ker), was in connection with a reference under the Land Acquisition Act. A question of tenancy was raised and it was contended that the matter should be referred to the Land Tribunal. But it so happened that there was a prior decision by the Civil Court wherein it was held that the person concerned was entitled to fixity of tenure as a tenant. This court held that in view of the above decision, there was no necessity to refer the question to the Land Tribunal.

8. C.R.P. No. 972 of 1976 was filed by the 2nd defendant in a suit for redemption. He claimed to be a tenant entitled to fixity of tenure, and that the question of tenancy should be referred to the Land Tribunal under S. 125 (3) of the Act. The plaintiff opposed the claim on the ground that there were prior proceedings before the Land Tribunal wherein it was held that the defendant was a varamdar under the mortgagee and as such outside the purview of the Land Reforms Act. Ext. A1 produced in that case was an order of the Land Tribunal in O. A. 214 of 1973 rejecting the claim of the mortgagee for recovery of arrears of rent on the ground that the relationship did not amount to a tenancy. Ext. A2 was a copy of the proceedings of the Land Tribunal in O. A. 1151 of 1966 rejecting a petition for fixation of fair rent filed by the revision petitioner. That petition was also dismissed on the identical ground. When the suit came before the trial court, that court held that there was no necessity for a reference to the Land Tribunal inasmuch as the Land Tribunal had already decided the issue in the prior proceedings. The finding was challenged in the revision petition. The matter came before one of us (myself). Though reference was made to the decisions in A. S. No. 222 of 1975 and also in Thomas v. Radhakumari Devi (1975 Ker LT 475), the bar of res judicata was not put forward in this Court. The prior proceedings were between the mortgagee and the person who was cultivating the land and not between the mortgagor and the mortgagee. The application for fixation was prior to the amendment Act of 1969. S. 125 as it stood then was not in the present form, and the Land Tribunal had not been provided with exclusive jurisdiction to decide questions relating to existence of tenancy relationship. The subsequent proceedings before the Land Tribunal related to claim for recovery of rent by the mortgagee from the alleged varamdar. The mortgagor was not bound by the order passed in the case. Hence there was no scope for any bar of res judicata. The case was remanded for compliance of the provision in Section 125 (3) to (5).

9. Reference may also be made to the decision in George v. Chakkunni (1977 Ker LT 865). The case therein was for recovery of possession of certain items of property. The defendants contended that the matter should be referred to the Land Tribunal in view of their claim of tenancy right. The plaintiff opposed the claim on the ground that

the identical contentions had been raised by the defendants in a prior Land Acquisition case and had been rejected. In a revision petition filed against the decision of the trial court, a distinction was sought to be made between the words 'arising' and 'raised' and it was contended that the reference need be made only in case the question really arose for decision and not merely raised by a party. The case was remanded to decide the question of res judicata.

10. The question whether a prior decision of the Land Tribunal would amount to res judicata was for the first time raised and considered by this Court in the Full Bench decision in Koran v. Kamala Shetty, 1977 Ker LT 358 : (AIR 1978 Ker 172) (FB). The revision petitioner filed application before the Land Tribunal for purchase of his kudikidappu under S. 80-B of the Land Reforms Act. Objection was raised against the maintainability of the petition on the ground that he had filed application on two prior occasions before the same Tribunal for the identical relief and both of them had been dismissed. The question arose as to whether the principle of res judicata applied to the case. After a survey of the case law, the Full Bench held:

"There is thus sufficient authority to hold that the principle of finality or conclusiveness of a prior decision, or the general principle of res judicata is applicable to quasi-judicial bodies like the Land Tribunals functioning under the Kerala Land Reforms Act. On principle it appears to us that this should be so, as these tribunals are invested with the task of deciding important right and have to do so on principle of natural justice and fair play. In these circumstances, the rules of res judicata are applicable to them."

11. The point to be considered is how far the observation in A. S. No. 222 of 1975 already quoted would fit in with the ratio of the decision in Koran v. Kamla Shetty (1977 Ker LT 358) : (AIR 1978 Ker 172) (FB). The facts of the two cases are not identical. While in the case before the Full Bench the bar of res judicata was raised in proceedings before the Land Tribunal and the prior orders and the subsequent orders were of the Land Tribunal, in A. S. No. 222 of 1975 and in the present revision petition the bar of res judicata was raised in suits pending before civil courts. The common feature is that the petitions in all the cases were filed before the Land Tribunal after the Amending Act 35 of 1969 came into force. In the case before the Full Bench, since the orders were passed by the same Tribunal, the simple question involved was whether the general principles of res judicata should be applied in matters pending before the Land Tribunal. The question in the present revision petition, as was the case in A. S. No. 222 of 1975, is whether the decision of a quasi-judicial authority like the Land Tribunal will be res judicata in a suit pending in a civil court.

12. It is now settled law that "provisions of S. 11 of the Civil Procedure Code are not exhaustive with respect to an earlier decision operating as res judicata between the same parties on the same matter in controversy in a subsequent regular suit and that on the general principle of res judicata any previous decision on a matter in controversy decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide it, will operate as res judicata in a subsequent regular suit. It is not necessary that the Court deciding the matter formerly be competent to decide the subsequent suit or that the former proceeding and the subsequent suit have the same subject-matter. The nature of the former proceeding is immaterial." (See Gulabchand v. State of Gujarat (AIR 1965 SC 1153)).

"The object of the rule of res judicata is always put upon two grounds — the one public policy, that is, in the interest of the State that there should be an end to litigation and the other the hardship on the individual that he should be vexed twice on the same cause." (Per Blackburn in Lockyer v. Ferryman (1877) 2 AC 519 — See also Daryao v. State of U. P. (AIR 1961 SC 1457). The rule of res judicata in so far as suits inter se are concerned is contained in S. 11 of the Civil P. C. But even in suits decisions made by quasi-judicial tribunals can be res judicata based on general principles provided such tribunals had the jurisdiction to decide the issues involved.

"The condition regarding the competency of the former Court to try the subsequent suit is one of the limitations engrafted on the general rule of res judicata by S. 11 of the Code and has application to suits alone. When a plea of

res judicata is founded on general principles of law, all that is necessary to establish is that the Court that heard and decided the former case was a Court of competent jurisdiction. It does not seem necessary in such cases to further prove that it has jurisdiction to hear the later suit. A plea of res judicata on general principles can be successfully taken in respect of judgments of Courts of exclusive jurisdiction, like revenue courts, land acquisition Courts, administration Courts etc. It is obvious that these Courts are not entitled to try a regular suit and they only exercise special jurisdiction conferred on them by the Statute."

(Per Mahajan J. In Raj Lakshmi Dasi v. Banamali Sen (AIR 1953 SC 33).

It is now settled law that a decision of a Court of Special jurisdiction will be res judicata in a Court of general jurisdiction provided the decision was within the competence of the former Court.

13. In Union of India v. Nanak Singh (AIR 1968 SC 1370), a decision in a writ petition was held to be res judicata in a subsequently instituted suit. On the other hand, if the earlier decision is by a court or tribunal which is not competent to decide the issue involved in the subsequent suit or proceedings, the decision of the tribunal does not operate as res judicata. See Bhagwan Dayal v. Reoti Devi (AIR 1962 SC 287) and Workmen of the Cochin Lighterage Corpn. v. M/s. Paul Abrao (1974 Ker LT 61) : (1974 Lab IC 790).

"Competent jurisdiction is an essential condition of every valid res judicata, which means that, in order that a judicial decision relied upon, whether as a bar, or as the foundation of an action, may conclusively bind the parties, or (in the case of in rem decisions) the world, it must appear that the judicial tribunal pronouncing the decision had jurisdiction over the cause or matter, and over the parties, sufficient to warrant it in so doing.

A tribunal may exceed its jurisdiction either by embarking upon an inquiry outside its province, or, while confining its inquiry within the proper limits, by making an order in excess of its powers. In either case the result will be to nullify the decision as a res judicata; in the former case, by the effect of the events we have mentioned upon the declaratory part of the decision, and, in the second, by their effect upon its jussive or prohibitory provisions."

(Res judicata — Spencer Bower and Turner, 2nd Edition, P. 92).

14. Bearing the above principles in mind, it remains to be decided whether under the provisions of the Kerala Land Reforms Act, as amended by Act 35 of 1969, a Land Tribunal has exclusive jurisdiction to decide the question of tenancy as to make its decision res judicata in a subsequent proceeding before a Civil Court. Mention may be made to S. 101 (3) which has been referred to in A. S. 222 of 1972. Sec. 101 (3) reads:

"Where in any proceeding before the Land Tribunal a question arises whether a person is a small holder or not or whether a person is or is not a tenant or whether the right, title and interest of the landowner and the intermediaries, if any, in respect of any holding, have or have not vested in the Government under S. 72, it shall be competent for the Land Tribunal to decide the question."

Left to itself the provision means only that the Land Tribunal is competent to decide whether a person is a tenant or not for the purpose of the proceedings before him. It does not take away the jurisdiction of the Civil Court to decide the point. But under S. 125 (1), no Civil Court is to have jurisdiction to settle, decide or deal with any question or to determine any matter which is under the Act required to be settled, decided or dealt with or to be determined by the Land Tribunal. S. 125 (2) contains a prohibition against a decision of the Land Tribunal being questioned in a Civil Court except as provided in the Act. S. 125 (3) directs that the question as to the existence or otherwise of a tenancy should at the first instance be decided by the Land Tribunal. The above provisions clearly indicate that while dealing with the question of tenancy under the Act, the Land Tribunal is no longer deciding a jurisdictional fact but an issue which is exclusively within the competence of the tribunal. The fact that an appeal lies against the decision of the Civil Court which has merely to accept the decision of the Land Tribunal on the question referred to it does not affect the exclusive jurisdiction of the Land Tribunal to decide the question of tenancy or reduce it to a Tribunal of limited jurisdiction. The result is that the decision of the Land Tribunal as to the existence of a tenancy will be res judicata in a subsequent civil suit or

proceedings and will be a bar for a further decision on the same point by the Land Tribunal or a court in a subsequent suit or proceedings. If the question of tenancy has been decided by a Land Tribunal after the coming into force of the Land Reforms Amedment Act, 35 of 1969 as provided in the Act, there need not be a reference to the Land Tribunal under S. 125 (3) of the Act if the identical issue is raised in subsequent proceedings. A. S. 222 of 1975 (1975 Ker LT (SN) 74) and S. A. 30 of 1974 (Ker) in so far as they contain observations contrary to the principles mentioned above will stand overruled.

The Civil Revision Petition is dismissed. The parties will bear their costs.

Petition dismissed.

AIR 1978 KERALA 223

GEORGE VADAKKEL, J.

Baby Paul, Petitioner v. Hindustan Paper Corporation Ltd. and another, Respondents.

C. R. P. No. 557 of 1978, D/- 28-3-1978.

Arbitration Act (1940), S. 41 (b) — S. 41 (b) cannot be invoked before reference to arbitration — "Arbitration proceedings" do not commence from the stage of arbitration agreement but only on the arbitrator getting authority to arbiter and act in that behalf.

The expression "for the purpose of" in S. 41 (b) is of no assistance to contend that the Court can make orders in respect of any of the matters set out in cls. 1 to 4 in the Second Sch. to the Act before and in anticipation of a reference to arbitration. Case law discussed. (Para 9)

Nor is there any merit in the contention that from the stage of the arbitration agreement "arbitration proceedings" commence and that S. 41 (b) can be invoked from that stage. That thereafter disputes have arisen also does not mean that arbitration has begun or arbitration proceedings have arisen. The parties to the arbitration agreement may or may not have named the arbitrator therein, and in the latter case, they might have nominated one subsequent to the agreement, but neither the nomination by the agreement itself nor the subsequent nomination is of any consequence in this regard, for arbitration begins and arbitration proceedings commence only on the arbitrator getting authority to act. An arbitrator's authority to act arises by actual submission of particular dispute or disputes to the authority of a particular arbitrator by the parties, or by one of the parties to an arbitration agreement requesting the arbitrator appointed by the arbitration agreement itself or subsequent thereto to enter upon the reference in respect of particular dispute or disputes, or by the Court making an order of reference to the arbitrator as contemplated by S. 20 of the Act or where the Court by order refers the matter or matters in difference to the arbitrator as provided for in Chap. IV of the Act. (Para 10)

Anno: AIR Manual (3rd Edn)., Arb. Act, S. 41, N. 1.

Cases Referred: Chronological	**Paras**
AIR 1971 J & K 130	5
AIR 1968 J & K 86	8
AIR 1964 Madh Pra 219	6, 8
AIR 1963 Cal 594	5
(1948) 52 Cal WN 45	5
AIR 1946 Pat 70	7
(1898) 2 Ch 92 : 78 LT 456, Zalinoff v. Hammond	5
(1873) 8 Ch 473 : 28 LT 428, Willesford v. Watson	5

M. A. George and K. L. Varghese, for Petitioner; M. Ramachandran, U. K. Ramakrishnan and T. K. Jayaram, for Respondents.

ORDER: — Alleging that without terminating the contract, and after the work has progressed to a substantial extent, the respondents entrusted the balance work to 'some other agency' (not specified) and that agency started work, the petitioner moved the lower Court for interim injunction restraining the respondents, from altering, modifying or tampering with or destroying the work he has already done by themselves (the respondents) or through other agencies, till the Arbitrator inspects and measures the same. The contract mentioned above is a works-contract for construction of a road and the culverts thereon, and contains an arbitration clause, but admittedly no dispute has been referred for arbitration, though according to the petitioner disputes have arisen between the parties — this is denied by the respondents. The petitioner invoked S. 41 (b) of the Arbitration Act, 1940 and the provisions in cls. 1, 3 and 4 in the Second Schedule to that Act. The lower Court said that no arbitration proceedings are pending and therefore S. 41 is not of any avail to the peti-

tioner. According to the learned counsel for the petitioner before the reference of the dispute or disputes, as the case may be, for arbitration, and even before any dispute arises S. 41 (b) can be invoked by a party to an arbitration-agreement. Whether this submission is right, is the question to be decided in this case.

2. Section 41 (b) confers on the Court the same power of making orders in respect of the matters mentioned in the Second Schedule to the Act as it has for the purpose of and in relation to any proceedings before the Court, for the purpose of and in relation to arbitration proceedings, but, as per the proviso thereto, without prejudice to any power vested in an arbitrator or umpire for making orders with respect to any of such matters. Whatever be the construction to be placed on the words 'for the purpose of, and in relation to, arbitration proceedings' in S. 41 (b), whether, under that provision the Court is, as contended on behalf of the petitioner, in view of the words therein, 'for the purpose of arbitration proceedings', competent to pass any order even prior to the commencement of the reference, that is to say, before the parties refer their disputes for arbitration to the arbitrator, or not, (it is also contended that 'arbitration proceedings' commence from the time of the 'arbitration agreement' and this I will examine hereinafter in due course) cls. 1 and 3 in the Second Schedule limit the power of the Court to make orders only as regards 'goods which are the subject-matter of the reference' (clause) and 'property or thing which is the subject-matter of the reference or as to which any question may arise 'therein' i. e. in the reference (cl. 3) and cl. 2: only as regards 'the amount in difference in the reference; which a priori means that the orders contemplated by S. 41 (b) read with cls. 1 to 3 in the Second Schedule can be made only when there has been a reference of the dispute or disputes, as the case may be, for arbitration. Clause 4 in the Second Schedule read with S. 41 (b) confers on the Court the same power of making orders of 'interim injunction or appointment of receiver' as it has for the purpose of and in relation to any proceeding before it. In relation to a proceeding before it, the Court derives its power of issuing interim injunction and appointing a receiver from the provisions contained in S. 94 (c) and (d) of the Civil P. C., 1908 and the said powers are to be exercised in accordance with Rr. 1 to 5 in O. 39 and Rr. 1 to 5 in O. 40 of that Code. Section 94 of the Code enables the Court to make interlocutory orders some of which are specified and enumerated in cls. (a) and (d) as is clear from the residuary clause, cl. (e) which says that the Court may 'make such other interlocutory orders as may appear to the Court to be just and convenient.' An interlocutory order is an order made during the course of a main proceeding as incidental and ancillary to the object of the principal proceeding. The principal proceeding so far as S. 41 (b) is concerned is an arbitration proceednig the object of which is an award by the arbitrator. Obviously, therefore, the Court's power of making orders in respect of matters set out in items 1 to 4 of the Second Schedule to the Arbitration Act, 1940 is only to make interlocutory orders in interlocutory proceedings during the course of arbitration proceedings pending determination of the rights of the parties thereto finally by an award passed by the arbitrator, and the Court is not competent to pass any order in respect of those matters anticipating a reference.

3. The above discussion is sufficient to hold that the lower Court is right in rejecting the petitioner's motion for injunction invoking S. 41 (b) of the Act and cls. 1, 3 and 4 in the Second Schedule thereto. I have for that purpose assumed without deciding that the words 'for the purpose of arbitration proceedings' in S. 41 (b) may indicate that the parties to an arbitration agreement can approach the Court before a reference, holding that the limitation on its power, namely, that the Court can pass such orders as are contemplated by cls. 1 to 4 only after the reference of the dispute for arbitration, arises by reason of the very nature of the matters set out in these clauses. In deference to the arguments advanced by both sides, and for the sake of completeness, it is necessary also to advert to the same with reference to the one remaining clause, cl. 5, in the Second Schedule.

4. Section 41 (b) read with cl. 5 invests the Court with the same power as it has in the matter of appointment of guardian for a minor or person of unsound mind for the purpose of and in relation to, any proceeding before it, 'for the purposes of arbitration proceedings' as well. The

Court's power to appoint a guardian to defend a suit during its pendency which continues until the same has been finally disposed of and complete satisfaction or discharge has been obtained, is to be found in Rr. 3 and 15 in O. 32 of the Civil P. C., 1908. The former Rule makes it the duty of the Court to appoint a proper person 'to be guardian for the suit' for a minor and the latter, makes R. 3 applicable to a defendant who is of unsound mind. This is an inherent power of the Court founded on the principle that it is the duty of the Crown as Parens Patriae to protect the interest of minors and persons of unsound mind and is to be exercised wherever necessary. However, this power arises only on the institution of a suit. On that analogy S. 41 (b) may not empower the Court to appoint a guardian to one of the parties to an arbitration agreement till there is a reference. But it may be that it is necessary to appoint a guardian even prior to actual submission or reference as for instance where the parties have not named the arbitrator in the arbitration agreement wherefore it is necessary to nominate one before the actual reference and this cannot be done because one of parties at the relevant time is not of sound mind, or, he is dead, and his legal representative by or against whom the arbitration agreement is under S. 6 (1) of the Act enforceable is a minor. In view of the provision 'for the purposes of arbitration proceedings' in S. 41 (b) and in cl. 5 in the Second Schedule, the Court may, perhaps, be competent to appoint a guardian to a party to the arbitration agreement even prior to the actual reference, but since that question does not arise in this case, it is not necessary to finally decide the same herein.

5. The decisions cited at the bar are of no assistance to the petitioner. In Ranjit Chandra Mitter v. Union of India, AIR 1963 Cal 594 (597) and in Mohinder Singh v. Executive Engineer, AIR 1971 J & K 130 (133) it was held that relief under S. 41 (b) can be granted by the Court only in some pending proceeding or suit. In the Calcutta case there was no reference to arbitration and therefore, an application for injunction was held to be incompetent. In the Jammu and Kashmir case the disputes had been referred for arbitration and therefore, an injunction application was held to be competent though the same was dismissed on merits. Adverting to an earlier decision of Das, J. in (1948) 52 Cal WN 45 on which strong reliance is made by the learned counsel for the petitioner, Mallick, J., in Ranjit Chandra Mitter v. Union of India, AIR 1963 Cal 594 said that 'the learned Judge (Das, J.) did not feel called upon in the view taken by him to give a meaning to the expression 'arbitration proceeding' in S. 41' and therefore, that decision is no authority 'for the proposition that the Court can issue an injunction even in the absence of any arbitration proceeding provided there is a dispute which can become the subject-matter of an arbitration proceeding under an arbitration agreement subsisting between the parties.' Chedilal v. Brit Over Ltd., (1948) 52 Cal WN 45, was a case where a suit was filed for damages for breach of implied condition as to quality and fitness of goods (Radio sets) supplied by the defendant to the plaintiff for sale in India. The plaintiff moved for temporary injunction restraining the defendant from operating on a letter of credit opened by the plaintiff in favour of the defendant and from forfeiting certain amounts deposited by the planitiff with the defendant. The Court issued an interim injunction. Defendant invoking S. 34 of the Arbitration Act, 1940 sought for stay of the suit. Before the suit was stayed the injunction application came up for final orders. Relying on S. 41 of the Arbitration Act, 1940 it was contended on behalf of the defendant that the application for injunction was not competent, since there was no pending arbitration proceeding. This contention was repelled on the ground that the application for injunction was filed in a suit and that the proceedings therein had not been stayed. Das, J. said that even after staying the suit under S. 34 the Court is competent to grant injunction and appoint a receiver, and referred to Zalineff v. Hammon, ((1898) 2 Ch 92) where the Court appointed a receiver and then stayed the suit, and to Willesford v. Watson, ((1873) 8 Ch 473) where the Court issued an injunction after staying the suit and during the operation of stay. Therefore, the passing observation made by the learned Judge that the power of the Court under S. 41 'is not in terms limited to pending arbitration proceedings' and that there is no reason to add the word 'pending' to that section cannot, with respect, and as pointed out by Mallick, J. in the subsequent decision

of that Court, be considered as an authority for the proposition stated therein.

6. In Daulat Ram v. Shriram, AIR 1964 Madh Pra 219, the parties had referred the question of partitioning their joint family properties to the arbitrators and they had entered upon the reference, and therefore, arbitration proceedings were pending when the Court was moved for appointment of a receiver.

7. In Nagarchand Goenka v. Surendra Nath, AIR 1946 Pat 70, along with an application by a partner under S. 20 of the Arbitration Act, 1940 for compelling reference to arbitration, an application for appointment of a receiver for the partnership-business was moved and the lower Court allowed the same. It was contended before the High Court that until actual reference to arbitration is made, that is to say, till the application under S. 20 of the Act is allowed, the Court has no jurisdiction to appoint a receiver. The argument was that a proceeding under S. 20 of the Act is not an arbitration proceeding till the Court orders filing of the agreement and makes an order of reference to the arbitrator appointed by the parties or by the Court, as the case may be as envisaged in sub-s. (4) of S. 20. Reliance was placed on sub-s. (5) of S. 20 which says that 'thereafter the arbitration shall proceed .....' and S. 41 (b) which speaks of 'arbitration proceedings'. It was held that a proceeding under S. 20 is one to enforce an agreement for arbitration wherefore it is a proceeding for arbitration from the very start, and that the words 'arbitration proceeding' in S. 41 (b) would include a proceeding under S. 20 of the Act. The Court said:—

"Furthermore, there is a great danger in putting such a narrow construction upon the words "arbitration proceedings". Because if the contention of Mr. Baldeo Sahay is accepted, the Court will be completely powerless to pass any order for the preservation or safety of the properties in dispute involved in the subject-matter of the agreement for arbitration, and the opposite party may take his own time in showing cause why the agreement should not be filed and reference should not be made to the arbitrators by which time the entire property may be completely wasted. In that case there will be no point in empowering the Court either to appoint an arbitrator or to pass an order of injunction by way of saving the property concerned long after the proceeding began. I am, therefore, of opinion that this contention of the appellant's learned Advocate has no force."

With respect, it seems to me, that at the stage the proceedings under S. 20 of the Act are pending in Court and prior to the making of an order of reference to the arbitrator (which may or may not be made), the Court has, in respect of and in relation to the said proceedings, all the powers invested on it by the Civil P. C., 1908, the provisions of which shall, as per S. 41 (a) of the Act, apply to all proceedings before it, and it is not Section 41 (b) that is to be looked into for its source of jurisdiction to issue interim orders, so that the difficulty mentioned in the above passage need not compel one to extend and widen the meaning of the expression: 'arbitration proceedings' in S. 41 (b) of the Act to include a proceeding before Court to compel arbitration.

8. In Jammu Forest Co. v. State, AIR 1968 J & K 86, the question that arose for consideration was whether, on making an order of reference under S. 20 (4) of the Act to the arbitrator, the Court can issue a temporary injunction, and relying on Daulat Ram v. Shriram, AIR 1964 Madh Pra 219, it was held that the Court is competent to do so. In the course of the discussion the decision seems to proceed on the basis that S. 41 (a) empowers the Court in that behalf for it is stated therein that 'the case will be deemed to be proceeding before the Court right from the time that an application under S. 20 is made in a particular case up to the time the Court finally disposes of the matter either by accepting the award of setting it aside' but it appears to me, that the decision is ultimately rested on S. 41 (b) of the Act on which rested the decision in Daulat Ram v. Shriram, AIR 1964 Madh Pra 219 which has been relied on in Jammu Forest Co. v. State, AIR 1968 J & K 86.

9. Therefore, the expression 'for the purpose of' in S. 41 (b) is of no assistance to contend that the Court can make orders in respect of any of the matters set out in cls. 1 to 4 in the Second Schedule to the Act before and in anticipation of a reference to arbitration, and this is so even if the words: 'arbitration proceedings' would include a stage prior to actual reference of the dispute or disputes for arbitration, for the matters set out in cls. 1 to 3 concern

goods and properties forming the subject-matter of a reference, or amount in difference in the reference, and those set out in cl. 4 enable the Court to pass only interlocutory orders.

10. When does 'arbitration proceedings' commence, is the next point debated at the bar. I am not prepared to subscribe to the view canvassed for on behalf of the petitioner that from the time an arbitration agreement is made arbitration begins, much less, arbitration proceedings start. That thereafter disputes have arisen also does not mean that arbitration has begun or arbitration proceedings have arisen. The parties to the arbitration agreement may or may not have named the arbitrator therein, and in the latter case, they might have nominated one subsequent to the agreement, but neither the nomination by the agreement itself nor the subsequent nomination is of any consequence in this regard, for arbitration begins and arbitration proceedings commence only on the arbitrator getting authority to act. An arbitrator's authority to act arises by actual submission of particular dispute or disputes to the authority of a particular arbitrator by the parties, or by one of the parties to an arbitration agreement requesting the arbitrator appointed by the arbitration agreement itself or subsequent thereto to enter upon the reference in respect of particular dispute or disputes, or by the Court making an order of reference to the arbitrator as contemplated by S. 20 of the Act or where the Court by order refers the matter or matters in difference to the arbitrator as provided for in Chap. IV of the Act. On his authority arising the arbitrator shall 'use all reasonable dispatch in entering on and proceeding with the reference and making an award' as otherwise the Court may remove him, S. 11 (1). So also an arbitrator 'who has misconducted the proceedings' is liable to be removed, S. 11 (2). These provisions make it clear that arbitration proceedings commence only on the arbitrator getting authority to arbiter, and act in that behalf. The provision in S. 37 (3), for the purposes of limitation, by a fiction pushes back the date of commencement of arbitration to a date anterior to when the arbitrator derives his authority to act, namely, when one of the parties to the arbitration agreement serves on the other or others a notice requiring the appointment of an arbitrator, or where an arbitrator has already been nominated, requiring that the dispute be submitted to that person. In the case on hand not even that stage has been reached. There is no merit in the contention that from the stage of the arbitration agreement 'arbitration proceedings' commence and that S. 41 (b) can be invoked from that stage.

I dismiss this civil revision petition with costs,

Petition dismissed.

AIR 1978 KERALA 227
FULL BENCH

V. P. GOPALAN NAMBIYAR, C. J., K. BHASKARAN AND T. CHANDRASEKHARA MENON, JJ.

Fr. Mathew Munthiri Chinthyil Vicar, St. Mary's Church Anikkampoil, and another, Petitioners v. State of Kerala and others, Respondents.

O. P. No. 4001 of 1971, D/- 14-8-1978.

Kerala Education Rules, Chap. V, Rr. 2, 2-A, 9, 11 and 17 — Constitutionality — Not violative of Art. 30 of Constitution — (Constitution of India, Art. 30).

Rules 2, 2-A, 9, 11 and 17 of Chap. V of the Rules do not go beyond the region of permissible regulations and do not amount to restrictions on the recognised right of minorities in the matter of establishing religious institutions. Case law discussed. (Para 3)

An extreme position entitling the minority to ask, and to be given, the educational institutions, wherever it wants to establish, at any moment when the cry is raised, is not the scope and the content of Art. 30. Regulation of the right in time as well as in space, must be permissible. R. 2 seems to provide for nothing more than such a regulation. It provides for the assessment of the educational needs of the locality by a competent authority after taking into account the relevant considerations. In weighing the educational needs of the locality, the authority is bound to consider, and will indeed consider, the requirements of the minority communities in establishing educational institutions of their choice. Before finalising the list of Schools to be opened in any locality, applications are to be invited, objections are to be received, and only after consideration of these, is the list to be finalised. The minority community therefore gets abundant opportunity of urging and putting forward its needs for serving the

cause of education in a locality. Quite apart from the opportunity that it gets, the authorities are themselves bound to consider on their own the educational needs of the locality from the point of view of the interests of the minority community. (Para 3)

Anno: AIR Comm. Const. of India, 2nd Edn., Art. 30, N. 3.

Cases Referred: Chronological	Paras
1976 Ker LT 458 (FB)	2
AIR 1975 SC 1821	2
AIR 1974 SC 1389	2
AIR 1970 SC 2079	2
AIR 1963 SC 540	2
AIR 1958 SC 956	2

K. George Varghese, Joseph Vithayathil and Varghese Kalliath, for Petitioners; Advocate General, for Respondents.

GOPALAN NAMBIYAR, C. J.:— The petitioner is the Vicar of the St. Mary's Parish at Anikkampoil, Tiruvampadi, Kozhikode District, and has filed the writ petition in his capacity as the Vicar of the Church under the Ecclesiastical jurisdiction of the Bishop of Tellichery. He claims authority to represent the Parish, and the Catholic community. The Catholic community in Kerala is a religious minority entitled to the fundamental rights under Art. 30 (1) of the Constitution to establish and administer educational institutions of their choice. It is alleged that it is the primary religious duty of Catholics to give Catholic education to their children, and for that purpose to establish educational institutions, where Catholic students are taught their religion. Details have been given about the St. Mary's Parish Church, the Chatholic families in Anikkampoil, the number of children of school-going age, the area covered by the Parish etc. The petitioner's grievance is that there was no Catholic school in the locality to cater to the needs of the Catholic community from 1963 onwards. The petitioner claims to have applied on behalf of the Parish for recognition and aid for the St. Mary's L. P. School, Anikkampoil, started by the Catholics in the locality. The District Development Committee of Kozhikode at its meeting on 2-3-1968, it is said, had included the School in its priority list of Schools in the Kunnamangalam education sub-district. But still, no sanction was accorded to the School. Ext. P-1 is a copy of the reply given to the petitioner by the Collector informing him that no School had been opened at Anikkampoil with the permission of the Education Department, and that the question of granting recognition did not therefore arise. The petitioner was directed to apply to the authorities concerned as and when notification is published for opening new Schools. No notification was published in 1969, 1970 and 1971. But the petitioner claims that sanction was accorded for opening new Schools in those years. It is under these circumstances that the petitioner approached this Court for a writ of mandamus compelling the State Government to accord recognition to the St. Mary's L. P. School, Anikkampoil, and to give it aid given to similar aided Schools in the State, and for other consequential directions. A counter affidavit dated 15-6-1972 has been filed by the State. There has also been a supplemental counter affidavit. On 6-9-1974 there was a preliminary order passed on the writ petition by a Full Bench of this Court. The Bench there recorded the assurance given by the Advocate-General on behalf of the Government that if an application in form No. 1 is made forthwith, it will be considered expeditiously. The petitioner was directed to apply in Form No. 1 for permission to open the School, and if sanction is granted, to apply for recognition of the School in accordance with the Rules. Ext. P-5 dated 20-9-1974 is a copy of the application made by the petitioner. In the counter affidavit of the Government dated 4-10-1974, it has been stated that in so far as the educational needs of the locality had already been satisfied, the Government did not find the reason given by the petitioner sufficient for another School. The counter affidavit referred to the report of the Assistent Educational Officer, Kunnamangalam, and the sanctioning of a Lower Primary School at Anikkampoil, by a notification published in the Gazette dated 21-8-1973 containing the list of places where Government Lower Primary Schools were to be opened for the year 1973-74. Ext. R-1 is a copy of the said notification. Anikkampoil was granted a Lower Primary School which started functioning in the academic year 1973-74. With that, the educational needs of the locality were satisfied; and according to the Government, there is no need for another School for the locality. The petitioner has filed a rejoinder affidavit dated 16-10-1974 repeating his prayer to direct the Government to give permission to open a School.

2. The petitioner has put his case plainly and directly. According to him, it is the absolute and unqualified right of the religious minority, namely, the Catholic community to establish and maintain educational institutions of their choice and the provisions of the Kerala Education Act and the Rules which in any manner fetter or restrict the exercise of the right must, for that reason, be unconstitutional. No fetters or restrictions can be placed on the right. The right can only be regulated in the interests of the minority community itself. The Rules impugned, it is said, go beyond the region of permissible regulations and amount to restrictions on the recognised right of minorities in the matter of establishing religious institutions. Article 30 of the Constitution reads:

"30. (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language."

We have been taken in detail through the pronouncements of the Supreme Court in the Kerala Education Act case (AIR 1958 SC 956); Rev. Sidhrajbhai Sabhai v. State of Gujarat (AIR 1963 SC 540) and the St. Xavier's College case (AIR 1974 SC 1389). Besides these, Counsel cited the pronouncements of the Supreme Court in the Kerala University Act case (AIR 1970 SC 2079), and of a Full Bench of this Court in Benedict Mar Gregorios v. State of Kerala (1976 Ker LT 458). In the light of the pronouncements of the Supreme Court, the Full Bench of this Court, in Benedict Mar Gregorios's case (1976 Ker LT 458), summarised the law stating that although the Article was couched in terms absolute and unqualified, such was not its effect or purport, and that regulations on the right in the interests of efficiency of instruction, discipline, health, sanitation, public order, morality, and the like, can certainly be imposed. It was stressed that what is permissible is only regulation of the right, and not any restriction thereon; and that the regulation can only be in the interests of the matters specified in the judicial decisions, and in the interests of the minorities themselves. The principles were emphasised with respect to the recent pronouncement of the Supreme Court in G. F. College, Shahjahanpur v. Agra University (AIR 1975 SC 1821) paras. 10, 11, 12, 13, 14 and 23.

3. The attack was on Rr. 2, 2-A, 9, 11 and 17 of Chap. V of the Kerala Education Rules. Rule 2 of Chap. V which is the main Rule reads:

"2. Procedure for determining the areas where new schools are to be opened or existing schools upgraded:—

(1) The Director may once in two years prepare a report indicating the locality where new schools of any or all grades are to be opened and existing Lower Primary Schools or Upper Primary Schools or both are to be upgraded. In preparing such a report, he shall take into consideration the following:—

(a) the existing schools in and around the locality in which new schools are to be opened or existing schools are to be upgraded;

(b) the strength of the several standards and the accommodation available in each of the existing schools in that locality;

(c) the distance from each of the existing schools to the area where new schools are proposed to be opend or to the area where existing schools are to be upgraded;

(d) the educational needs of the locality with reference to the habitation and backwardness of the area; and

(e) other matters which he considers relevant and necessary in this connection.

(2) The list prepared by the Director shall be published in the Gazette before the end of January of the year of publication, inviting objections or representations against such list. Objections if any, can be filed against the list published within one month from the date of publication of the list. Such objections shall be filed before the Asstt. Educational Officers or the District Educational Officers as the case may be. Every objection filed shall be accompanied by a chalan for Rs. 10/- remitted into the Treasury. Objections filed without the necessary chalan receipt shall be summarily rejected.

(3) The Assistant Education Officer and the District Educational Officer may thereafter conduct enquiries, hear the parties, visit the areas and send their reports, with their views on the objections raised to the Director within two months from the last date of receipt of the objections. The Director if found necessary,

may also hear the parties and finalise the list and send his recommendations with the final list to Government within two months from the last date of the receipt of the report from the Educational Officer.

(4) Government after scrutinising all the records may approve the list, with or without modification and forward it to the Director within a month from the last date of the receipt of the recommendation of Director. The list shall be finalised before the end of July by the Government and shall be published by the Director.

(5) No appeal or revision shall lie against the final list published by the Director.

(6) Government may revise the dates fixed, if found necessary, and shall duly publish the fact in the Gazette."

Rule 2-A deals with applications for opening of new schools and upgrading of existing schools. Rule 9 deals with permission to open new Schools and under Cl. (iv) of the said Rule, permission is not to be granted if the educational needs of the locality do not require the opening of a new school. Under R. 17, Cl. (v) again, in regard to granting of recognition, the school must be necessary to meet the educational needs of the locality. What has been stressed with respect to these Rules is that they placed unwarranted fetters and restrictions on the absolute right of the minority to establish educational institutions; that they do not take into account the needs of the minority community itself for an educational institution of its choice, but are really based on the needs of the locality which cover a far wider range. It was stressed that just as considerations of national interest and public interest cannot affect the content of the fundamental right of the minorities, the needs of the locality for a School should also be left out, and it should be assessed only on the interests of the minorities themselves. The argument is attractive; but we are afraid, should break down on an analysis. That the right is not absolute and unqualified, but one capable of regulation in the matter and manner of its exercise, is now beyond dispute. In the course of the argument, we had asked the petitioner's counsel whether the minorities would claim a right to establish educational institutions whenever and wherever demanded. Although with hesitation, petitioner's counsel was obliged to admit that this extreme right cannot be maintained. We think too, that such an extreme position entitling the minority to ask, and to be given, the educational institutions, wherever it wants to establish, at any moment when the cry is raised, is not the scope and the content of Art. 30. Regulation of the right in time as well as in space, must, it appears, be permissible. Rule 2 seems to provide for nothing more than such a regulation. It provides for the assessment of the educational needs of the locality by a competent authority after taking into account the relevant considerations. In weighing the educational needs of the locality, the authority, we have no doubt, is bound to consider, and will indeed consider, the requirements of the minority communities in establishing educational institutions of their choice. Before finalising the list of Schools to be opened in any locality, applications are to be invited, objections are to be received, and only after consideration of these, is the list to be finalised. The minority community therefore gets abundant opportunity of urging and putting forward its needs for serving the cause of education in a locality. Quite apart from the opportunity that it gets, the authorities are themselves bound to consider on their own the educational needs of the locality from the point of view of the interests of the minority community. We cannot, therefore, in the nature of things, regard R. 2 as passing beyond the pale of permissible regulations and trenched on the offending sphere of restrictions on the fundamental right. We are of the opinion, that the Rule is well within the borderland of regulation of the right sanctioned by judicial decisions. Rules 2-A, 9, 11 and 17 are merely consequential on R. 2, and further amplify the said rule. As realised by the petitioner's counsel, they stand or fall along with R. 2. We see no reason to strike down any of these Rules.

4. In the result, we hold the impugned Rules to be constitutional, and dismiss this writ petition with no order as to costs. It will of course be open to the petitioner to apply for permission to open a School and to seek aid and recognition for the School. We have no doubt, his application will be considered and judged in the light of the rights conferred under Art. 30 (1) of the Constitution.

Petition dismissed.

AIR 1978 KERALA 231

FULL BENCH

P. NARAYANA PILLAI,
P. SUBRAMONIAN POTI AND
GEORGE VADAKKEL, JJ.

Mariyumma, Petitioner v. Mohammed Ibrahim, Respondent.

Criminal Revn. Petn. No. 135 of 1977, D/- 28-6-1978.

Criminal P. C. (2 of 1974), S. 125 (4) — Applicability — Not applicable to a divorced woman. 1976 Ker LT 87, Overruled.

It is true that the Explanation (b) to S. 125 (1) enlarges the scope of the term wife for the purpose of Chap. IX. But that does not create any jural relationship between a divorced woman and her erstwhile husband. Evidently the object of the Explanation is to obviate repeated reference to the wife as well as the wife who has been divorced in appropriate places in the relevant sections. The operation of the Explanation is only to read the term wife in Chap. IX as referring to wife as well as a divorced woman who has not remarried, if such reference would not be inappropriate. Though a divorced woman may be understood by the term wife by reason of the Explanation the person who was her husband prior to such divorce will not be comprised within the term 'husband'. Section 125 (4) refers to the right of the wife to receive an allowance from her husband. If the definition has not the effect of treating the person who is really not a husband as the husband, then sub-section (4) will not be applicable to the case of a divorced woman. There are other indications in sub-sec. (4) which make the sub-section inapplicable to a divorced woman. A woman whose marital tie does not subsist cannot be guilty of adultery much less can she be said to be living in adultery. She may live a promiscuous life. But that would not render her guilty of adultery, for adultery is a term that denotes an offence against the institution of marriage. The inclusive definition of the term 'wife' will not be sufficient to read promiscuous or immoral living of a divorced woman as of one living in adultery. 1976 Ker LT 87, Overruled.

Sub-section (4) of S. 125 conceives refusal to live with the husband without sufficient reason as sufficient justification for refusing maintenance. This presupposes a right and an obligation to live with the husband. Such a right and an obligation cannot be assumed in the case of a divorced woman nor can a corresponding obligation in the erstwhile husband to keep the woman in his house be assumed. If so such a ground available for refusing allowance contemplated in S. 125 (4) becomes inapplicable to the case of a divorced woman.

So is the case with the provision that if the husband and wife are living separately by mutual consent the wife shall not be entitled to receive the allowance. No question of mutual consent would arise in the case of parties to a marriage which is dissolved. That clause is also evidently inapplicable to the case of a divorced woman. (Para 8)

Anno: AIR Comm., Cr. P. C. (7th Edn.), S. 125, Notes 22, 23.

Cases Referred: Chronological Paras
1976 Ker LT 87 8

P. V. Ayyappan and P. K. Venugopalan, for Petitioner; T. V. Prabakaran and Mary Dias, for Respondent.

SUBRAMONIAN POTI, J.:— This revision is against an order passed by the Judicial Magistrate of the First Class, Kodungalloor in a petition under S. 125 of the Cr. P. C. for the award of maintenance moved by a divorced woman and her 3 children. The Magistrate found that the children are eligible to get maintenance at the rate of Rs. 45/-, Rs. 35/- and Rs. 30/- per mensem respectively while the first petitioner the divorcee was not entitled to any maintenance. This was so found because, according to the court below, adultery on the part of the first petitioner had been proved by the evidence in the case and that disentitled her to the award of any maintenance. This revision comes up before the Full Bench because a single Judge of this Court directed reference to the Full Bench in view of the important questions arising for decision in the case.

2. The revision is by all the petitioners in the court below. The first petitioner claims that she too must be found entitled to maintenance until her remarriage while on behalf of petitioners 2 to 4 she claims enhancement of the quantum of maintenance awarded by the court below.

3. Evidently the learned Magistrate who declined to award maintenance to the first petitioner on the ground that she was living in adultery, was relying on S. 125 (4) of the Cr. P. C. The questions before us as urged by learned coun-

sel Sri P. V. Ayyappan, appearing for the petitioners are (1) whether S. 125 (4) would be applicable to the case of a woman who had been divorced or whether it is applicable only to the female spouse in a subsisting marriage and (2) whether the words "is living in adultery" in S. 125 (4) should be taken to indicate that proof must be not of any past conduct but of the present.

4. Section 125 of the Code of 1973 has to some extent altered the scheme of maintenance envisaged in the corresponding S. 488. Under the repealed Code it is only the 'wife' as the term is generally understood the female spouse in a subsisting marriage that could seek maintenance from the husband. But S. 125 (1) of the new Code obliges a person who refuses or neglects to maintain a woman who was his wife and who had been divorced to maintain her if she is unable to maintain herself. Such obligation is to last until she remarries. The scope of the term wife is enlarged to take in the case of such a woman and this is by Explanation (b) to S. 125 (1). Explanation (b) to that sub-section reads thus:

"Explanation—For the purposes of this Chapter,—

(a) ... ...

(b) "wife" includes a woman who has been divorced by, has or obtained a divorce from, her husband and has not remarried."

5. The effect of the Explanation is evidently to read the term wife in Chap. IX of the Code as meaning not only the wife as generally understood but also a woman who has been divorced but who has not remarried. It may be noticed that Section 125 (1) deals with the obligation of a 'person' and not of a husband or of a father or of a son. The scope of the Explanation is not to create a jural relationship between the divorced woman and the erstwhile husband. No new obligation outside the scope of the Code is sought to be imposed either on the divorced woman or her erstwhile husband by reason of the Explanation. The object of the Explanation is only to enable such a divorced woman to claim maintenance from her erstwhile husband until her remarriage. The very object of the provision in S. 125 of the Code is to provide for a minimum obligation on the part of a person to maintain his wife, children parents and his divorced wife who is not remarried under certain circumstances. In regard to some of his dependants there may be a similar obligation under the civil law, but in awarding maintenance in civil proceedings considerations other than those which arise in the matter of a petition under S. 125 of the Code may arise. The quantum of maintenance may also differ in such proceedings. The provision in S. 125 is intended as a measure to prevent vagrancy and the responsibility is cast upon a husband or a father or a son as the case may be to give maintenance to the wife or to the children or to the parents. The Parliament, in its wisdom, has thought fit to include a woman who has been divorced by her husband as also one of those entitled to the benefits of S. 125 (1), such benefit to subsist until her remarriage. It is not because she has any claim based on her status as a divorced wife. She is under no obligation to make any return to her erstwhile husband for the maintenance provided to her by S. 125 (1) of the Code. The Explanation does not result in casting on her any marital obligation. Naturally so since on the dissolution of the marriage the marital tie is broken. It is in this background that we may have to consider the scope of S. 125 (4) and in that context we may refer to sub-sec. (5) of S. 125 also. These sub-sections run as follows:

"125 (1) ... ...

(2) ... ...

(3) ... ...

(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order."

6. Sub-sec. (4) of S. 125 provides for cases where a wife is to be denied maintenance on certain grounds notwithstanding the provisions in S. 125 (1). Where an order under S. 125 (1) has been passed subsequent circumstances may disentitle the wife to continue to receive such maintenance. Those are circumstances akin to the circumstances contemplated under S. 125 (4). Provision is made to meet this situation in Section 125 (5). The circumstances which may disentitle a wife to receive maintenance (1) wife living in adultery (2) the wife without sufficient reasons, refuses to live

with her husband and (3) the spouses are living separately by mutual consent.

7. The learned Magistrate seems to have assumed without deliberating on it that in view of the Explanation (b) to S. 125 (1) of the Code the term wife under Section 125 (4) would take in a woman who has been divorced and if so when 'living in adultery' is proved as against such a woman that would be sufficient to disentitle her to maintenance. It may be mentioned that parties here are Muslims. They were married in the year 1963. They seem to have fallen out by about 1975. By that time six children had been born in that marriage. 3 of them died and the other 3 survived. On 4-6-1976 the husband divorced the wife by pronouncing 'talak' and that was communicated to the wife on 5-6-1976. The petition for maintenance was filed on 24-7-1976. This was so filed because the new Code of 1973 gave the right to claim maintenance even to a divorced woman. The erstwhile husband opposed the claim for maintenance on the ground that the wife divorced by him was living in adultery, that she was living in adultery even during the subsistence of the marriage and it was such adultery that was the cause of the divorce. It was alleged that the woman was living in the same manner after the divorce. The court below found it to be true. There is of course no reason to interfere with this finding of fact in revision. Therefore we may take it as proved for the purpose of this case that at the time of divorce the first petitioner was living in adultery. There is some evidence to indicate that she was living the same life thereafter too. But counsel for the petitioners would say that such evidence is unreliable and proof must be of the fact that the woman is living in adultery on the date of the petition and not once upon a time.

8. Now we will come to the question whether we should read S. 125 (4) as applicable to any person other than the female spouse in a subsisting marriage. It is true that the Explanation enlarges the scope of the term wife for the purpose of Chap. IX. But that, as we have indicated earlier, does not create any jural relationship between a divorced woman and her erstwhile husband. Evidently the object of the Explanation is to obviate repeated reference to the wife as well as the wife who has been divorced in appropriate places in the relevant sections. The operation of the Explanation is only to read the term wife in Chap. IX as referring to wife as well as a divorced woman who has not remarried, if such reference would not be inappropriate. Though a divorced woman may be understood by the term wife by reason of the Explanation the person who was her husband prior to such divorce will not be comprised within the term 'husband'. Section 125 (4) refers to the right of the wife to receive an allowance from her husband. If the definition has not the effect of treating the person who is really not a husband as the husband, then sub-sec. (4) will not be applicable to the case of a divorced woman. There are other indications in sub-sec. (4) which make the sub-section inapplicable to a divorced woman. A woman whose marital tie does not subsist cannot be guilty of adultery much less can she be said to be living in adultery. She may live a promiscuous life. But that would not render her guilty of adultery, for, adultery is a term that denotes an offence against the institution of marriage. The inclusive definition of the term 'wife' will not be sufficient to read promiscuous or immoral living of a divorced woman as of one living in adultery.

There is no obligation on the part of a divorced woman to live with her erstwhile husband. In fact, one would not expect such a woman to do so. Even if she is willing her erstwhile husband may not be willing to oblige her. The provisions of the Code do not and are not intended to cast an obligation on him to permit his divorced wife to live with him. Sub-sec. (4) of S. 125 conceives refusal to live with the husband without sufficient reason as sufficient justification for refusing maintenance. This presupposes a right and an obligation to live with the husband. Such a right and an obligation cannot be assumed in the case of a divorced woman nor can a corresponding obligation in the erstwhile husband to keep the woman in his house be assumed. If so such a ground available for refusing allowance contemplated in S. 125 (4) becomes inapplicable to the case of a divorced woman.

So is the case with the provision that if the husband and wife are living separately by mutual consent the wife shall not be entitled to receive the allowance. No question of mutual consent would arise in the case of parties to a marriage which is dissolved. That clause is also evidently inapplicable to the case of a divorced woman.

It is agreed that if we construe the term wife in S. 125 (4) as referring to a divorced woman also the same construction must apply to S. 125 (5). That would yield anomalous results. Assume that the same sub-section applies to a divorced woman who has not remarried. It would mean that provision is made for cancelling the order for maintenance in the case of such a woman in that sub-section. But there is a specific provision dealing with that matter and that is S. 127 (3) of the Code. That section deals with circumstances under which an order for maintenance obtained by a divorced woman could be cancelled. That sub-section gives an indication that S. 125 (5) covers only the case of a female spouse under a subsisting marriage. If that be so that should be the case with S. 125 (4) also.

The way we have construed Sec. 125 (4) will only promote the object of the provisions in S. 125. The scope of the obligation of a person to maintain is extended in the new Code to embrace cases which were not within its scope under the repealed Code. One of the classes of persons brought in additionally within the scope of the section is women who have been divorced. While the legislature expected the erstwhile husbands to maintain them if the other conditions of the section applied, the legislature could not have expected them to perform any marital obligation for that reason or to keep the vow of chastity or loyalty to their erstwhile husbands. That would be unreasonable and unrelated to the object of providing for maintenance. Counsel Sri T. V. Prabhakaran appearing for the first respondent submitted that a 'wife' in the proper sense of the term is obliged not to live in adultery if she is to claim maintenance and if so it would be unreasonable to read more freedom in a divorced woman. The question is not one of freedom. In the case of a wife she has her solemn obligations to her husband just as he has his obligations towards her. To ask him to discharge his obligation without reference to her conduct may not be in the interest of promotion of matrimonial harmony. Hence his obligation to maintain his wife has been linked with the discharge of her obligations by her. Such a situation does not arise in the case of a divorced woman since she has no obligation to perform.

We find nothing unreasonable in reading S. 125 (4) in the manner we have done. That would be the construction consistent with the object of the Code and it appears to us that to construe it in the manner canvassed by counsel for the first respondent would lead to anomalous results while at the same time not promoting any objective.

The reference to the Full Bench was evidently necessitated by reason of a decision of the Division Bench of this Court in Kunhi Moyin v. Pathumma, 1976 Ker LT 87 in which a different view on the scope of S. 125 (4) has been expressed by the Bench. Of course, that was in a different context. The learned Judges were dealing with the challenge to the validity of S. 125 and while answering the challenge the learned Judges discussed about the scope of the section. Evidently it appears to have been argued before the learned Judges that since S. 125 (4) and (5) as they stand apply to a divorced woman also that was objectionable. The Division Bench was attempting to point out how it may not be objectionable. It is in this context that the Division Bench said thus in regard to S. 125 (4) of the Code:

"25. We may also answer another argument based upon S. 125 (4) and (5). These sub-sections read as follows:

"(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order."

Sub-sec. (4) therefore says that a wife will not be entitled to receive maintenance if she is living in adultery or without sufficient reason refuses to live with her husband. According to Mr. Sukumaran Nair, this sub-section read along with the new definition, would sadly reflect the wisdom of the law making body, since when a wife ceases to be a wife, there is no question of her living in adultery, because adultery postulates existence of the legal status of a wife. He also submitted that it is revolting to commonsense to contend that an ex-wife can be asked to live with her husband.

26. We will answer this argument. The husband has two defences open to him

when claim for maintenance is made by his wife. First, to prove that she is living in adultery. Second, if he satisfies the Court that she refuses to live with him without sufficient cause or if they are living separately by mutual consent. The contention of Sri Sukumaran Nair that an ex-wife cannot, in law, live in adultery, cannot be accepted if the definition of wife in the new Code embraces all the sub-sections of S. 125. If that be so, when the wife — who is living in adultery — files an application for maintenance, the husband can successfully contend that she, though an ex-wife, is living in adultery and therefore is not entitled to maintenance. After all the liability to maintain ex-wives is till they get remarried.

27. The second limb of the argument also has no basis. If the wife refuses to live with him, without sufficient cause, no maintenance will be granted. It is contended that after divorce, no husband will like his wife to live with him. Need not necessarily be so. By this section, indirectly a very welcome and salutary object can be achieved. It is possible for a husband and wife, who have been separated for a short period, to get reconciled. To illustrate this point, we will take the instance of a Muslim husband and wife. Under the pure Islamic law, a divorce can become irrevocable only after the third pronouncement of Talaq. Revocable divorce is on two occasions. There can be revival of conjugal relationship during the period of waiting. "The divorced women should keep themselves waiting for three courses." This is so provided to give an opportunity to the parties to recant. If the wife, after the first Talaq files an application for maintenance there is a chance of reconciliation. The husband can ask the wife to live with him and the wife can join him again. Therefore it cannot be said that the new definition offends sub-secs. (4) and (5) of S. 125. When we refer to the above illustration, we are not unaware of Talaq-ul-bidant or talak-i-badi, which consists of three pronouncements made during a single tuhr (period between menstruations) by which an irrevocable divorce comes into existence immediately it is pronounced. We cannot redeem Muslim wives from this bondage, since we ordinarily interpret law and do not make law.

28. Therefore, we hold that the definition of wife given in S. 125 (1) and the legal fiction implied therein apply to the entire section."

In para 26 of the judgment the learned Judges seem to assume that the definition of wife in the new Code is to be applied to all the sub-sections of S. 125. The learned Judges seem to assume without discussing the question that acts which may be said to constitute 'living in adultery' during wedlock will continue to be of that character even after divorce. That will amount to giving a meaning different from the recognised meaning to the term 'adultery' and the term 'husband'. That would be beyond the scope of the section and is not warranted merely because the definition of the term wife takes in a divorced woman too. Though there is no requirement of joint residence in the case of a divorced wife with her divorced husband the learned Judges seem to assume that the idea behind sub-sec. (4) of S. 125 is to promote a process of reconciliation between the divorced spouses. We see no justification to assume so. On the other hand, the question is whether there is an obligation on any of the parties to the divorce to live with the other and whether any one of the parties can insist upon the exercise of right to live with the other even where the other is not willing. We are afraid, the answer can only be in the negative. Sub-sec. (4) cannot hence logically apply to the case of a divorced woman.

We feel that since the learned Judges were concerned not with a case where they had to apply S. 125 (4) to an instance such as the one before us but were only considering the validity of the section, there was no occasion to examine the section in the manner we have done here. With great respect to the learned Judges, we hold that S. 125 (4) of the Code will apply only to the female spouse in the subsisting marriage.

In the view we have taken above we are not called upon to consider the question whether "is living in adultery" in S. 125 (4) calls for proof of present conduct and not proof that the wife was" living in adultery. Hence we do not want to go into the evidence on that question.

In the case before us the first petitioner would therefore be entitled to maintenance. The question is, what should be the quantum to be awarded to the petitioner. There is a prayer by her to enhance the amount of maintenance awarded to the children. Evidence

shows that the husband in drawing only a salary of Rs. 465/- per mensem out of which, after recoveries, he is receiving less than Rs. 300/- per mensem. He has properties, the total extent of which is less than 1 acre. The income from the properties is, according to him, Rs. 500/- per annum. There is no other evidence on this. Therefore his monthly income available for meeting his expenses and of those who are to be maintained by him is only about Rs. 350/- per mensem. Already Rs. 110/- has been allowed as maintenance to the three children. We do not think that any enhancement is called for in the circumstances. In fact the husband is left with very little for himself. He is a school teacher. He has to maintain himself too. Therefore we are not in a position to allow to the first petitioner what we would have normally ordered as maintenance if the opposite party was shown to be capable of meeting such obligation. The liability to maintain under S. 125 (1) of the Code is dependant upon one's ability to meet the obligation. Taking all these into account, an amount of Rs. 25/- need alone be awarded to the first petitioner. The Revision Petition is thus allowed by directing payment of Rs. 25/- per mensem to the first petitioner as maintenance till her remarriage. No costs.

Revision allowed.

AIR 1978 KERALA 236

G. BALAGANGADHARAN NAIR, J.

Narayana Pillai Krishna Pillai, Appellant v. Ponnuswami Chettiar Subbalekshmi Ammal, Respondent.

Ex. Second Appeal No. 93 of 1976, D/- 22-5-1978.*

(A) Civil P. C. (1908), S. 47 — Decree in suit for specific performance of contract for sale — Powers of executing court. AIR 1948 Nag 406 Diss. from.

The executing court can grant delivery of possession of property even where no such relief is granted by a decree for specific performance of the contract of sale. AIR 1948 Nag 406 Dissented from. Case law discussed. (Para 10)

Anno: AIR Comm. C. P. C. (9th Edn.), S. 47, N. 28.

(B) Specific Relief Act (1963), S. 22 (1) (a) & (2) — Suit for specific performance of contract of sale of immovable property — No claim for relief of possession — Effect.

Even where the plaintiff suing for specific performance of contract of sale of immovable property fails to claim relief of delivery of possession of property, S. 22 (2) would not operate as bar to giving delivery of possession of property to the plaintiff-decree-holder. AIR 1977 All 156 Rel. on. (Para 15)

The plaintiff may claim a decree for possession in a suit for specific performance, even though, strictly speaking, the right to possession accrues only when specific performance is decreed. Where the defendant is in possession and the plaintiff could ask for possession and that position has now been settled, it is legitimate to think that the Legislature contemplated a different situation when it framed the expression "in an appropriate case" in sub-sec. (1). (Para 15)

Cases Referred: Chronological	Paras
AIR 1977 All 156	15
AIR 1974 Mad 289	9
AIR 1972 SC 1826	11
(1966) 1 Mys LJ 799	8
AIR 1961 Pat 466	5
AIR 1957 Pat 701	5, 8
AIR 1955 Cal 267	6, 8
AIR 1954 All 643	7, 8
AIR 1952 Cal 362	6, 12
AIR 1950 FC 83	13, 14
AIR 1950 All 415	7, 9
AIR 1948 Nag 406	2, 3, 4, 5, 9, 10
AIR 1931 Pat 179	5, 7, 9
AIR 1920 Pat 89	5
AIR 1914 Mad 465: ILR 38 Mad 698	9

P. C. Chacko and P. Krishna Moorthy, for Appellant; M. Krishnan Nair, for Respondent.

JUDGMENT:— The short question in this appeal by the judgment-debtor is whether the courts below were wrong in allowing the respondent-decree holder's prayer for possession of property in execution of the decree for specific performance of a contract for sale, when the decree did not give any express relief of delivery of possession. The appellant had contended that as the plaint did not ask for such a relief and the decree had not granted it, the execution court had no jurisdiction to order delivery of possession and it could only refer the respondent to a fresh suit for possession on the strength of the sale-deed executed by the court in his favour in execution of the decree. This contention failed before the courts below.

2. Counsel for the appellant argued that it was beyond the jurisdiction of the

*(Against order of Dist. J. Quilon, in A. S. No. 196 of 1976.)

execution court to deliver possession of the property in the absence of an enabling provision in the decree, even though the respondent has now become owner of the property and has thereby obtained a right to secure possession on the strength of his title. Relying upon Brijmohan v. Chandrabhagabai, AIR 1948 Nag 406, counsel maintained that this has always been the law and that in any case it is the law under S. 22 of the Specific Relief Act, 1963, whatever might have been the position before.

3. AIR 1948 Nag 406 which decided to quote the head note:

"Where in a suit for specific performance of a contract to sell a house, there is no prayer for delivery of possession and the decree passed in the suit does not direct delivery of possession of the property, the executing Court has no jurisdiction to deliver possession in execution under S. 47 (C. P. C.) on the ground that relief for possession is incidental to the relief for specific performance"

definitely supports the appellant.

4. Now there is no dispute that by the suit contract the appellant agreed not only to sell the property to the respondent but also to put him in possession of it. It was this contract of which the court decreed specific performance, the contract to execute the sale-deed and give the respondent possession of the property. On the failure of the appellant, the court executed the sale-deed on his behalf in favour of the respondent. On the terms of the contract of sale and under S. 55 (1) (f), T. P. Act, the appellant was bound to give possession of the property to the respondent. It was incidental to the relief of specific performance that besides the conveyance possession should also be given to the respondent; in other words that relief was a mandate to the respondent to do both and thus complete the specific performance. If he defaults in either it is for the court to do it for him at the respondent's instance and as the court has already executed the sale-deed what remains is to carry out the appellant's unfulfilled obligation to put the respondent in possession of the property. As the right to obtain possession is thus implicit in the decree, the absence of a specific relief for delivery of possession is immaterial. When the court thus puts the respondent in possession of the property it is but executing the decree for specific performance which is within its jurisdiction. The learned Judge who decided AIR 1948 Nag 406 omitted to take note of the rights of the parties to a decree for specific performance but had merely gone by the general principle that the power of the executing court is conditioned by the reliefs granted by the decree. With respect I disagree from the view taken in that decision.

5. While AIR 1948 Nag 406 has not been followed in any case brought to my notice, it has been expressly dissented from in a number of cases by various High Courts, which were relied on by counsel for the respondent. An earlier case Atal Behary v. Barada Prasad, AIR 1931 Pat 179, which itself followed a still earlier case Deonandan Prasad Singh v. Janki Singh, (1920) 5 Pat LJ 314 : AIR 1920 Pat 89 of the same court has taken the view which I have indicated above. The head note which correctly represents the decision in AIR 1931 Pat 179 reads thus:

"Incidental to the relief to which a plaintiff is entitled in a decree for specific performance arising on a contract for sale, the Court has a right to grant possession of the property. A contract for sale includes not only the execution of the necessary document but also putting the vendee in possession of the property. Therefore if there is an omission in the plaint or in the decree about possession the executing Court is not debarred from granting the plaintiff the possession of the property."

The Patna High Court has maintained this position in subsequent decisions — Janardan Kishore Lal v. Girdhari Lal, AIR 1957 Pat 701 (which follows AIR 1931 Pat 179) and Parameshwar Mandal v. Mahendra Nath, AIR 1961 Pat 466 (which follows AIR 1920 Pat 89 relied upon in AIR 1931 Pat 179). I might however add that AIR 1961 Pat 466 arose in a suit and not in execution.

6. The Calcutta High Court has taken the same view as is illustrated by Kartik Chandra v. Dibakar, AIR 1952 Cal 362 and Subodh Kumar v. Hiramoni Dasi, AIR 1955 Cal 267. In AIR 1952 Cal 362 the learned Judges noted "that no special form of decree in a suit for specific performance is supplied by the Civil P. C." and held that "The Court when allowing the prayer for specific performance vests the executing court with all the powers which are required to give full effect to the decree for specific performance." This case was followed in AIR 1955 Cal

267 where another Bench observed that "Thus unless there is a contract to the contrary, giving delivery of possession to the buyer by the seller is an incident of a contract for sale and when there is a decree directing the contract to be specifically performed it includes a direction upon the vendor to give delivery of possession to the purchasers."

7. The Allahabad view is the same: Pt. Balmukand v. Veer Chand, AIR 1954 All 643 which followed Arjun Singh v. Sahu Maharaj Narain, AIR 1950 All 415, which itself had relied upon the decision of the Patna High Court AIR 1931 Pat 179. In AIR 1954 All 643 it was held:

"The decree for specific performance, which provides that the property shall be sold to the plaintiff by the defendants and the sale deed shall be executed within a certain time, failing which the court will have the sale deed executed by a person nominated by it, implies that delivery of possession shall be given in accordance with the provisions of Sec. 55 (1) (f), T. P. Act. Delivery of possession is a necessary ingredient and part of transfer of ownership" and "We do not think that it is necessary in a suit for specific performance either to separately claim possession or it is necessary for the Court to pass a decree for possession. A decree for specific performance of contract includes everything incidental to be done by one party or another to complete the sale transaction, the rights and obligations of the parties in such a matter being indicated by S. 55, T. P. Act."

8. In Venkatesh v. Parappa, (1966) 1 Mys LJ 799, the High Court of Mysore sustained an order of delivery of possession even where there was a prayer for possession in the plaint but the decree was in general terms for specific performance and observed that AIR 1954 All 643, AIR 1955 Cal 267 and AIR 1957 Pat 701 fully supported the view taken by the Courts below.

9. It is unnecessary to multiply cases except to refer to S. S. Rajabathar v. N. A. Sayeed, AIR 1974 Mad 289, where a learned Judge has discussed practically the entire case law and taken the view indicated earlier. The learned Judge dissented from AIR 1948 Nag 406 and agreed with the view represented by AIR 1931 Pat 179 and other like cases discussed above. AIR 1974 Mad 289 is of further interest because it pointed out, as did AIR 1950 All 415 that Krishnammal v. Sundararaju Aiyar, ILR 38 Mad 698 : (AIR 1914 Mad 465) on which AIR 1948 Nag 406 relied, had no application as it was concerned only with the question whether a suit for possession by a plaintiff who had obtained a sale deed in execution of a decree for specific performance was barred under O. 2, R. 1, C. P. C.

10. The result is that the preponderance of judicial opinion is in favour of the competency of the executing court to grant delivery of property even where no such relief is granted by a decree for specific performance of the contract of sale and that AIR 1948 Nag 406 stands in isolation.

11. The question can be viewed in another aspect also. As observed earlier the Civil P. C. does not prescribe any particular form in which decrees for specific performance should be drawn. It is settled law as pointed out in H. I. Trust v. Haridas Mundhra, AIR 1972 SC 1826 that "the court which passes a decree for specific performance retains control over the decree even after the decree has been passed". The effect of the decisions quoted with approval by the Supreme Court in para. 22 of the judgment is that the contract between the parties is not extinguished by the decree for specific performance, that the decree is not a final decree and that the suit must be deemed to be pending even after the decree and that it is virtually in the nature of a preliminary decree. The Supreme Court also quoted with approval passages from Fry on Specific Performance (6th Edn. p. 546) and from Halsbury's Laws of England, (3rd Edn. Vol. 36, 351-52) of which the following extracts could be helpfully reproduced:

"It may and not infrequently does happen that after judgment has been given for the specific performance of a contract, some further relief becomes necessary, in consequence of one or other of the parties making default in the performance of something which ought under the judgment to be performed by him or on his part; as for instance, where a vendor refuses or is unable to execute a proper conveyance of the property, or a purchaser to pay the purchase money ... ..." (Fry)

"Ancillary relief may be obtained after judgment in an action for specific performance where such further relief becomes necessary ... ... (Halsbury)

(In this decision the Supreme Court rescinded a decree for specific performance of a contract for the sale of shares, owing to the refusal of the seller to perform his part of the contract, even though

S. 28 of the Specific Relief Act 1963 provides only for rescission of decree for specific performance for the sale or lease of immovable property).

12. In view of this legal position the court can grant the relief of possession to the respondent as the appellant has not fully performed his part of the contract in that he has not handed possession to the respondent. I might also refer to the following passage from Kartik Chandra v. Dibakar (AIR 1952 Cal 362) (supra) (para 11):

"It may be noticed further that a decree in a suit for specific performance has been considered to be somewhat in the nature of preliminary decree which cannot set out in the fullest detail all the different steps which are required to be taken to implement the main portion of the order directing specific performance of the contract. The executing court is in such a case vested with authority to issue necessary directions."

13. Counsel for the appellant however contended that a suit for specific performance of a contract of sale, even if it be of immovable property is not a suit for land and the court is for that reason incompetent to deliver possession of the property. He sought to support this contention by referring to the observations of Mahajan and Mukherjee JJ. in Moolji Jaitha & Co. v. K. S. & W. Mills, AIR 1950 FC 83. The respondent company brought a suit alleging that certain lands belonged to it and not to the appellants who had been its secretaries and treasurers and that the lands happened to stand in the name of the appellants only as benamidars or trustees of the respondent whose interests they were bound to protect. The two relevant prayers claimed in the plaint were: (a) That it may be declared that the lands belonged to and are the properties of the respondent and that the appellants have no beneficial interests therein and (b). That the appellants may be ordered to execute all such documents and deeds and do such acts as may be necessary for transferring the said lands to the name of the respondent. The suit was brought on the original side of the High Court of Bombay. Apart from the merits, the appellants contested that the court had no jurisdiction to try these prayers as the suit was not a "suit for land" within Cl. 12, Letters Patent which prescribes the ordinary original jurisdiction of the court. The trial Judge upheld the objection but his view was reversed on appeal by a Bench of the Bombay High Court. The Federal Court by a majority (Kania C. J., Patanjali Sastri and Fazl Ali JJ.) dismissed the appeal taken by the defendants, Mahajan and Mukherjee JJ. dissenting. In the course of the judgment Mahajan J. said:

"In my opinion, if the suit is for specific performance and a decree for possession of the land sold is claimed, such a suit would certainly be a suit for land; but if the suit is simpliciter for specific performance i. e. for the enforcement of the contract of sale and for execution of a conveyance, in that event there can be no good ground for holding that such a suit is a suit for determination of title to land or that the decree in it would operate on the land." Page 110 (Para 102) and Mukerjee J.:

"As I have said already, the principles of equity may assist us in determining the essential nature of a particular suit or action. Thus the remedy by way of specific performance was fashioned by the Equity Courts for the purpose of giving a more complete relief in the way of enforcing a contract. In its essence, it is a suit to enforce a contract and its nature is not changed simply because it relates to immovable property." Page 125, Para 170.

14. Apart from the contention raised by counsel for the respondent that these observations are mere obiter of the minority judges and are not therefore binding, on which I prefer to say nothing, what is to be emphasised is that they were merely concerned with the content of the expression "suit for land" in order to determine the jurisdiction of the High Court and not with the question of the effect of a decree for specific performance or the Court's power to deliver possession of the property which on behalf of the disobedient vendor it has sold to the plaintiff. The decision in AIR 1950 FC 83 has no application.

15. What remains to consider is the appellant's alternate contention based on S. 22 of the Specific Relief Act 1963. That section reads:

"22. Power to grant relief for possession, partition, refund of earnest money, etc.—(1) Notwithstanding anything to the contrary contained in the Civil P. C. 1908 (5 of 1908), any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for—

(a) possession, or partition and separate possession, of the property, in addition to such performance; or

(b) any other relief to which he may be entitled, including the refund of earnest money or deposit paid or made to him, in case his claim for specific performance is refused.

(2) No relief under Cl. (a) or Cl. (b) of sub-sec. (1) shall be granted by the Court unless it has been specifically claimed:

Provided that where the plaintiff has not claimed any such relief in the plaint, the Court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just for including a claim for such relief.

(3) The power of the Court to grant relief under Cl. (b) of sub-sec. (1) shall be without prejudice to its powers to award compensation under S. 21."

The suit out of which the appeal arises was instituted after the 1963 Act came into force and it is urged that sub-sec. (2) is an absolute bar to the grant of the relief of possession as the respondent had not claimed it in terms of Cl. (a) of sub-sec. (1). Counsel contends that the appellant was in possession of the property and it was therefore an "appropriate case" within sub-sec. (1) where the respondent could have claimed recovery of possession and that not having been done the bar under sub-sec. (2) operates. The answer to this contention has to be found in the true meaning and significance of the expression "in an appropriate case" in sub-sec. (1). It had been settled by judicial decisions that a plaintiff may claim a decree for possession in a suit for specific performance, even though strictly speaking, the right to possession accrues only when specific performance is decreed. Where the defendant is in possession and the plaintiff could ask for possession and that position has been settled, it is legitimate to think that the Legislature contemplated a different situation when it framed the expression "in an appropriate case". On that aspect I find myself, with respect, in agreement with the following discussion in Gyasa v. Risalo, AIR 1977 All 156:

"The expression 'in an appropriate case' indicates that it is not always incumbent on the plaintiff to claim possession or partition or separate possession in a suit for specific performance of contract for the transfer of the immovable property. That is to be done where the circumstances demand it. The relief for specific performance of the contract of sale embraces within its ambit not only the execution of the sale deed but also possession over the property conveyed under the sale deed. It may not always be necessary for the plaintiff to specifically claim possession over the property, the relief for possession being inherent in the relief for specific performance of the contract for sale. It cannot, however, be disputed that in certain circumstances relief of possession cannot be effectively granted to the decree-holder without specifically claiming relief for possession e. g., where the property agreed to be conveyed is jointly held by the defendant with other persons. In such a case the plaintiff in order to obtain complete and effective relief must claim partition of the property and possession over the share of the defendant." and

"Similarly a case may be visualised where after the contract between the plaintiff and the defendant the property passed in possession of a third person. A mere relief for specific performance of the contract of sale may not entitle the plaintiff to obtain possession as against the party in actual possession of the property. As against him a decree for possession must be specifically claimed for such a person is not bound by the contract sought to be enforced. It appears that S. 22 of the Specific Relief Act was enacted to get over such technical difficulties and to avoid multiplicity of suits. In a case where exclusive possession is with the contracting party, a decree for specific performance of the contract of sale simpliciter without specifically providing for delivery of possession, may give complete relief to the decree-holder. In order to satisfy the decree against him completely he is bound not only to execute the sale deed but also to put the property in possession of the decree holder. This is in consonance with the provisions of S. 55 (1) (f) of the T. P. Act which provides that the seller is bound to give, on being so required, the buyer or such person as he directs, such possession of the property as its nature admits."

In my view the property being in the possession of the judgment-debtor, as in that case, S. 22 (2) is no bar to delivery of possession of the property to the decree-holder. I reject the appellant's argument on this point.

The judgment of the courts below are confirmed and the appeal is dismissed with costs.

Appeal dismissed.

END

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1978

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" " G. P. Singh, B.Sc., LL.B. (Acting Chief Justice From 17-7-78 to 26-7-78 then C. J.).

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	(1978) 2 Serv L R 203
122FB	1978 M P L J 70
	1978 Jab L J 96
143FB	1978 Jab L J 227
	(1978) 1 Ren C J 552
	1978 M P L J 862
	(1978) 2 Rent L R 166
	(1978) 2 Ren C R 505
150FB	1978 Cri L J 1147
	1978 M P L J 125
	1978 Jab L J 194
152FB	1978 Jab L J 89
	1978 M P L J 113
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157	...
160	1978 Jab L J 228
	1978 M P L J 284
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165FB	(1978) 1 Ren C J 518
	1978 M P L J 405
	1978 Jab L J 826
	(1978) 2 Rent L R 149
	(1978) 2 Ren C R 62
171	1978 M P L J 520
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	(1978) 2 Rent L R 499
	(1978) 2 Ren C J 516
173	1978 Jab L J 221
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174	1978 M P L J 892
	1978 Jab L J 852
179	1978 Jab L J 206
	1978 M P L J 586
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184	1978 M P L J 272
	1978 Jab L J 245
189	1978 Jab L J 299
	1978 M P L J 527
191	1978 M P L J 207
197	1978 M P L J 288
	1978 Jab L J 368
199	1978 Jab L J 275
	1978 M P L J 544
201	1978 M P L J 488
	1978 Jab L J 570
209	1978 A C J 215
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213	1978 M P L J 440
	1978 Jab L J 435
218	1978 M P L J 562
237	1978 M P L J 678
	1978 Jab L J 703
245	1978 Jab L J 535
	1978 M P L J 633
250	1978 M P L J 447
	(1978) 2 Ren C R 92
	1978 Jab L J 695
	(1978) 2 Ren C J 408
255	1978 T A C 295
	1978 Jab L J 589
	1978 M P L J 604

LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM ETC., IN A. I. R. 1978 MADHYA PRADESH

Diss.=Dissented from in; Over. = Overruled in; Revers. = Reversed in.

AIR 1961 Madh Pra 84 (Pt E)—Diss. AIR 1978 (NOC) Delhi 145 (Jan).

(1964) Misc. Petn. No. 436 of 1963 D/- 3-3-1964 (Madh Pra) — Over. AIR 1978 Madh Pra 116A (FB) (Jun).

AIR 1964 Madh Pra 171 (Pt A)—Diss. AIR 1978 Delhi 129A (Jun).

1965 M P L J 961 — Held no longer good law in view of AIR 1976 SC 578 — AIR 1978 Madh Pra 218A (Oct).

1966 M P L J 426—Over. AIR 1978 Madh Pra 65 (FB) (Apr).

(1967) F. A. No. 1 of 1960, D/- 20.4.1967 (Madh Pra)—Partly Reversed—AIR 1978 SC 1447B (Oct).

AIR 1967 Madh Pra 201 (Pt B) — Revers. AIR 1978 SC 1740B (Dec).

(1970) Misc. Second Appeal No. 64 of 1968, D/- 19-8-1970 (Madh Pra) — Revers. AIR 1978 SC 22 A, B (Jan).

AIR 1970 Madh Pra 1=1969 M P L J 672 (FB)—Over. AIR 1978 Madh Pra 143 (FB) (Jul).

(1971) S. A. No. 115 of 1966, D/- 14-4-1971 (Madh Pra)—Revers. AIR 1978 Madh Pra 237D (Nov).

(1972) Criminal Appeal No. 23 of 1972, D/- 25.2.1972 (Madh Pra) — Revers. AIR 1978 SC 36 (Jan).

1973 M P L J 179—Over. AIR 1978 Madh Pra 54 (FB) (Mar).

(1974) F. A. No. 94 of 1967 (Madh Pra), D/- 19-8-1974—Held no longer good law in view of AIR 1976 SC 578 — AIR 1978 Madh Pra 218A (Oct).

AIR 1975 Madh Pra 189 (Pt C)=1975 Jab L J 468—Over. AIR 1978 Madh Pra 8 (FB) (Jan).

1975 Cri L J 498 (Madh Pra) — Held not good law in view of (1964) Cri Appeal No. 2 of 1964, D/- 26.10.1964 (SC) — AIR 1978 Delhi 138 (FB) (July).

1975 Jab L J 884—Over. AIR 1978 Madh Pra 150 (FB) (Aug).

AIR 1976 Madh Pra 175 = 1976 M P L J 254—Over. AIR 1978 Madh Pra 152 A, B (FB) (Aug).

1977 Cri L J 972 (Madh Pra) — Revers. AIR 1978 SC 1244 (Aug).

1977 Jab L J 248 - Over. AIR 1978 (NOC) (Madh Pra) 83 (Mar).

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title—Civil Courts' jurisdiction to entertain it — Not excluded by the Act (Apr) 72A **(FB)**

——S. 11 (3) — Limitation Act (1963), Ss. 5 and 29 — Objection application under S. 11 (3) — Section 5 of Limitation Act applies (Apr) 72B **(FB)**

——S. 46—See Ibid, S. 11 (Apr) 72A **(FB)**

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——S. 6 (1) (g) — See Ibid, S. 2 (f) (Nov) 237C

——S. 22 — See also Ibid, S. 37 (2) (Nov) 237D

——S. 22 — Scheme of section indicated (Nov) 237A

——S. 22 (1) — See Ibid, S. 2 (f) (Nov) 237C

—— S. 22 (1) — Interpretation of — Expression "which he was cultivating personally" qualifies both Sir and Khudkasht land and not only Khudkasht land after which it occurs in S. 22 (1) (Nov) 237B

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——Ss. 37 (2) and 22—Bar to jurisdiction of Civil Court—Order of allotment under S. 22 in favour of plaintiff — Not open to collateral attack by a plea in defence. S. A. No. 115 of 1966, D/- 14.4.1971 (Madh Pra), **Reversed** (Nov) 237D

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——S. 43 (2) Proviso — See Ibid, S. 36 (Feb) 46A
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THE

All India Reporter

1978

Madhya Pradesh High Court

AIR 1978 MADHYA PRADESH 1

FULL BENCH

SHIV DAYAL, C. J., K. K. DUBE AND J. P. BAJPAI, JJ.

The Madhya Pradesh State Road Transport Corporation, Bhopal, Petitioner v. The Regional Transport Authority, Jabalpur and another, Respondents.

Misc. Petn. No. 940 of 1976, D/- 8-10-1977.

(A) Constitution of India, Art. 226 — Constitution (42nd Amendment) Act (1976), S. 58 — Writ jurisdiction — Scope before and after 42nd Constitution Amendment, compared — Other remedy open — Petition pending on appointed day abates.

The jurisdiction under Art. 226 (1) before the amendment was very wide. The issuance of writ was not confined only for enforcement of the fundamental rights. The jurisdiction under Art. 226 could be invoked even for 'other purposes'. This jurisdiction could be exercised even in such cases where there was existence of other alternative remedy. It is true that by way of self-imposed limitations, the Courts were not inclined to invoke this extraordinary jurisdiction in such cases where it was found that adequate alternative remedy existed under the law and was not exhausted. Since it was a case of self-restraint only, the Courts entertained petitions by invoking the extraordinary jurisdiction in such suitable cases where the act or order challenged was apparently illegal and without jurisdiction and it was thought unjust to drive the petitioner to take recourses to ordinary remedy available under the law. But after the amendment, the jurisdiction under Article 226 (1) of the Constitution has been restricted in many respects and a further fetter has been imposed under Art. 226 (3) that no such petition for redress of injury referred to in sub-cls. (b) and (c) of Cl. (1) shall be entertained if any other remedy for such redress is provided for by or under any other law for the time being in force. Undoubtedly, this fetter does not apply to a case falling under sub-cl. (a) of Article 226 (1) relating to enforcement of fundamental rights. But the jurisdiction for the specified purposes in Cls. (b) and (c) can now be invoked only if there is no other remedy for such redress provided by or under any other law for the time being in force. (Para 10)

Section 58 of the Amendment Act, gives retrospective effect, however, in a limited manner inasmuch as it applies to writ petitions and interlocutory orders of stay, which have been pending on the appointed day. From the language of Art. 226 (3), it is apparent that the words "any other remedy for such redress" are significant in disclosing the intention of the Parliament that the fetter will apply only to such cases where the other remedy is capable of giving such redress as specified in sub-cls. (b) and (c) of Art. 226 (1). It would be, therefore, always necessary for the Courts to examine the facts and circumstances of each case. The redress sought and the scope of the other remedy provided under any other law for the time being in force and consequently the applicability of the fetter imposed by S. 58

and Art. 226 (3) will always depend on the facts and circumstances of each case. It will not be possible under these circumstances to lay any hard and fast rule in this respect. (Para 10)

If there is any other remedy provided for seeking the redress as contemplated by sub-cls. (b) and (c) of Art. 226 (1), the fetter of cl. (3) will apply and by operation of S. 58 of the Amendment Act, the petitions pending on the appointed day for such redress will abate as hit by the same. (Para 11)

(B) Motor Vehicles Act (4 of 1939), Ss. 64, 64-A and 68-F — Grant of stage carriage permit to private operator — Allegation of violation of provisions of nationalisation scheme — Remedy of appeal or revision open to State Transport Undertaking.

Where grant of stage carriage permit to private operator is alleged to be in contravention of a nationalisation scheme on ground that the route in question forms part of the exclusive route, an appeal against the order by the State Transport Undertaking is not barred by the provisions of sub-sec. (3) of S. 68-F. Even otherwise, the remedy by way of revision as provided under S. 64-A of the Act is available. (Para 8)

(C) Constitution of India, Art. 226 (as amended by 42nd Amendment) — Other remedy — Grant of permit under S. 57 (8), Motor Vehicles Act — Petition against pending — Abates on commencement of Constitution (Amendment) Act, 1976. (Motor Vehicles Act (1939), Ss. 57 (8), 64, 64-A — Constitution (42nd Amendment) Act (1976), S. 58).

Where an order of R.T.A. under S. 57 (8) of the Motor Vehicles Act granting extension of permit to private operator is challenged in writ petition by State Transport Undertaking on ground that the same is passed in contravention of the provisions of an approved nationalisation scheme, and the petition is pending on commencement of the Amending Act (1976) it must be deemed to have abated by operation of the provisions of S. 58 of the Amending Act (1976) as other remedy is available under the provisions of the Motor Vehicles Act. Even if the construction put by the Regional Transport Authority and the decision taken may be ultimately found to be wrong, it cannot be said that there is inherent lack of jurisdiction, so as to say that the order granting permit is ex facie without jurisdiction and thereby a complete nullity. The scope of remedies of appeal or revision provided under Ss. 64 and 64-A respectively of the Motor Vehicles Act is wide enough for seeking such redress. AIR 1977 Guj 113 (FB), Rel. on. (Paras 13, 15)

(D) Constitution (42nd Amendment) Act (1976), S. 58 (2) and (3) — Abatement of writ petition under S. 58 (2) — Petition cannot be treated as pending — Amendment of petition cannot be allowed — (Constitution of India, Art. 226 (as amended by 42nd Amendment).)

From the perusal of the language used in sub-sec. (3) of S. 58 of the Amendment Act, it is apparent that the scheme, as contained in various sub-sections of S. 58 of the Amendment Act contemplates two types of pending petitions — one category is of such pending petitions which have abated under sub-sec. (2) of S. 58 and the other of such pending petitions which have not abated under sub-sec. (2). Where a writ petition abates by virtue of sub-sec. (2) of S. 58, an application to amend such petition cannot be considered or allowed. The writ petition cannot be treated as one pending till the date of hearing. Once it is declared that the petition was such as abated by virtue of the provisions of S. 58 (2) of the Act, the effect of the declaration will be that such petition was not in force on the appointed day. 1977 Mah LJ 587 (FB), Disting. (Para 11)

Cases Referred: Chronological	Paras
1977 Mah LJ 587 (FB)	16
AIR 1977 Guj 113 (FB)	9
AIR 1970 Mys 60	7
(1969) 1 All ER 208	14
AIR 1966 SC 1089	14
AIR 1961 Madh Pra 81	7

V. S. Dabir with A. G. Dhande, for Petitioner; S. Q. Hasan with B. K. Rawat, for Respondent No. 2.

BAJPAI, J.:— This petition under Art. 226 of the Constitution of India was filed in October, 1976 and was admitted for final hearing by a Division Bench on 2-11-1976.

2. By this petition, the petitioner-Madhya Pradesh State Road Transport Corporation claims writ quashing the order made by the Regional Transport Authority, Jabalpur granting extension of route under the stage carriage permit held by respondent No. 2. The application for grant of extension was duly published and the petitioner filed an objection to the grant of extension on the ground inter alia that the proposed ex-

tension on Mandla-Jabalpur route forms part of the exclusive route as specified under scheme No. 8, the approved scheme for nationalisation and as such the grant of extension was in violation of the aforesaid approved scheme under Chapter IV-A of the Motor Vehicles Act, 1939. However, according to the Regional Transport Authority, the provisions of the scheme, as construed, did not make the route in question an exclusive route and therefore, the extension sought for was granted subject to the condition that respondent No. 2 shall not pick up or set down passengers between certain portions of the route, namely, Jabalpur-Barela and Phoolsagar-Mandla. The petitioner, being aggrieved by the said order instead of preferring an appeal or availing the remedy of revision provided under the Act, approached this Court to invoke the jurisdiction under Art. 226 of the Constitution of India. The grounds relied for challenging the order impugned are that according to the provisions of the scheme, the route in question was a route of exclusive operation and, therefore, the Regional Transport Authority had no jurisdiction to grant any extension in respect of the said route which actually amounted to grant of a fresh permit which was otherwise not possible. It was argued that the construction put by the Regional Transport Authority on the clauses of the scheme in question was wrong and the prohibition contained in the scheme also covered the case of grant of extension.

3. During the pendency of this petition, the Constitution (42nd Amendment) Act, 1976 (hereinafter referred to as 'the Amendment Act') came into force on 1-2-1977. On July 14, 1977, respondent No. 2 made an application to declare this petition to have already abated on 1-2-1977 by the operation of the provisions of S. 58 (2) of the Amendment Act. This application was registered as Interlocutory Application No. 2090 of 1977 and was placed before the Division Bench on 18-7-1977. Shri Dabir, learned counsel for the petitioner, while opposing the said application, contended that he was going to move an application for amendment of the petition challenging the vires of the Amendment Act itself and the question whether a case was made out for making a reference under Art. 131-A of the Constitution of India will have to be examined. At this statement, the Division Bench did not treat the petition as abated and directed that the question, whether a reference under Art. 131-A of the Constitution of India can be made or not, will be considered at the time of final hearing.

4. After the aforesaid interlocutory orders, the petitioner moved an application seeking leave to amend the petition for incorporating certain grounds relating to the challenge to the constitutionality of the Amendment Act. This application for amendment of the petition was registered as Interlocutory Application No. 2143 of 1977 and was laid before the Division Bench on 26-7-1977. Since the question of allowing the application for amendment was inter-linked with the question of abatement of the petition in pursuance of the provisions of S. 58 (2) of the Amendment Act, the parties were again heard on the question of abatement of the petition also. Looking to the importance of the point involved, the Division Bench thought it proper to refer the case to a larger Bench and accordingly this case has been placed before us.

5. It was not disputed by either side that the occasion for allowing or disallowing the application for amendment will arise only when it was found that the petition does not stand abated by operation of S. 58 (2) of the Amendment Act, and therefore, the parties were heard on this aspect alone and the hearing of the application for leave to amend the petition on merits was accordingly deferred.

6. On behalf of respondent No. 2, it was contended that since the order impugned was appealable in accordance with the provisions of S. 64 of the Motor Vehicles Act, the petition stands abated in pursuance of the provisions of S. 58 (2) of the Amendment Act. It was also contended that apart from there being a provision for appeal, the remedy for seeking the redress as sought in the present petition was also available by way of revision as provided under S. 64-A of the Motor Vehicles Act.

7. While meeting the objection raised by the respondent, it was contended that according to some High Courts, appeal against an order of the nature as involved in the present case could lie under cl. (b) of S. 64 (1), whereas according to some High Courts, it lies under Cl. (f) of the same. According to the view taken by this Court in Jasram v. State Transport Authority, AIR 1961 Madh Pra 81 such orders are appealable under Cl. (f)

and this view has been followed by the Mysore High Court also in B. B. Mali Patil v. Sreedar Rao Patil, AIR 1970 Mys 60. In any case, undisputedly an appeal does lie against such orders, may be under Cl. (b) according to some High Courts.

8. Shri Dabir, learned counsel appearing for the petitioner then contended that an appeal against the order impugned is barred by the specific prohibition contained in S. 68-F (3) of the Motor Vehicles Act. In our opinion, this objection is not at all tenable, because the order impugned is not an order as contemplated by sub-sec. (1) or (2) of S. 68-F of the Motor Vehicles Act. Even otherwise, the remedy by way of revision as provided under S. 64-A of the Act was undoubtedly available.

9. Lastly it was contended that since the order made by the Regional Transport Authority is without jurisdiction being in violation of the scheme of nationalisation duly approved according to the provisions of Chapter IV-A of the Act, the provisions of S. 58 (2) of the Amendment Act regarding abatement will not be attracted to the present case, even if the remedies of appeal or revision were available. According to him, the provisions of S. 58 (2) of the Amendment Act are not attracted to a case which involves challenge to such orders which are void ab initio, being without jurisdiction. He placed reliance on a decision of the Full Bench of Gujarat High Court reported in A'bad Cotton Mfg. Co. Ltd. v. Union of India, AIR 1977 Guj 113.

10. In our opinion, the present petition is hit by the provisions of S. 58 (2) of the Amendment Act for the reasons stated hereinafter. If we look to the scheme of the Amendment Act in the context of the object and purpose intended to be achieved, we find that the jurisdiction under Art. 226 (1) before the amendment was very wide. The issuance of writ was not confined only for enforcement of the fundamental rights. The jurisdiction under the said Article could be invoked even for 'other purposes'. This jurisdiction could be exercised even in such cases where there was existence of other alternative remedy. It is true that by way of self imposed limitations, the Courts were not inclined to invoke this extraordinary jurisdiction in such cases where it was found that adequate alternative remedy existed under the law and was not exhausted. Since it was a case of self restraint only, the Courts entertained petitions by invoking the extraordinary jurisdiction in such suitable cases where the act or order challenged was apparently illegal and without jurisdiction and it was thought unjust to drive the petitioner to take recourse to ordinary remedy available under the law. But after the amendment, the jurisdiction under Art. 226 (1) of the Constitution has been restricted in many respects and a further fetter has been imposed under Art. 226 (3) that no such petition for redress of injury referred to in sub-cls. (b) and (c) of Cl. (1) shall be entertained if any other remedy for such redress is provided for by or under any other law for the time being in force. Undoubtedly, this fetter does not apply to a case falling under sub-cl. (a) of Art. 226 (1) relating to enforcement of fundamental rights. But so far as the petitions falling under sub-cl. (b) or (c) are concerned, the fetter imposed by Art. 226 (3), as reproduced below, prohibits entertainment of the petition itself:—

"226 (3) No petition for the redress of any injury referred to in sub-cl. (b) or sub-cl. (c) of Cl. (1) shall be entertained if any other remedy for such redress is provided for by or under any other law for the time being in force."

(Underlining is ours).

The jurisdiction for the specified purposes in cls. (b) and (c) can now be invoked only if there is no other remedy for such redress provided for by or under any other law for the time being in force. The learned counsel for the petitioner specifically stated that the present petition did not fall under sub-cl. (a) and was for the specified purposes of sub-cls. (b) and (c) only. Section 58 of the Amendment Act, thereafter gives retrospective effect, however, in a limited manner inasmuch as it applies to writ petitions and interlocutory orders of stay, which have been pending on the appointed day. From the language of Art. 226 (3), it is apparent that the words "any other remedy for such redress" are significant in disclosing the intention of the Parliament that the fetter will apply only to such cases where the other remedy is capable of giving such redress as specified in sub-cls. (b) and (c) of Art. 226 (1). It would be, therefore, always necessary for the Courts to examine the facts and circumstances of each case. The redress sought and the scope

of the other remedy provided under any other law for the time being in force and consequently the applicability of the fetter imposed by S. 58 and Art. 226 (3) will always depend on the facts and circumstances of each case. It will not be possible under these circumstances to lay any hard and fast rule in this respect.

11. In view of the discussion made above, the position which emerges is that if there is any other remedy provided for seeking the redress as contemplated by sub-cls. (b) and (c) of Art. 226 (1), the fetter of Cl. (3) will apply and by operation of S. 58 of the Amendment Act, the petitions pending on the appointed day for such redress will abate as hit by the same. Earlier, the practice, that the High Courts entertained the writ petitions in suitable cases irrespective of the fact that there was an alternative remedy and the petitioner had not exhausted the same, cannot now be continued because the self-imposed restraint for not ordinarily entertaining such petitions by invoking the writ jurisdiction has now been made statutory restraint.

12. In the present case, what we have to see is whether by availing the remedy of appeal or revision as provided under the Motor Vehicles Act against the order impugned, the petitioner can seek the redress which he wants by invoking the jurisdiction under Art. 226, sub-cls. (b) and (c). In this case, the main contention of the petitioner is that the order impugned is bad in law because it violates the provisions of duly approved scheme of nationalisation. The provisions of the scheme as construed by the Regional Transport Authority do not make the portion of the route in question as one reserved for exclusive operation. This aspect of the case and various other grounds raised in this petition can always be examined and decided by the appellate or revisional authority. The scope of appeal and revision as provided by Ss. 64 and 64-A of the Motor Vehicles Act, as reproduced below, is wide enough:

64. Appeals:— (1) Any person—

....

(b) aggrieved by the revocation or suspension of the permit or by any variation of the conditions thereof;

....

(f) being a local authority or police authority or an association which, or a person providing transport facilities who, having opposed the grant of a permit, is aggrieved by the grant thereof or by any condition attached thereto,

....

may, within the prescribed time and in the prescribed manner, appeal to the State Transport Appellate Tribunal constituted under sub-sec. (2), who shall, after giving such person and the original authority an opportunity of being heard, give a decision thereon which shall be final.

(2) The State Government shall constitute for the State a State Transport Appellate Tribunal which shall consist of a whole-time judicial officer not below the rank of a District Judge.

....

64-A. Revision.— The State Transport Appellate Tribunal may, either on its own motion or on an application made to it, call for the record of any case in which an order has been made by a State Transport Authority or Regional Transport Authority and in which no appeal lies, and if it appears to the State Transport Appellate Tribunal that the order made by the State Transport Authority or Regional Transport Authority is improper or illegal, the State Transport Appellate Tribunal may pass such order in relation to the case as it deems fit, and every such order shall be final:

Provided that the State Transport Appellate Tribunal shall not entertain any application from a person aggrieved by an order of a State Transport Authority or Regional Transport Authority, unless the application is made within thirty days from the date of the order:

Provided further that the State Transport Appellate Tribunal shall not pass an order under this section prejudicial to any person without giving him a reasonable opportunity of being heard."

(Underlining is ours).

13. In the present case, the order impugned has been made under S. 57 (8) of the Motor Vehicles Act. This section empowers the Regional Transport Authority to grant extension of routes under the existing permit subject to such restrictions as provided by the Act or the Rules made thereunder. The Regional Transport Authority had jurisdiction, therefore, to consider whether grant of extension was permissible or not. While doing so, the said authority also

had jurisdiction to decide whether grant of extension applied for is hit by the provisions of Chapter IV-A or not. In order to decide the same, it was required to construe the provisions of the approved scheme. Under these circumstances, even if the construction put by the Regional Transport Authority and the decision taken may be ultimately found to be wrong, it cannot be said that there was inherent lack of jurisdiction, so as to say that the order is ex facie without jurisdiction and thereby a complete nullity. If the appellate or the revisional authority ultimately held that the Regional Transport Authority was wrong in coming to the conclusion that the route in question was available for conjoint operation and was not made exclusive and that the extension has been illegally granted it may set aside the same.

14. On going through the decision of the Full Bench of the Gujarat High Court referred above, we find that no such hard and fast rule has been laid down in the matter of deciding the applicability of the fetter imposed by Article 226 (3) and the provisions of S. 58 of the Amendment Act to pending petitions. In paras 27 and 28 of the judgment, as reproduced below, it has been clearly observed that while considering the question of applicability of fetters imposed by Art. 226 (3) of the Constitution and the provisions of S. 58 (2) of the Amendment Act, the amplitude of appeal or revision in each and every case will have to be examined:

"27. Every Act would have to be examined when such a question of the existence of alternative remedy arises and it would have to be found out as to what is the amplitude of the normal Act remedies for appeal or revision so that the question of real or purported order would be decisive. In the Act remedy is so wide as to cover even purported orders so that no part of the activity of the authority is collateral activity, the Act having provided for direct remedies to such a wide extent, that remedy would have to be first exhausted. On the other hand, where the Act remedies are not of such wide amplitude but only orders under the Act, in cases of such purported orders, the appeal remedy could not come in the way of the petitioner as it could not be said to have been provided for such purported orders which are null and void and which it would not be obligatory for the petitioner to exhaust for the simple reason that such an appeal remedy would not be able to cure the defect even if the appeal confirms the original order bearing this indelible mark of nullity."

"28. Similarly in cases where the question raised is of legislative competence or of excessive delegation, the authorities created by the Act being creatures of the statute, such questions of ultra vires of the provisions of the Act would be foreign to the scope of that jurisdiction and they could not dispose of such questions of ultra vires of the provisions of the statute, orders, rules or instruments made thereunder as per the settled legal position after the decision in Venkataraman & Co. v. State of Madras, AIR 1966 SC 1089. The same would be true of the orders which are totally de hors the Act and therefore, ex facie without jurisdiction even in the narrow sense as complete nullities which could be ignored as creating the rights and obligations whatever. The amplitude of the appeal provision would be a relevant consideration in cases of purported orders without 'jurisdiction' as interpreted in the wider sense as explained in the Anisminic decision [(1969) 1 All ER 208]

15. In view of the discussion made above, we are of the opinion, that in the present case, the scope of remedies of appeal or revision provided under S. 64 and S. 64-A respectively of the Motor Vehicles Act is wide enough for seeking such redress as sought for in this petition and therefore, it is held to have abated by operation of the provisions of S. 58 of the Amendment Act.

16. Lastly it was contended that since on 1-2-1977 or thereafter up to the date of presentation of the application for amendment, no order holding the petition as having abated has been made, the petition remained a pending petition and recourse to Art. 131-A of the Constitution will be permissible if the Court is satisfied that a case is made out for reference to the Supreme Court on the question of the constitutional validity of the 42nd Amendment Act. The argument was that, according to the scheme contemplated by S. 58 of the Amendment Act, the event of abatement depended upon the decision of the question whether the petition should have been admitted under the provisions of the amended Article 226 if it would have been in force on the date when the peti-

tion was actually admitted and entertained. This means that after the appointed day, the matter will have to be examined by the Court and after applying its mind to the question whether the petition should have been admitted under the new Article, an order declaring abatement will have to be made if the Court is of the view that the petition could not have been admitted under the new Article. Shri Dabir contended that in the context of the aforesaid situation, the words "the petition shall abate" as used in S. 58 should be construed to mean that the abatement will take effect from the date of the order made by the Court holding the petition as having abated. Reliance was placed by Shri Dabir on a decision of the Full Bench of Maharashtra High Court in Shantilal's case, (1977 Mah LJ 587). On going through the discussion beginning from para 98 of the judgment, we find that the Full Bench of the Maharashtra High Court, in the context of the question of exclusion of the period during which the proceedings relating to the petition actually remained pending and the question when a stay order made in such petition stands vacated, observed that looking to the provisions contained in S. 58 providing for exclusion of the period during which proceedings relating to such petition were pending in the High Court, it is apparent that the period sought to be excluded would cover the period even after 1-2-1977 up to the date of the order declaring the petition to have abated. It was also observed that the provisions made in S. 58 of the Amendment Act in respect of exclusion of time were in substance the extension of the provisions of S. 14 of the Limitation Act on principles to petitions hit by S. 58 (2) of the Amendment Act. As regards the date on which orders of stay or injunction etc. already made in such petitions found to have abated, it was observed that such orders will cease to have effect from the date of the order made by the Court declaring the petition as having abated.

17. In the present case we are at this stage not concerned either with the question of exclusion of time for the purpose of computing the period of limitation or the actual date on which any interim order by way of injunction or stay is to stand vacated. These questions are on different footing. Language, as used in S. 58 (2) and the proviso appended to it, is reproduced below:

"58 (2) In particular, and without prejudice to the generality of the provisions of sub-sec. (1), every pending petition before a High Court which would not have been admitted by the High Court under the provisions of Art. 226 as substituted by S. 38 if such petition had been made after the appointed day, shall abate and any interim order (whether by way of injunction or stay in any other manner) made on or in proceedings relating to, such petition shall stand vacated:

Provided that nothing contained in this sub-section shall affect the right of the petitioner to seek relief under any other law for the time being in force in respect of the matters to which such petition relates and in computing the period of limitation, if any, seeking such relief, the period during which the proceedings relating to such petition were pending in the High Court shall be excluded." (Underlining is ours).

Perusal of the above provisions makes it clear that for the purpose of giving the benefit of exclusion of time in computing the period of limitation, the period, during which the proceedings relating to such petition (i. e. the petition which has abated) remained pending in the High Court, shall be excluded, because the parties to such petition cannot be themselves made a judge to decide whether the petition in question would not have been admitted by the High Court according to the provisions of new Article if such petition had been made after the appointed day. As observed by the Full Bench of Maharashtra High Court, this question has to be decided by the Court itself and since the abatement of a petition is dependent on this fact, the proceedings relating to even such a petition which has abated will naturally remain pending till the applicability of sub-sec. (2) of S. 58 is decided by the Court. Similarly, a party cannot be expected to take recourse to the other remedy that may be open to him even before the decision whether the petition abates or not. On the same reasoning, the vacating of the interim order or injunction or stay being the result of abatement of the petition, it could not be said that the parties for themselves would decide whether the stay order is in force or not. However, as stated earlier since we are not concerned at present with the question of exclusion of time for computing the period of limita-

tion, or of stay, it is not necessary to deal further with this aspect of the case.

18. The question before us is whether the present petition which we have found as having abated by virtue of the provisions of S. 58 (2) could be treated as a petition pending like other pending petitions, which are not hit by the provisions of S. 58 (2). From the perusal of the language used in sub-sec. (3) of Section 58 of the Amendment Act, as reproduced below, it is apparent that the scheme, as contained in various sub-sections of S. 58 of the Amendment Act contemplates two types of pending petitions— one category is of such pending petitions which have abated under sub-sec. (2) of S. 58 and the other of such pending petitions which have not abated under sub-sec. (2):

"58 (3) Every interim order (whether by way of injunction or stay or in any other manner) which was made before the appointed day, on or in any proceedings relating to, a pending petition not being a pending petition which has abated under sub-sec. (2) and which is in force on that day, shall unless before the appointed day copies of such pending petition and of documents in support of the plea for such interim order had been furnished to the party against whom such interim order is made and an opportunity had been given to such party to be heard in the matter, cease to have effect if not vacated earlier." (Underlining is ours).

19. Thus, in our opinion, since the present petition is of the category of such pending petitions which have abated under sub-sec. (2) of S. 58, we are not inclined to consider and allow the application for amendment of such a petition. For the reasons stated above, as the present petition cannot be said to be a pending petition, which has not abated, there is no scope for considering or allowing the application for amendment by taking it out from the purview of sub-sec. (2) of S. 58. Once it is declared that the petition was such as has abated by virtue of the provisions of S. 58 (2) of the Act, the effect of the declaration will be that such petition was not in force on the appointed day.

20. The application moved by respondent No. 2 for declaring this petition as having abated by operation of S. 58 of the Amendment Act is allowed and the application for amendment of the petition is consequently dismissed as infructuous.

21. This petition accordingly abates and shall be consigned to the record room. In the circumstances of the case parties will bear their own costs. The amount of security deposit, if any, may be refunded to the petitioner.

Order accordingly.

AIR 1978 MADHYA PRADESH 8
FULL BENCH

SHIV DAYAL, C. J., C. KONDAIAH AND G. G. SOHANI, JJ.

Shantilal Soganmal and another, Appellants v. Town Improvement Trust, Ratlam and others, Respondents.

First Appeal No. 50 of 1974, D/- 25-8-1977.*

M. P. Town Improvement Trusts Act (14 of 1960), Ss. 147 and 78 — Appeal against decision given under S. 78 — Court-fee payable will be under Art. 11 in Sch. II of Court-Fees Act — AIR 1975 Madh Pra 189, Overruled — (Court-Fees Act (1870), S. 8 and Sch. II, Art. 11).

In an appeal under S. 147 from a decision given under S. 78 ad valorem court-fees on the difference between the amount claimed and the amount awarded is not required to be paid; the court-fees payable on such appeal will be under Art. 11 in Schedule 2 of the Court-Fees Act. AIR 1976 SC 1503, Foll.; AIR 1975 Madh Pra 189, Overruled. (Para 6)

Cases Referred: Chronological Paras

AIR 1976 SC 1503 2, 5
AIR 1975 Madh Pra 189: 1975 Jab LJ 468 1
AIR 1971 SC 1887: (1970) 1 SCC 685 1

SHIV DAYAL, C. J.:— This is an appeal under S. 147 of the Madhya Pradesh Town Improvement Trust Act, 1960. When the matter was placed before a learned single Judge, the question arose whether the court-fee paid on the appeal was adequate. Court-fee of Rs. 30 has been paid and not ad valorem court-fee. In Suresh Kumar v. Town Improvement Trust, Bhopal, 1975 Jab LJ 468: (AIR 1975 Madh Pra 189), the Hon'ble Taxing Judge (Raina J.) held that on such appeal ad valorem court-fee is payable on the difference between the com-

*(Against order of R. S. Saxena, Dist. J., Ujjain and President, Compensation Tribunal for Improvement Trust, Ratlam, D/- 13-11-1973.)

pensation claimed and the compensation awarded. Since the learned single Judge thought that in view of certain other decisions of the Nagpur High Court and the Bombay High Court and since the decision in Sahadu Gangaram Bhagade v. Special Deputy Collector, Ahmednagar, (1970) 1 SCC 685 : (AIR 1971 SC 1887) did not decide the above question, he referred the matter to be decided by the Larger Bench, i. e. how the matter has come up before us.

2. The decision of Raina, J. was rendered and the reference by the learned single Judge was made prior to the decision of the Supreme Court in Diwan Brothers v. Central Bank of India, Bombay (AIR 1976 SC 1503) on going through which we are of the opinion that on the basis of that authority the point referred to us must be held to have been settled. Section 8 of the Court-Fees Act reads thus:

"S. 8. The amount of fee payable under this Act on a memorandum of appeal against an order relating to compensation under any Act for the time being in force for the requisition of land for public purposes, shall be computed according to the difference between the amount awarded and the amount claimed by the appellant."

Article 11 in Schedule 2, Court-Fees Act, provides as follows:

(For Article see below)

3. The crux of the matter is whether a decision rendered under S. 78 of the M. P. Improvement Trust Act, 1960, is an order having the force of a decree for the purposes of Art. 11 in Schedule 2 of the Court-Fees Act.

4. Section 72 of the M. P. Improvement Trust Act, 1960, provides for compensation. Section 73 provides for the constitution of a Tribunal to assess the compensation. Section 78, sub-sec. (1) confers powers on the Tribunal as regards the procedure. Sub-sec. (2) attaches finality to the decision given by the Tribunal and sub-sec. (3) of S. 78, reads thus:

"S. 78 (3) Every decision of the Tribunal and every order made by the Tribunal for the payment of money shall be enforced by a competent civil Court within the local limits of whose jurisdiction it was made as if it were a decree of that Court."

(Contd. on Col 2)

Sections 147, 148 and 149 of the said Act are as under:—

"S. 147. Appeal from the decision of the Tribunal—

Any person aggrieved by the decision of the Tribunal may—

(a) where the value of the claim of such person before the Tribunal exceeds Rs. 500 appeal to the High Court within 90 days from the date of the decision.

(b) in any other case appeal to the Court of the District Judge having jurisdiction over the Trust area, within 60 days from the date of such decision."

Section 148—

"S. 148. Procedure in such appeals— The provisions of the Code of Civil Procedure, 1908 (V of 1908), with respect to appeals from original decrees shall, so far as may be, apply to appeals under this Act."

Section 149—

"S. 149. Execution of order of High Court— Every order passed by the Court of the District Judge or the High Court on appeal under this Act shall be enforced, on application, by a competent Civil Court within the local limits of whose jurisdiction the award or order appealed against was made, as if it were a decree of that Court."

5. In Diwan Brothers v. Central Bank of India, Bombay (AIR 1976 SC 1503) (supra), a similar question arose for consideration under the Displaced Persons (Debts Adjustment) Act, 1951. Their Lordships have held as follows (at p. 1514):—

"The term 'decree' used in Schedule II, Art. 11 of the Court-Fees Act is referable to a decree as defined in S. 2 (2) of the Civil P. C. The decision of the Tribunal constituted under Displaced Persions (Debts Adjustment) Act either allowing a claim or rejecting a claim, though described as a decree in the Act, does not make it a decree within the meaning of the Court-Fees Act. The decision does not fulfil the requirements of a decree within the meaning of Schedule II, Art. 11 of the Court-Fees Act. Therefore, the memorandum of appeal filed by

"Art. 11. Memorandum of Appeal when the appeal is not from a decree or an order having the force of a decree.	(a) When presented to the High Court.	Seven rupees and fifty Paise
	(b) When presented to a Civil Court other than the High Court	Three rupees.

a person aggrieved by the decision of the Tribunal squarely falls within the ambit of Sch. II, Art. 11 of the Court-Fees Act and ad valorem court-fees under Sch. I, Art. 1 are not payable."

6. In view of this decision of the Supreme Court, nothing remains to be decided by this Court as regards the applicability of Art. 11 in 2nd Schedule of the Court-Fees Act. Following the Supreme Court decision we hold that in an appeal under S. 147 of the M. P. Town Improvement Trust Act from a decision given under S. 78 of the same Act, ad valorem court-fees on the difference between the amount claimed and the amount awarded is not required to be paid, the court-fees payable on such appeal will be under Art. 11 in Schedule 2 of the Court-Fees Act.

This is our answer to the question referred to us.

Question answered accordingly.

AIR 1978 MADHYA PRADESH 10

(GWALIOR BENCH)

FULL BENCH

SHIV DAYAL, C. J., G. L. OZHA AND R. L. MURAB, JJ.

Firm Ladhuram Rameshwardayal, Petitioner v. Krishi Upaj Mandi Samiti, Shivpuri and others, Respondents.

Misc. Petn. No. 319 of 1975, D/- 7-5-1977.*

(A) Letters Patent (M. P.), Cl. 26 — M. P. High Court Rules (Civil), Chap. I, R. 11 — Difference of opinion between Judges of Division Bench — Case referred to third Judge — After the opinion of the third is recorded, the case need not necessarily be placed before the same Bench which first heard it.

When on account of difference of opinion between two Judges constituting a Division Bench, a matter is referred to a third Judge nominated by the Chief Justice under R. 11 of Chap. I of the High Court Rules, and the third Judge, after formulating the point or points of difference of the Judges of the Division Bench, returns his opinion under Cl. 26 of the Letters Patent, any other Division Bench of which one or both of the Judges were not members of the Division Bench which originally heard the case, can render the decision in accordance with the majority of the opinion of the Judges of the referring Bench and the referee Bench.

There is no such restriction either in R. 11, Chap. I of the High Court Rules or in Cl. 26 of the Letters Patent that after the opinion of the third Judge is recorded the case must be placed before the same Bench which first heard it. But as a matter of propriety it should be laid before the same Bench which first heard it. However, if that Bench is not available or if it is not convenient for that Bench to sit, it is not necessary that the matter should go before the same Bench for deciding the point according to the opinion of the majority. The Chief Justice can constitute another Division Bench to decide the case according to method provided by Cl. 26 of the Letters Patent. After the opinion of the third Judge is returned, it is more or less a matter of formality to pronounce the decision of the Court which has got to be according to the opinion of the majority, consisting of the third Judge and the Judges of the Division Bench which first heard it. (Case law discussed).

(Paras 18, 19, 20)

(B) Letters Patent (M. P.), Cl. 26 — M. P. High High Court Rules (Civil), Chap. I, R. 11 — Difference of opinion between Judges of Division Bench — Case referred to third Judge — Jurisdiction of referee Judge.

When on a difference of opinion between two Judges constituting a Division Bench, a matter is referred to a third Judge, the third Judge can only express his 'opinion' on the 'points' on which the Judges are divided in opinion. However, the third Judge cannot 'decide' that point. (He has to leave to the Division Bench to 'decide' the point as directed under Cl. 26 of the Letters Patent). Nor can he enter into any other point on which the Judges of the Division Bench were not divided in opinion. If the third Judge expresses his opinion on any other point or finally decides the case as a whole, the latter part of his opinion (be it styled as 'order' or 'judgment') has to be ignored as without jurisdiction. After the third Judge has recorded his opinion, the case must be laid before the Division Bench for deciding the point or points which were referred to the third Judge according to the method provided by Cl. 26 of the Letters Patent and it is

*(Decided by Full Bench on order of reference made by S. R. Vyas and U. N. Bhachawat, JJ. on 5-5-1977.)

at this stage that a Division Bench will finally decide the case before it.

(Para 20)

Cases Referred: Chronological Paras

AIR 1971 SC 1836 : 1971 Cri LJ 1287 15
AIR 1970 SC 1266 : 1970 Cri LJ 1138 15
AIR 1967 Madh Pra 56 : 1966 Jab LJ 884 11
AIR 1960 Pat 400 11
AIR 1954 SC 340 11
AIR 1943 Lah 84 (FB) 11, 12
AIR 1933 All 861 11

A. R. Naokar, for Petitioners; B. D. Gupta, H. G. & A. B. Mishra, Swamisaran, G. A., for Non-Petitioners.

SHIV DAYAL, C. J.:— Two questions have been referred to us by a Division Bench. It will be useful to state the circumstances leading to this reference:—

(i) Firm Ladhuram Rameshwardayal, by this petition under Art. 226 of the Constitution, sought a writ of mandamus and/or certiorari, inter alia, to quash the electoral roll and also to quash the election programme in connection with an election to the Agriculture Market Committee of Krishi Upaj Mandi Samiti, Shivpuri.

(ii) The petition was heard by a Division Bench of Raina, J. and Bhachawat, J. They differed. In the opinion of Raina, J. the petition was to be dismissed. In the opinion of Bhachawat, J. the petition was to be allowed inasmuch as the voters list and the whole programme of the election were invalid and consequently the election which had taken place was also to be quashed.

(iii) Accordingly, they directed the case to be placed before the Chief Justice for nominating a Bench under R. 11 of Chapter I of the High Court Rules.

(iv) The Chief Justice nominated Lodha, J. as the third Judge.

(v) Lodha, J., in his order, directed as follows:—

"In view of my foregoing conclusions, I partly allow this petition and quash the Electoral Roll (Annexure 2) and direct that a fresh Electoral Roll be prepared in accordance with law on the lines indicated above and election for constituting the market committee be held thereafter in accordance with law. The election held during the pendency of this petition is quashed. There will be no order as to costs.

In other words, he agreed with Bhachawat J.

(vi) The Registry then placed the matter before the Chief Justice who constituted a Division Bench of Vyas, J. and Bhachawat, J. (because, in the meantime, Raina, J. had taken over as Chairman of the Industrial Court, Indore, and was not available to sit in the High Court).

(vii) When the opinion of Lodha, J. was placed before the Division Bench of Vyas, J. and Bhachawat, J., a question cropped up whether that Bench, constituted as it was, and which had not heard the matter on merits at any stage, could decide the case in accordance with the opinion of the majority. They agreed with each other that this question be decided by a larger Bench. However, Bhachawat, J. was of the opinion that one more question should be referred to the larger Bench along with the abovesaid question, on which they both agreed. Thus, again, a difference of opinion arose between Vyas, J. and Bhachawat, J. as to the questions to be referred to the larger Bench.

(viii) This difference was resolved by a third Judge (Chief Justice), who said that as it was a matter of procedure and of general importance, the other question may also be referred to a larger Bench which is to be constituted for the first question.

2. It is thus that the matter has come before us and the two questions which we have to answer are these:—

"(1) When on account of difference of opinion between two Judges constituting a Division Bench, a matter is referred to, under R. 11 of Chapter I of the High Court Rules, a third Judge nominated by the Chief Justice under Cl. 26 of the Letters Patent who, after formulating the point or points of difference between the Judges of the Division Bench, gives his decision, then can any other Division Bench of which one or both the Judges were not members of the Division Bench which originally heard the case, give its decision in accordance with the majority of the opinion of the Judges of the referring Bench as well as of the referee Bench?

(2) When on a difference of opinion between the two Judges constituting the Division Bench, the matter is referred to a third Judge and the third Judge while expressing his opinion on the point of difference passed a final order, disposing of the matter referred to him and does not return the matter to the Division Bench, can the matter be said to be pending and can the Chief Justice suo motu order for its being listed be-

fore the referring Division Bench or to some other Division Bench for disposal according to the method provided by Cl. 26 of the Letters Patent?

3. It appears that for two peculiarities, the Division Bench (Vyas, J. and Bhachawat, J.) thought that these questions should be decided by a larger Bench. (i) Vyas, J. did not hear this case earlier. It was Raina, J. who heard it with Bhachawat, J. (ii) the operative part of Lodha, J.'s opinion is couched in a language expressive of the final decision of the writ petition.

4. Rule 11 of Chapter I of the High Court Rules reads thus:—

"11. When in any appeal or civil matter heard by a Bench of two Judges, the Judges composing the Bench differ on a point of law and state the point on which they differ, the proceeding shall be placed before the Chief Justice for the purpose of nominating one or more of the other Judges to deal with the matter."

It was under this rule that, when Raina, J. and Bhachawat, J. differed, the proceedings were placed before the Chief Justice who nominated Lodha, J. to deal with the matter. The expression 'civil matter' is comprehensive enough to include a writ petition under Art. 226 of the Constitution. The object of this rule is the appointment of a third Judge, in case the Judges of the Division Bench are equally divided in opinion as to the decision to be given on any point. The object and purpose of the rule is that the third Judge should be appointed by the Chief Justice. This rule does not lay down the jurisdiction of the third Judge.

5. The jurisdiction of the third Judge is to be found in Cl. 26 of the Letters Patent, which reads thus:—

"26. Single Judges and Division Courts.— And we do hereby declare that any function which is hereby directed to be performed by the High Court of Judicature at Nagpur in the exercise of its original or appellate jurisdiction may be performed by any Judge or by any Division Court, thereof appointed or constituted for such purpose in pursuance of section one hundred and eight of the Government of India Act; and if such Division Court is composed of two or more Judges and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges, if there be a majority, but if the Judges be equally divided they shall state the point on which they differ and the case shall then be heard upon that point by one or more of the other Judges and the point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it."

The contemplation of this clause is that whenever Judges are equally divided in opinion as to the 'decision' to be given on 'any point', an opinion is to be obtained on such point by one or more of the other Judges. By this method the opinion of a third Judge or a Bench of Judges is obtained. Then there are three opinions on the 'point'.

6. The next stage is that the point has to be 'decided'. The mandate in Cl. 26 is that the point shall be 'decided' according to the 'opinion' of the majority of the Judges who have heard the case, including those who first heard it. The three opinions have to be placed side by side and it has to be seen what the opinion of the majority of Judges is, that is to say, out of the three opinions, which is the majority opinion and which is the minority opinion. The point must be decided according to the majority opinion.

7. The question is who shall decide what the majority opinion is? Clause 26 does not specify which Judge or Bench would decide the point. It merely leaves the matter with the mandate that the point shall be decided according to the opinion of the majority of the Judges who heard the case including those who first heard it."

8. It is undoubted position that the point has to be decided at this stage (i.e. after the third Judge has recorded his opinion) as a matter of formal expression of the decision. There is no question of fresh application of the mind on the merits of the point, on which the opinion of the third Judge has been recorded. If two Judges had first heard the matter, the point will be decided by a Division Bench of two Judges after receipt of the opinion of the third Judge. It is true that the word 'decided' ordinarily envisages an application of the mind but such application of the mind must be restricted to two things only:

(i) to find out from the three opinions what the majority opinion is and to 'decide' the point according to the majority opinion; and (ii) to decide what relief flows from such decision, which relief the Division Bench shall be bound to give to the parties.

9. It is at once noteworthy that the two Judges of the Division Bench which first heard the case, recorded their 'opinions'. They did not decide the point at the stage of their difference; obviously they could not, because of the difference. When the matter goes to the third Judge, he also records his 'opinion' on that 'point'. Cl. 26 of the Letters Patent confers only this limited jurisdiction on the third Judge. He does not 'decide' the point. This is obviously so because in a matter which is to be heard by a Division Bench of two Judges, every point has to be 'decided' by two Judges only. It cannot be decided by a single Judge, be he the third Judge. That is why what the third Judge does (who is so constituted because of the difference of opinion of two Judges) is that he records his 'opinion' on the point on which the Judges of the Division Bench are divided in opinion. After the receipt of the opinion of the third Judge, it is the Division Bench which 'decides' the point, although it cannot decide the point by applying its mind de novo on the merits but is bound to decide the point according to the majority opinion of the Judges. Thus although the jurisdiction is limited, yet, the jurisdiction to decide the point rests with the Division Bench itself.

10. Clause 26 of the Letters Patent studiously employs the words 'decide' and 'opinion'.

11. The third Judge has no jurisdiction to decide any other point. His jurisdiction is limited to the point on which the Judges of the Division Bench are divided in opinion. It is that point alone which is referred to the third Judge for decision. In Cl. 26 of the Letters Patent the word 'point' is used everywhere. It is true that in Rule 11 of Chapter I of the High Court Rules the expression employed is 'to deal with the matter' but it is plain enough that the word 'matter' here means the point and not the whole case. The referee Judge has no jurisdiction to enter into any question or point on which the Judges who first heard the case did not differ, and the referee Judge has no jurisdiction to decide the whole case. It must, therefore, be said that even if the referring Division Bench directs that the 'case be referred to a third Judge', the jurisdiction of the third Judge cannot be enlarged by the Division Bench. Clause 26 of the Letters Patent itself confines it to the 'point' on which there has been difference of opinion between the two Judges. It follows that if the referee Judge decides any point on which the Judges of the Division Bench did not differ, or if referee Judge decides the whole case, that part of his opinion, or order or judgment (howsoever the opinion may be styled) must be read as opinion on the point or points on which the Judges of the Division Bench were divided in opinion. The rest is to be ignored, for want of jurisdiction, by application of the principle of Kiran Singh v. Chaman Paswan, AIR 1954 SC 340. See Amalgamated Coalfields Ltd. v. State of M. P., AIR 1967 MP 56: 1966 Jab LJ 884 (Para 58 at p. 917): 1966 MP LJ 842 where it is observed as follows (at p. 74 of AIR):—

"The very language of Cl. 26 makes it undoubted that the Judge to whom the matter is referred in consequence of the difference of opinion between the Judges constituting the Division Bench, shall not hear the case upon any other point, because his opinion on such other points will not itself be the decision of the Court, his opinion on the point or points on which the Judges constituting the Division Court have differed will be the decision of the Court. The reason is that every point has to be decided according to the opinion of the majority of the Judges who first heard the case and the Judge who has heard the case in consequence of the difference of opinion. This is not possible unless and until the Judges constituting the Division Bench have heard upon other points. The duty of the referee Judge is only to express an opinion on the point or points of difference and to return the case with his opinion to the Division Bench. It is the Division Bench seized of the case, which must pronounce the final judgment according to the method provided by Cl. 26 of the Letters Patent. If the referee Judge passes the final order, it would cause difficulty and anomaly with regard to the question of forum in case of a further appeal. If the referee is a single Judge and he decides the appeal or other matter finally, will a further appeal lie? If it will, the position will be anomalous. Useful assistance can be derived from the analogous provisions contained in S. 98, Civil Procedure Code. My view finds support in Royal Calcutta Turf Club v. Kishan Chand, AIR 1943 Lah 84 (89, Col. 1); also observations of Blacker, J. on the same page, col. 2 (FB)); Mst. Akbari v. Rahmat Hussain,

AIR 1933 All 861 and State of Bihar v. Ram Ballabh Das, AIR 1960 Pat 400. For these reasons, I am of the opinion that 'matter' in R. 11 of the High Court Rules, means the point or points on which the Judges constituting the Division Bench have differed and not the whole case. It seems to me that under R. 11 of the High Court Rules, read with Cl. 26 of the Letters Patent, a Division Bench cannot refer the entire case, to a third Judge without expressing its opinion on all the points and that the Judge to whom the case is referred cannot enter into those points on which the Judges constituting the Division Bench have not differed. Rule 11 itself requires that the Judges composing the Division Bench have to state the point on which they differ and it is in this light that I read the order of the Division Bench in the present case."

12. The view that we are taking was also the view expressed by a Full Bench of the Lahore High Court in Royal Calcutta Turf Club v. Kishan Chand, (AIR 1943 Lah 84 at p. 89):—

"It appears to me doubtful whether even the referee Judge has jurisdiction to decide the point of difference. The clause says that the appeal shall be heard upon that point by the referee Bench and the point shall be decided according to the opinion. It does not specifically lay down that the point shall be decided by the referee Judge, as the Legislature could very easily have stated, if it had been the intention to transfer jurisdiction for deciding the point, from the Division Bench seized of the case, to the referee Judge. It appears to me, therefore, that the jurisdiction for the decision not only of the appeal as a whole but also of the point of difference, remains with the referring Bench; and all that the clause lays down is a method by which in the case of a difference of opinion, the difficulty is to be resolved. On this view, it would be the duty of the referee Judge to express an opinion on the point or points of difference and to return the case with his opinion to the Division Bench seized of the case which must pronounce the final judgment, according to the method provided by Cl. 26. If in the interval a change has occurred in the constitution of the Division Bench in question, it would be necessary for the Hon'ble the Chief Justice to constitute another Division Bench as the successor of the referring Bench."

13. It was an argument before us that Justice Lodha's order in deciding the whole case is ultra vires so that it must be sent back to him for recording fresh opinion. We cannot accede to this contention. Lodha, J. has expressed his opinion on the point on which Raina, J. and Bhachawat, J. differed. He has clearly held that the electoral roll was invalid and in his opinion, fresh electoral roll has to be prepared and consequently the election is to be quashed. That being so, his opinion is undoubtedly within his jurisdiction under Cl. 26 of the Letters Patent. If he has said something beyond it and has as if decided the case, that part, being clearly separable, cannot be given effect to, being without jurisdiction.

14. Section 98 of the Code of Civil Procedure also employs the following expression:—

"..... shall then be heard upon that point only by one or more of the Judges, and such point shall be decided according to the majority (if any) of the Judges who have heard the appeal, including those who first heard it."

The Letters Patent overrides S. 98 of the Code of Civil Procedure, under which even when there is a difference of opinion on a question of fact, it can be referred to a third Judge.

15. The corresponding provisions contained in S. 429 of the Code of Criminal Procedure, 1898, and S. 392 of the Code of Criminal Procedure, 1973, are differently worded. Under S. 392 of the present Code, where Judges of a Division Bench are divided in opinion, "the appeal with their opinion shall be laid before another Judge of that Court, and that Judge, after hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow the opinion....." This was also the wording of S. 429 of the Code of Criminal Procedure, 1898. Under that section, the whole case, not merely the point or points on which the Judges differed, is referred to a third Judge, whose duty it is to consider all the points involved before he gives his opinion. His jurisdiction is not limited to the point or points on which the Judges constituting the Division Bench differed. The third Judge is empowered to deal with the entire case. The judgment and order in the case follows the opinion of the third Judge. This is because of the clear language of S. 392 of the Code of Criminal Proce-

dure, which adopts the language of Section 429, Cr. P. C., 1898. See Hethubha v. State of Gujarat, AIR 1970 SC 1266 which was followed in Union of India v. B. N. Ananthapadmanabhaiah, AIR 1971 SC 1836.

16. To the present case, the provisions of the Code of Criminal Procedure have no application. Therefore, the dictum of the two cases last mentioned is not apposite. The present case is governed by R. 11 of Chap. I of the High Court Rules and Cl. 26 of the Letters Patent.

17. Suppose in a civil appeal between A as the appellant, and B and C as respondents, each one of the three parties claims title to the land and the two Judges of the Division Bench of the High Court differ in their opinion, one of them holding that A is the owner, while the other holding that B is the owner. In such a case, if the third Judge is of the opinion that neither A nor B is the owner, but C is the owner, it will have to be said that the opinion of the third is without jurisdiction. He has to confine his opinion to the difference of opinion whether A is the owner or B.

18. We would now advert to the question whether after the opinion of the third Judge is recorded, it is necessary that the case must be placed before the same Bench which first heard it. There is no such restriction either in R. 11, Chapter I of the High Court Rules, or in Cl. 26 of the Letters Patent. But as a matter of propriety it should be laid before the same Bench which first heard it. However, if that Bench is not available or if it is not convenient for that Bench to sit, for instance in our High Court, where Judges who sat in a Division Bench at one of the seats of the High Court may be sitting at another seat when the matter is returned by the third Judge, it is not necessary that the matter should go before the same Bench for deciding the point according to the opinion of the majority.

19. As already said, after the opinion of the third Judge is returned, it is more or less a matter of formality to pronounce the decision of the Court which has got to be according to the opinion of the majority, consisting of the third Judge and the Judges of the Division Bench which first heard it.

20. In the result, we answer the two questions referred to us as follows:—

(1) When on account of difference of opinion between two Judges constituting a Division Bench, a matter is referred to a third Judge nominated by the Chief Justice under R. 11 of Chapter I of the High Court Rules, and the third Judge, after formulating the point or points of difference of the Judges of the Division Bench, returns his opinion under Cl. 26 of the Letters Patent, any other Division Bench of which one or both of the Judges were not members of the Division Bench which originally heard the case, can render the decision in accordance with the majority of the opinion of the Judges of the referring Bench and the referee Bench.

(2) When on a difference of opinion between two Judges constituting a Division Bench, a matter is referred to a third Judge, the third Judge can only express his 'opinion' on the 'point' on which the Judges are divided in opinion. However, the third Judge cannot 'decide' that point. (He has to leave to the Division Bench to 'decide' the point as directed under Cl. 26 of the Letters Patent). Nor can he enter into any other point on which the Judges of the Division Bench were not divided in opinion. If the third Judge expresses his opinion on any other point or finally decides the case as a whole, the latter part of his opinion (be it styled as 'order' or 'judgment') has to be ignored as without jurisdiction. After the third Judge has recorded his opinion; the case must be laid before the Division Bench for deciding the point or points which were referred to the third Judge according to the method provided by Cl. 26 of the Letters Patent and it is at this stage that a Division Bench will finally decide the case before it. It is not the requirement of law that the case must be laid before the same Division Bench which first heard it, after it is returned by the third Judge. When one of the Judges constituting the Division Bench which first heard the case, has retired or is not otherwise available, the Chief Justice can constitute another Division Bench to decide the case according to the method provided by Cl. 26 of the Letters Patent.

Answered accordingly.

AIR 1978 MADHYA PRADESH 16

SHIV DAYAL, C. J. AND
P. D. MULYE, J.

M/s. Ramdayal Umraomal Partnership Firm, Raipur, Applicant v. M/s. Pannalal Jagannathji Partnership Firm, Dhanmandi, Mandsaur, Opposite Party.

Civil Revn. No. 207 of 1976, D/- 25-8-1977.

Civil P. C. (5 of 1908), O. 14, R. 2 — Issue when to be decided as preliminary issue.

Where the question is a pure question of law or a mixed question of law and fact and may result in the disposal of the suit it should be decided as a preliminary issue. Where the question is a pure question of law but which may not dispose of the entire suit, it is not necessary to decide it first and it may await the stage of the final decision of the suit. Where the question of law is mixed with facts, on which facts there are independent issues of fact to be tried, the decision on the question has to be postponed and it cannot be tried first as a preliminary issue. AIR 1955 Bom 55, Rel. on. Case law Ref. AIR 1976 All 201. Explained. (Paras 4, 5)

Anno:— AIR Commentary, Civil P. C. (1908), O. 14, R. 2, N. 2.

Cases Referred: Chronological	Paras
AIR 1976 All 201	7
AIR 1976 Andh Pra 70	5
1975 MPLJ 43	5
1974 MPLJ (SN) 45	5
(1974) Civil Revn. No. 252 of 1974, D/- 12-11-1974 (Madh Pra)	2
AIR 1974 Punj 97	5
1973 Jab LJ (SN) No. 59	5
(1973) Civil Revn. No. 524 of 1973 (Madh Pra)	3, 5
AIR 1972 Madh Pra 157 : 1972 Jab LJ 448	2, 5
AIR 1971 Madh Pra 1 : 1970 Jab LJ 290 (FB)	5
1967 MPLJ (SN) No. 57	5, 6
AIR 1966 SC 153	8
AIR 1966 SC 1431	8
AIR 1964 SC 497	2, 5
AIR 1962 SC 646	8
AIR 1959 SC 492	8
1957 Jab LJ 243	5
AIR 1955 Bom 55	5, 6

P. K. Saxena, for Applicant; V. K. Jain, for Opposite Party.

SHIV DAYAL, C. J.:— The learned single Judge has referred the following question for our opinion:

"Whether an issue relating to jurisdiction of the trial Court which requires the taking of some evidence, has to be decided as a preliminary issue or not."

2. It appears from the order of reference that the learned single Judge found some conflict between two single Bench decisions in Balchand v. Basantidevi, 1972 Jab LJ 448 : (AIR 1972 Madh Pra 157) and Mohansingh v. Sampatbai, (Civil Revn. No. 252 of 1974, decided on 12-11-1974) (Madh Pra), although in both these decisions a reference has been made to Major S. S. Khanna v. F. J. Dhillon (AIR 1964 SC 497).

3. The learned counsel for both the sides have placed before us several decisions of this Court and other High Courts and also an unreported decision of A. P. Sen, J. in Civil Revn. No. 524 of 1973 (Madh Pra), Gordhandas v. Lalsingh.

4. Having gone through all these decisions we find that there is a debate as to the jurisdiction of the trial Court to try the question of jurisdiction when that question cannot be decided without recording evidence on it; otherwise generally the Courts are agreed that the question of jurisdiition must be decided first. Now the requirement of evidence to be taken may arise in different situations, which may be categorised as follows:

(1) Pure questions of law, which are preliminary i. e. which would go to the root of the case and on their decision the suit may be disposed of;

(2) Mixed questions of law and fact, which are preliminary in nature and may result in the disposal of the suit;

(3) Pure questions of law, which may not be preliminary i. e. which may not dispose of the entire suit; and

(4) questions of laws which are mixed with facts, on which facts there are independent issues of fact to be tried.

5. Since the question of jurisdiction is one which goes to the root of the matter if it is not decided at the earliest opportunity, it may cause unnecessary expense and harassment to the parties. It is the requirement of the law that the question of jurisdiction must be decided first, as a preliminary issue. If, however, some evidence is to be recorded before the question of jurisdiction can be disposed of, that also the Court can do. But, where an independent issue of fact has to be determined, on which the question of jurisdiction depends so that the question of jurisdiction cannot be decid-

ed without such other independent issue of fact being decided, to record evidence on the question of jurisdiction will be to record evidence on that fact for which there is an independent issue. Such lop-sided trial, their Lordships have held in S. S. Khanna v. F. J. Dillon (AIR 1964 SC 497) (supra) is not permissible. We are, therefore, of the opinion that the question of the first two categories should be decided as preliminary issues without proceeding with the trial of other issues. However, in the case of the third category, it is not necessary to decide the question of law as a preliminary issue because it will not dispose of the entire suit and therefore await the stage of the final decision of the suit. In the case of the fourth category, decision of the question has to be postponed and it cannot be tried as a preliminary issue. Such was the situation in Major S. S. Khanna v. Brig. F. J. Dhillon (AIR 1964 SC 497) (supra). The view that we take was taken by A. P. Sen, J. in Gordhandas v. Lalsingh (Civil Revision No. 524 of 1973) (Madh Pra), or Vishnu Saw Mills v. Vitthal Rao (1957 Jab LJ 243), Ramdas v. Navinchandra (1973 Jab LJ (SN) No. 59); Firm Ramrichpal v. Firm M/s. Mahabir Trading Co. (1974 MPLJ (SN) 45); Dr. Krishnamurthy v. Smt. Bhagwanidevi (1967 MPLJ (SN) No. 57); Santoshchandra v. Gyansundarbai (1970 Jab LJ 290 : (AIR 1971 Madh Pra 1 (FB)); Balchand v. Basantidevi, 1972 Jab LJ 448 : (AIR 1972 Madh Pra 157) in the order of reference of Tare, J. as he then was, Rameshrandas v. Motilal (1975 MP LJ 43), Reshamlal v. Anand Sarup (AIR 1974 Punj 97), Ghatmal v. Amaravati Dyeing Pvt. Ltd. (AIR 1976 Andh Pra 70) and Fazelhussein v. Yusufally Adamji (AIR 1955 Bom 55).

6. We may, however, make a particular reference to the decision in Dr. Krishnamurthi v. Smt. Bhagwanidevi (1967 MPLJ (SN) No. 57) (supra) decided by Pande J. He has further referred to Rule 145 (2) of the rules and orders (Civil made by this court). In Fazlehussain v. Yusufally Adamji (AIR 1955 Bom 55) (supra) Mr. Justice J. C. Shah (as his Lordship then was) held thus (at page 57):

"In considering the preliminary issue the court must look to the averments in the plaint and consider any objections which the defendants may choose to raise against the maintainability of the action on those averments. The question of jurisdiction which is raised by way of demurrer has always to be decided on the allegations made in the plaint and not on the contentions that the defendants may raise. It is true that if the jurisdiction of the court depends upon the proof of a fact and the question as to the existence or otherwise of that fact is canvassed, the parties may lead evidence in support of their respective cases before the preliminary issue as to the jurisdiction of the court is decided."

This decision deserves great respect and we respectfully concur with what has been said therein.

7. We are aware of a decision by the Allahabad High Court in M/s. Estrela Batteries Ltd. v. M/s. Modi Industries Ltd. (AIR 1976 All 201). There it has been observed that

"where the question of jurisdiction of the court to entertain the suit involves mixed questions of law and fact, it cannot be decided as a preliminary issue, under O. 15, R. 3, when there is no material on record to decide it".

If, we may say with respect, having regard to the facts stated this principle laid down in the Allahabad case falls within the purview of the fourth of the categories enumerated above. If however, it was intended to be laid down that just because any evidence becomes necessary to be recorded, the determination of question of jurisdiction ceases to be a preliminary issue we respectfully beg to differ.

8. There was some argument before us whether when the trial court has decided not to dispose of the question of jurisdiction as a preliminary issue, this court can interfere in revision. In our opinion the point is concluded by their Lordships in Chaube Jagdishprasad v. Gangaprasad (AIR 1959 SC 492), Roshanlal Mehra v. Ishwardas (AIR 1962 SC 646), Pandurang Dhondi v. Maruti Hari (AIR 1966 SC 153) and S. Rama Iyer v. Sundaresa (AIR 1966 SC 1431). In Pandurang Dhondi v. Maruti Hari (supra) Gajendragadkar, C. J. has if we may say so with greater respect succinctly laid down the rule as follows:—

"While exercising its jurisdiction under S. 115 it is not competent to the High Court to correct errors of fact however gross they may be or even errors of law, unless the said errors have relation to the jurisdiction of the court to try the dispute itself.

That point of law may arise in proceedings instituted before the Subordinate Court which are related to the

question of jurisdiction. It is well settled that a plea of limitation or a plea of res judicata is a plea of law which concerns the jurisdiction of a court which tries the proceedings. A finding on this plea in favour of the party would oust the jurisdiction of the court and, so an erroneous decision on these pleas can be said to be concerned with the question of jurisdiction, which fall within the purview of S. 115 of the Code. But an erroneous decision of a question of law by the Subordinate Court which has no relation to the questions of jurisdiction of that court cannot be corrected by the High Court under S. 115.

9. The learned counsel for the non-petitioner endeavoured to tell us that having regard to the facts and circumstances of this case from which this revision arises, the question of jurisdiction cannot be decided as a preliminary issue. That in our opinion will be a question to be considered by the learned single Judge, who will deal with this particular case. We are merely called upon to express our opinion on the question referred to us.

10. Accordingly we answer the reference as in paragraphs 4 and 5 above.

Order accordingly.

AIR 1978 MADHYA PRADESH 18

(GWALIOR BENCH)

SHIV DAYAL, C. J.

Jayendra Singh Kushwaha, Applicant v Madhya Pradesh Electricity Board, Gwalior and others, Opposite Parties.

Civil Revn. No. 13 of 1974, D/- 22-7-1977.*

Motor Vehicles Act (4 of 1939), Ss. 110, 110-A and 110-F — Jurisdiction of Civil Court and claims tribunal to entertain claims — Classification of claims.

The scheme of the Motor Vehicles Act from S. 110 to S. 110-F clearly shows that such claim may be categorised as follows:—

(1) If no death or personal injury results in the accident arising out of the use of motor vehicles, the claim for compensation for loss suffered in property alone is not tenable before the Claims Tribunal, but before the Civil Courts.

(2) If death or personal injury results in the accident arising out of the use of motor vehicles on the basis of express wordings used in these sections, the claim for compensation for such loss suffered has to be made before the Claims Tribunal, and not the Civil Courts.

(3) Loss or damage of property may be suffered by a person who has not been given a right to make an application under the provisions of S. 110-A to the Claims Tribunal. The only remedy in such a case will lie in Civil Courts.

(4) There may be cases of composite injuries in which death or personal injury may have resulted, as well as loss or damage to property, or where death has resulted from the accident, loss is sustained by the deceased or by his legal representatives. In case of claims of such composite nature, the claim will be triable by the Claims Tribunal. (Para 4)

Thus the scheme is that the claims can be tried only by a Claims Tribunal and the jurisdiction of the Civil Court is barred when there is composite claim for damages to property and injury to person. However, by virtue of the proviso to S. 110, where such a claim includes a claim for compensation in respect of damage to property exceeding rupees two thousand, the claimant may at his option refer 'the claim' to a Civil Court for adjudication. (Para 4)

A claim by a person other than those enumerated under S. 110-A cannot be made under S. 110. The claim is, therefore, not covered by S. 110-F. If a claim of a third person is not entertainable under S. 110, to apply the bar under S. 110-F merely because by its nature the claim is entertainable by the Claims Tribunal will leave the third person without remedy. But it is an elementary rule of jurisprudence that where there is a right there is a remedy. Therefore, the expression "to any question relating to any claim for compensation which may be adjudicated upon by the Claims Tribunal" must be limited to a claim which can be made under S. 110 but not otherwise. (Para 6)

Cases Referred: Chronological Paras

1974 MPLJ (SN) 10 10
AIR 1962 Madh Pra 19 4

H. G. Mishra, for Applicant; J. P. Dewan (for No. 1), for Opposite Parties.

ORDER:— The defendant is aggrieved by an order passed by the trial Court holding that it has jurisdiction to try the suit. The defendant's objection was

*(From order of R. C. Sharma, 1st Addl. Dist. J., Bhind, D/- 16-11-1973.)

that the claim contained in the suit is exclusively triable by the Motor Accidents Claims Tribunal constituted under S. 110 of the Motor Vehicles Act, 1939. The trial Court did not accept this contention.

2. The plaintiff, M. P. Electricity Board, has claimed as compensation Rs. 35,220 on the following allegations; the defendant No. 1 is the owner of a bus, defendant No. 2 was the driver. On December 22, 1969, the bus dashed against a pick-up van belonging to the plaintiff M. P. Electricity Board which caused injuries to the occupants of the pick-up, one of whom died.

3. It is averred in the plaint that the plaintiff had to pay Rs. 4,800 as compensation under the Workmen's Compensation Act, to the dependants of the occupants who were in the pick-up when it became involved in the accident. The plaintiff had also to pay Rs. 420 on medical treatment given to the injured persons. The damage caused to the pick-up has been claimed at Rs. 21,800. Thus there are three claims in the suit:—

(A) Damage to the pick-up van	...	Rs. 21,800.00
(B) Compensation paid under the Workmen's Compensation Act	...	Rs. 4,800.00
(C) Expenses incurred in medical treatment.	...	Rs. 420.00
		Rs. 27,020.00

4. Shri Mishra, learned counsel for the defendants argues that this is a composite claim which falls under S. 110 of the Motor Vehicles Act and is triable exclusively by the Tribunal. Reliance is placed on Om Prakash v. National Fire & G. Insurance Co. (AIR 1962 MP 19). The scheme of the Motor Vehicles Act from S. 110 to S. 110-F clearly shows that such claim may be categorised as follows:—

(1) If no death or personal injury results in the accident arising out of the use of motor vehicles, the claim for compensation for loss suffered in property alone is not tenable before the Claims Tribunal, but before the Civil Courts.

(2) If death or personal injury results in the accident arising out of the use of motor vehicles on the basis of express wordings used in these sections, the claim for compensation for such loss suffered has to be made before the Claims Tribunal, and not the Civil Courts.

(3) Loss or damage of property may be suffered by a person who has not been given a right to make an application under the provisions of S. 110-A to the Claims Tribunal. The only remedy in such a case will lie in Civil Courts.

(4) There may be cases of composite injuries in which death or personal injury may have resulted, as well as loss or damage to property, or where death has resulted from the accident, loss is sustained by the deceased or by his legal representatives. In case of claims of such composite nature, the claim will be triable by the Claims Tribunal.

Thus the scheme is that the claims can be tried only by a Claims Tribunal and the jurisdiction of the Civil Court is barred when there is composite claim for damages to property and injury to person. However, by virtue of the proviso to S. 110, where such a claim includes a claim for compensation in respect of damage to property exceeding rupees two thousand, the claimant may at his option refer 'the claim' (which means the claim underlined by me) to a Civil Court for adjudication.

5. Now, in the present case there is a claim of the plaintiff for Rs. 21,800 for compensation in respect of damage to the property. There is no bar to a Civil suit in respect of this claim.

6. Then adverting to claims under heads (B) and (C) Shri Diwan's contention is that to these claims S. 110 of the Motor Vehicles Act does not apply. His argument is that such claims can be made only by the persons enumerated in S. 110-A.

7. The petitioner's contention is really based on S. 110-F which bars the jurisdiction of Civil Court to entertain any question relating to any claim for compensation which may be adjudicated upon by the Claims Tribunal. The scheme of the provisions beginning with Sec. 110 and ending with S. 110-F is that the legislature has provided cheap and speedy remedy for claims for compensation in respect of accidents involving death or bodily injury to persons arising out of the use of a motor vehicle and also damage to any property to a third party so arising or both.

8. The Claims Tribunal is constituted under S. 110 and that section confers jurisdiction on a Claims Tribunal to entertain such claims as specified above.

Section 110-A runs thus:—

"S. 110-A. Application for compensation— (1) An application for compensation arising out of an accident of the nature specified in sub-sec. (1) of S. 110 may be made—

(a) by the person who has sustained the injury; or

(b) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or

(c) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be."

Provided ..... etc."

The combined effect of Ss. 110 and 110-A is that the Claims Tribunal may entertain a claim by one of the persons enumerated under S. 110 but not otherwise. The claim made by a person who falls outside the purview of S. 110-A cannot make claim under S. 110. In that event S. 110-F is out of the way.

9. A claim by a person other than those enumerated under S. 110-A cannot be made under S. 110. The claim is, therefore, not covered by S. 110-F. If a claim of a third person is not entertainable under S. 110, to apply the bar under S. 110-F merely because by its nature the claim is entertainable by the Claims Tribunal will leave the third person without remedy. But it is an elementary rule of jurisprudence that where there is a right there is a remedy. Therefore, the expression "to any question relating to any claim for compensation which may be adjudicated upon by the Claims Tribunal" must be limited to a claim which can be made under S. 110 but not otherwise.

10. In this view of the matter the conclusions I have reached are:—

(i) The plaintiff's claim in respect of damage to its pick-up van, i. e. Rupees 21,800 falls within the purview of S. 110 and it was in the absolute discretion of the plaintiff whether to bring a suit in the Civil Court or to lodge a claim before the Claims Tribunal. This I said earlier in Civil Revision No. 325/73 also decided on September 28, 1973 at Jabalpur in Ali Ahmed & Sons v. M. P. S. R. T. C. (See, 1974 MPLJ (SN) 10).

(ii) As regards the other two claims, since the petitioner is neither a person injured (nor a legal representative to any of the persons injured), are outside the purview of S. 110 read with S. 110-A. Thus the two claims for Rs. 4,800 and Rs. 420 could not be laid before the Claims Tribunal so that the Civil Court necessarily has jurisdiction to try them.

11. In the result, this revision is dismissed. Parties shall bear their own costs. The record shall be returned to the trial Court within three days from today.

Petition dismissed.

AIR 1978 MADHYA PRADESH 20

(GWALIOR BENCH)

C. M. LODHA AND U. N. BHACHAWAT, JJ.

Smt. Shazadi Begum, Appellant v. Vinod Kumar and another, Respondents.

First Appeal No. 21 of 1976, D/- 4-2-1977.*

(A) Civil P. C. (5 of 1908), O. 41, R. 1 — Court-fee on memorandum of appeal — Dismissal of suit against appellant without costs — Appeal with prayer that he should have been awarded costs — No court-fee paid on amount of costs claimed — Appeal rejected regarding that prayer. (Para 3)

(B) Civil P. C. (5 of 1908), S. 96 — Appeal — Dismissal of suit against appellant — Adverse finding against appellant on a point wholly unnecessary and about which no issue framed — Finding would not operate as res judicata — As there was no decree against appellant, no appeal would lie against that finding. (Para 4)

(C) Civil P. C. (5 of 1908), O. 41, Rr. 22 and 33 — Cross-objection — No relief sought against appellant who had no interest in cross-objection — Objection under R. 22 could not be directed against other respondents in such case — Cross-objection not maintainable — Rule 33 could not be invoked when trial Court's decree was not interfered with in appeal. AIR 1963 SC 1516, Rel. on. (Paras 6, 7)

Cases Referred: Chronological Paras

AIR 1963 SC 1516 6, 7

K. N. Gupta, for Appellant; H. G. Mishra and K. S. Agarwal, for Respondents.

LODHA, J.:— This is an appeal by one of the defendants against whom the suit has been dismissed by the trial court. There are two prayers contained in the appeal viz. (1) that the appellant should have been awarded costs of the suit by

*(From decree of J. D. Shrivastava, 3rd Addl. Dist. J., Gwalior, D/- 3-8-1976.)

the lower court and (2) that the adverse finding given by the lower Court against the defendant-appellant may be quashed.

2. A preliminary objection has been raised by Mr. H. G. Mishra on behalf of the plaintiff-respondent No. 1 that the appeal is not maintainable. The objection is two-fold. It is urged in the first instance, that appeal lies from the decree but not against an adverse finding. Then it is argued that the appellant is not entitled to raise the objection regarding costs inasmuch as she has not paid court-fee on the amount of costs claimed by her.

3. We might first take up the second branch of the preliminary objection regarding deficiency of court-fee. Admittedly no court-fee has been paid on the amount of costs claimed by the appellant in the memo of appeal. The appeal, therefore, so far as the prayer for award of costs is concerned is liable to be rejected. No prayer for grant of time to make up the deficiency in the court-fee has been made before us. We may, however, observe that even if such a prayer was made, we would not be inclined to grant it, inasmuch as the appeal would be time-barred, if the court-fee is paid now.

4. This brings us to the first part of the preliminary objection. The plaintiff respondent No. 1 brought the present suit for recovery of Rs. 12,000 on the basis of three Hundis alleged to have been executed by the defendant respondent No. 2 Gani Mohammad and the present appellant, who is wife of Gani Mohammad, was impleaded as a party on the ground that she was carrying on business jointly with Gani Mohammad. The trial Court has found that the appellant was not carrying on any business jointly with Gani Mohammad and, therefore, she is not liable for the suit amount. The suit against the appellant was, therefore, dismissed. However, while deciding the question of liability of the defendant Gani Mohammad, the trial Court has made an observation, even though there was no issue on the point, that Gani Mohammad had fraudulently transferred his property in favour of the appellant in order to defeat the plaintiff's suit. In our opinion, this finding was wholly unnecessary. As a matter of fact the question did not arise in the case at all, and, therefore, this finding will not operate as res judicata against the appellant, nor she would be estopped from challenging it in any subsequent proceeding. It is clear that the appellant is not attacking the decree obviously because there is no decree against her. In this view of the matter, we are clearly of the opinion that no appeal lies against this finding.

5. The appeal is, therefore, rejected but without any order as to costs.

6. The respondent Gani Mohammad has also filed a cross-objection against the decree by the trial Court. The cross-objection pertains to the rate of interest awarded against Gani Mohammad. In our opinion, the cross-objection is not maintainable under O. 41, R. 22, C.P.C. In this connection reference may be made to Pannalal v. State of Bombay, AIR 1963 SC 1516 wherein their Lordships have been pleased to lay down that O. 41, R. 22 permits, as a general rule, a respondent to prefer an objection directed only against the appellant and it is only in exceptional cases such as where the relief sought against the appellant in such an objection is intermixed with the relief granted to the other respondents, so that the relief against the appellant cannot be granted without the question being reopened between the objecting respondent and other respondents that an objection under O. 41, R. 22 can be directed against the other respondents. Such is not the situation in the present case. No relief is sought against the appellant who has no interest in the cross-objection and, therefore an objection under O. 41, R. 22 cannot be directed against the other respondents. In this view of the matter, the cross-objection under O. 41, R. 22, C.P.C. by the respondent Gani Mohammad is not maintainable.

7. Mr. K. S. Agarwal submitted, in the alternative, that relief may be granted to his client under O. 41, R. 33, C.P.C. This submission, in our opinion, is also devoid of substance. In Pannalal v. State of Bombay (AIR 1963 SC 1516) (supra) it was also observed that the wide wording of O. 41, R. 33 was intended to empower the appellate court to make whatever order it thinks fit, not only as between the appellant and the respondent but also as between a respondent and a respondent. It empowers the appellate court not only to give or refuse to the appellant by allowing or dismissing the appeal but also to give such other relief to any of the respondents as 'the case may require'.

8. In our opinion, no relief requires to be granted to the respondent Gani

Mohammad in this appeal inasmuch as we have not interfered with the decree of the trial Court in any way. The respondent Gani Mohammad could have filed an appeal from the decree of the trial court, if he was aggrieved by it or by any part of it.

9. Accordingly, we dismiss the cross-objection also, but make no order as to costs of the cross-objection.

Appeal & Cross-objection dismissed.

AIR 1978 MADHYA PRADESH 22

(GWALIOR BENCH)

G. P. SINGH AND P. D. MULEY, JJ.

Harcharanlal Gupta, Applicant v. Regional Transport Authority, Gwalior and others, Opposite Parties.

Misc. Petn. Case No. 244 of 1976, D/- 20-7-1977.

Motor Vehicles Act (4 of 1939), Ss. 57 (2) and 58 (2) — Applications for fresh permit — Whether can be invited by R.T.A. after application for renewal — Whether both the applications can be disposed of simultaneously.

The person holding a permit and persons interested in getting new permit on the route have to apply for renewal and fresh grant of permit within the period of limitation allowed by Sections 58 (2) and 57 (2) so that their application may be considered and disposed of before the date of expiry of the permit. Even after an application for renewal is published, fresh applications for permit can be entertained and can be considered along with the application for renewal provided it is possible to finally dispose of the applications for renewal and the application for fresh permit before the date of expiry of the permit. AIR 1973 Madh Pra 209 (FB), Dist. (Para 3)

Even assuming that applications for fresh permit cannot be invited where an application for renewal has been made, there is no legal bar to applications for fresh permit without invitation and such applications can be disposed of along with the application for renewal of permit. (Para 5)

Cases Referred: Chronological Paras

AIR 1973 Madh Pra 209 : 1973 MPLJ 451 (FB) 2

D. V. Nigudkar, for Applicant; M. C. Gupta (for No. 4), for Opposite Parties.

IU/JU/D644/77/DLD/WNG

SINGH, J.:— The petitioner was holder of permit No. 29 of 1972 for the route Guna-Sironj. The permit was valid up to 27th May 1975. The petitioner applied for renewal of his permit on 26th August 1974. This application was published in the Gazette dated 18th Oct., 1974. The Gazette publication contained a footnote inviting fresh applications for the route within 30 days. Respondents 3 and 4 made applications for the grant of permit on the said route on 9th and 12th Nov., 1974 respectively. Their applications were published in the Gazette in March 1975 inviting objections within 30 days. The petitioner then filed this petition under Art. 226 of the Constitution in April 1975. The petitioner's contention in this petition is that the Regional Transport Authority should not have invited applications for fresh permit and that the Authority should be restrained from considering the applications of respondents 3 and 4 along with the application of the petitioner.

2. Learned counsel for the petitioner has relied on the case of Bipatlal v. R. T. Authority, Jabalpur, 1973 MPLJ 451 : (AIR 1973 Madh Pra 209) (FB) in support of the contention that after publication of the petitioner's application for renewal, no applications should have been invited by the R.T.A. In our opinion, the Full Bench case is distinguishable on facts and this petition must be dismissed.

3. It will be seen that the petitioner's permit was expiring on 27th May 1975. An application for renewal has to be made under S. 58 (2) of the Motor Vehicles Act not less than 120 days before the date of its expiry. The idea behind this provision is that the application for renewal would be disposed of normally within 120 days and the renewed permit would be effective from the date of the expiry of the original permit. In this context, reference is also necessary to S. 57 (2) of the Act. Under this section, an application for a stage carriage permit has to be made not less than six weeks before the date on which it is desired that the permit shall take effect. The parties interested to ply stage carriages on a route can easily know the date of expiry of any permit covering the route. They can apply for fresh permit to be effective from that date within the period allowed under S. 57 (2). During the period the existing permit is in operation, a vacancy does not occur in lieu thereof. The question that arises in such

cases before the Regional Transport Authority is either to renew the existing permit from the date of its expiry or to grant a new permit from that date. By considering the application for renewal with other applications, public interest is better served because the Regional Transport Authority has a more wide range of selection than when he considers the application for renewal alone. The person holding the permit and the persons interested in getting new permit on the route have to apply for renewal and fresh grant of permit within the period of limitation allowed by Ss. 58 (2) and 57 (2) so that their applications may be considered and disposed of before the date of expiry of the permit. In our opinion, even after an application for renewal is published, fresh applications for permit can be entertained and can be considered along with the application for renewal, provided it is possible to finally dispose of the application for renewal and the applications for fresh permit before the date of expiry of the permit.

4. In the instant case, the petitioner applied eight months before the date of expiry of his permit. The petitioner's application was published on 18th October 1974. It is true that it became ripe for consideration after the expiry of the period allowed for lodging objections, i.e. 30 days. But it is a point to be noted that the vacancy was to occur nearly six months thereafter. The disposal of the petitioner's application six months before the date on which the permit was to expire would not have conferred any benefit on the petitioner except this that he would have gained a tactical advantage of the consideration of his application without meeting any competition from other applications. Respondents 3 and 4, as already stated, applied on 9th and 12th Nov., 1974. Their applications were within limitation under S. 57 (2) as also under S. 58 (2) of the Act. These applications were published in the middle of March 1975 and became ripe for consideration after 30 days. These applications as also the application for renewal made by the petitioner could have been easily considered and disposed of before expiry of the permit. Consideration of all these applications together would advance public interest for, as pointed out earlier, the Regional Transport Authority would have a wider field of selection. In our opinion, applications for renewal should not be considered by the Regional Transport Authority at such an early stage that there is no chance of other competitors to come in the field. It is true that Regional Transport Authority should not delay the disposal of an application for renewal beyond the date of expiry of the permit. But if the application for renewal and other applications received in lieu of renewal can be disposed of before that date, we do not find any illegality or irregularity if the Authority decides to dispose of all these applications together instead of dealing them one by one. Rather, in our opinion, it would be more advisable for the Authority to dispose of all the applications together so that a proper person may be selected for operating on the route.

5. The argument of the learned counsel for the petitioner that the R.T.A. has no power to invite applications after the application for renewal is published, is based on the Full Bench case referred to above. Even assuming that that is the correct legal position, we find that there was no legal bar for respondents 3 and 4 to apply for grant of a permit in lieu of renewal even without any invitation. Their applications being well within time both under Ss. 57 (2) and 58 (2) of the Act, they could have been disposed of along with the application for renewal made by the petitioner before the expiry of the permit. In these circumstances, in our opinion, the R.T.A. cannot be restrained from considering the applications made by respondents 3 and 4 along with the application for renewal made by the petitioner. In the Full Bench case, the permit expired on 19th April 1970. The notification inviting fresh applications was issued on 15th May 1970, not only after publication of the application for renewal but even after the expiry of the permit. The applications received on such an invitation could not obviously be considered before the date of expiry of the permit. As earlier pointed out, the facts in the instant case are entirely different. The applications for permit in lieu of renewal were made well within the statutory period of limitation provided under Ss. 58 (2) and 57 (2) of the Act and they could have been easily disposed of along with the application for renewal before the date of expiry of the permit. The Full Bench case, in our opinion, is not applicable on these facts.

6. The petition fails and is dismissed. There shall, however, be no order as to costs of this petition. The amount of the

security deposit be refunded to the petitioner.

Petition dismissed.

AIR 1978 MADHYA PRADESH 24

N. C. DWIVEDI AND C. P. SEN, JJ.

Smt. Usha Devi and another, Petitioners v. Kailash Narain Dixit and others, Respondents.

Misc. Petn. No. 1078 of 1976, D/- 21-1-1977.

Constitution of India, Art. 226 — Habeas corpus — Custody of minor son — Welfare of child — Child aged 4½ years — Illegal detention — Right of parents to his custody in preference to other relations — Volition of child whether material in deciding his legal custody — Remedy available under Guardians and Wards Act whether bar to habeas corpus application.

A boy, aged 4½ years, has no independent volition of his own and will prefer to live with the person in whose custody he is then. The association of a boy with persons (especially relations and the grand-mother for some time as in the instant case) will make him dear to them, but such relations (respondents) in preference to the father and mother, have no legal right to the custody of the minor and the welfare of the boy lies in his living with his natural guardians (petitioners) who are best suited persons to take care of him and rear him in their own traditions. (Para 21)

The boy, if kept away from his parents, will be deprived of the parental affection and will, after some time, become stranger to them. This will not be in the interest of the minor. (Paras 27, 28, 29)

There is no substance in the contention of the respondents that the petitioners (natural guardians) can take recourse to the Guardians and Wards Act. Since the other relations have no legal right to the custody of the minor son of the petitioners, their refusal to return the boy to the petitioners results in an illegal detention of the boy. The fact that the petitioners have a right to relief under the Guardians and Wards Act is no justification for denying the petitioners the clear right for the custody of the minor. (Direction given to the respondents to return the minor to the petitioners). AIR 1960 SC 93; 1976 MPLJ 621; AIR 1976 Madh Pra 92; AIR 1914 PC 41; AIR 1969 Madh Pra 23, Ref.; Misc. Cr. Case No. 471 of 1970, D/- 18-11-1970 (M. P.), Disting. (Para 22)

Cases Referred: Chronological Paras

AIR 1976 Madh Pra 92 : 1976 MPLJ 41 23
1976 MPLJ 621 23
(1970) Misc. Cri. C. No. 471 of 1970, D/- 18-11-1970 (MP) 26
AIR 1969 Madh Pra 23 : 1968 MPLJ 685 : 1969 Cri LJ 204 25
AIR 1960 SC 93 : 1960 Cri LJ 164 22
AIR 1914 PC 41 24

Fakhruddin and M. A. Khan, for Petitioners; J. P. Gupta and R. K. Varma, for Respondents.

DWIVEDI, J.:— This is a petition by the two petitioners Shrimati Usha Devi Dixit and Raviprakash Dixit, mother and father respectively, for a writ of habeas corpus directing the respondents to produce their son Manish Dixit alias Babloo aged about 4½ years and for his custody to them.

2. The petitioners' case is this: They were married according to Hindu rites at Kanpur on 3-7-1971. Out of their wedlock, Manish Dixit was born on 17-6-1972 and was living with the petitioners. Respondents 1 and 2 are the father and uncle of petitioner No. 2 who is living separate from them since 1967. The petitioners are living with Revashanker Dixit at Sehora since 20-6-1967. On 8-11-1976, at 8.30 p. m., the respondents, armed with lathis, entered inside the house of the petitioners and forcibly took away their son Manish Dixit alias Babloo in spite of their protests and against their wishes. Since then, their minor son is living with the respondents. The petitioners approached the police and the Sub-Divisional Magistrate, but to no effect. The petitioners are the legal and natural guardians of the minor son and his welfare would be adversely affected if he is allowed to remain with the respondents. The child, being of tender age, if allowed to remain with the respondents for a long time, is likely to suffer physically as well as mentally.

3. This application was supported by an affidavit of petitioner No. 1 as also by Annexure 'A', report to the police lodged by Revashanker Dixit, uncle of petitioner No. 2, and Annexure 'B', notice sent to the respondents 1 and 2. Hence this petition for issue of writ of habeas corpus with the prayers for:

(i) production of the child illegally and improperly detained, before this Court; and

(ii) custody of the child to the petitioners.

4. The respondents, in their return, supported by an affidavit, controverted the allegations of the petitioners. They, however, did not dispute the birth date of Manish Dixit as being 17-6-1972 as also their being in custody of the minor child. They contended that petitioner No. 2 abandoned his wife after the birth of the child with the result that respondent No. 2 reared up the petitioner No. 1 and her son. This petition has been filed at the instance of Shrimati Urmila Dixit, wife of Revashanker Dixit. They contended that the child does not recognise its father nor has it received any paternal affection from him. The mother of respondents 1 and 2 is attached to the child and is rearing it up. Petitioner No. 1 who was a deserted wife, was educated by respondent No. 1. When she was busy with her studies, the child lived with its grand-mother. The petitioner No. 2 attempted to burn his wife and did not see the child after three months of its birth. The relations of the parties compelled the petitioner No. 2 to keep the petitioner No. 1 with him. The compromise between petitioners 1 and 2 was brought about by the intervention of Shri Sachchidanand Awasthi Advocate.

5. The respondents further alleged that the condition of petitioner No. 1 is like a prisoner who is not permitted to contact her relations or to have correspondence with them. In the circumstances, she is unable to rear up the child. Petitioner No. 2 beats the child and the behaviour of Revashanker Dixit and his wife towards the child was not cordial and, therefore, the child was afraid of them and entreated that it should not be sent to live with its parents. Petitioner No. 2 forcibly took away the child on 8-12-1976 from Jabalpur when it was with its grand-mother and took it to Sehora. This seriously affected the health of the grand-mother and there was danger to her life. Therefore, under the direction of the grand-mother, the respondents 2 and 4 went to the petitioners at Sehora and entreated them to return the child. There they learnt that petitioner No. 2 had mercilessly beaten the child and kept it confined inside a room. The respondents heard the cries of the child from inside the room and found the child and its mother closed inside the room and both of them were weeping. The child was weeping and was repeatedly saying that it would not go to the petitioner No. 2. The respondents denied that they had forcibly removed the child from the custody of the petitioner. They contended that they have made arrangements for the education of the child and for properly looking after its welfare. The treatment of the petitioners towards the child is undesirable and the child itself does not want to live with the petitioners. It is in the interest of the minor that he should be permitted to live with the respondents and his grand-mother. They further contended that the Subdivisional Magistrate Sehora had enquired from the child regarding its wishes and the child expressed its desire to live with the respondents. Therefore, the applications dated 8-12-1976 and 13-12-1976 were rejected. On the above facts, the respondents prayed that the petition be dismissed. They have supported their return by an affidavit of respondent No. 1 and with Annexures A to F.

6. In response to the notice issued by this Court, the respondent No. 1 produced the child Manish Dixit before us. Shri Fakhruddin Advocate for the petitioners, contended that the child is aged 4½ years and the petitioners, being the mother and father respectively, are its natural guardians and it is in the interest of the minor that he should live with his parents. On the other hand, Shri J. P. Gupta Advocate for the respondents contended that the behaviour of petitioner No. 2 towards his wife was not good and that petitioner No. 2 attempted to burn his wife. He contended that the child itself is not willing to live with its parents and is attached to him (respondent?) and its grand-mother and they are taking proper care of its person and arranging for its education. We questioned the petitioner No. 2 who denied that he had attempted to burn his wife and both the petitioners stated that they were leading a happy married life.

7. We have considered the submissions of Shri Fakhruddin Advocate for the petitioners and Shri J. P. Gupta Advocate for the respondents. We have also perused the Annexures filed by the parties. We are of the view, for the reasons hereinafter stated, that the petition deserves to be allowed.

8. A perusal of the petition and the return brings out the following admitted position:

(i) The petitioners are the mother and father of the minor Manish Dixit alias Babloo.

(ii) The minor Manish Dixit was born on 17-6-1972 and is at present about 4½ years old.

(iii) Manish Dixit, the minor, was living with the petitioners on 8-11-1976 when he was taken away by the respondents.

9. According to the petitioners, they being the mother and the father of the minor, are the natural guardians and are entitled to the custody of the minor. They further asserted that their custody would be for the welfare of the child.

10. The respondents have alleged that the petitioners were not pulling on well and petitioner No. 2 attempted to burn petitioner No. 1. We find no support for this allegation and the petitioner No. 2, when questioned by us, denied anything of this sort having taken place with him and his wife. We are therefore, not impressed with the respondents' contention that relations between the husband and the wife are not cordial. We feel convinced that at present, the petitioners are living cordially and their alleged strained relationship could not be a bar to the custody of their minor son, they being the natural guardians and entitled best to the custody of the child.

11. The petitioners alleged that the respondents took away their minor son under show of force on 8-11-1976. The respondents, in para 3 of their return, admitted that petitioner No. 2 forcibly took away the child from Jabalpur to Sehora on 8-12-1976. There appears to be some mistake in the date, because admittedly on 8-11-1976, the child was with the petitioners. The respondents contended that the child is afraid of petitioner No. 2, but there is no support for this allegation. The respondents contended that the petitioners were meeting out inhuman treatment to the child and have kept it confined inside the room where it was weeping. We find that the petitioners had lodged a report regarding the forcible removal of the child from their custody. (Annexure 'A'). The petitioner No. 1 also served a notice on the respondents Kailashnarayan and Jagdishnarayan for return of the child to her. We find no support from the annexures of the respondents that the child was kept confined by the petitioner No. 2 in a room or that it was either beaten or caned.

12. On 14-1-1977, arguments were heard and the case was closed for orders with a direction to the parties to remain present on 15-1-77 and to keep the child present. On this date, the respondents filed an application along with an affidavit of Dr. Shrimati Maya Tiwari, Assistant Surgeon, Sehora and prayed for taking it on record. The affidavit was taken on record and the petitioners were granted time to file counter-affidavit. The case was then opened and the Government Advocate was directed to keep Dr. Shrimati Maya Tiwari present in Court along with all documents possessed by her concerning the facts sworn by her in the affidavit. On 18-1-1977, Dr. Shrimati Maya Tiwari was examined, cross-examined and discharged. Arguments were then heard. Dr. Shrimati Maya Tiwari admitted that she possessed no documents or record concerning the facts sworn by her in the affidavit and that she had given the affidavit on the basis of her memory. We will, therefore, scrutinise the evidence of Dr. Shrimati Maya Tiwari.

13. In the affidavit, Dr. Maya Tiwari stated that on 8-11-1976, she had gone to the house of the respondent No. 1 Kailashnarayan to treat his wife when the child Manish alias Babloo came in torn clothes and was weeping. She saw marks of injuries on his back, signs of cane beating on his thighs and finger marks on his face. On being questioned, Manish told that his father had beaten him and his mother did not save him. The weeping of the boy continued and Manish repeated that he would not go to his parents because he was afraid of them. Dr. Maya Tiwari further stated that the injuries were 4 or 6 hours old.

14. The affidavit of Dr. Maya Tiwari is not in conformity with her oral evidence. According to the affidavit, the date of incident was 8-11-1976, but according to Dr. Maya Tiwari, the incident took place on 18-11-1976 and she was positive about the date. Then she stated that the boy only told her that he was beaten by his father and nothing else and thereafter she did not question him further. In the affidavit, she mentioned that the boy told that his mother had not saved him and on being further questioned, he stated that he did not

want to go to his parents, because he was very much afraid of them. The oral evidence of Dr. Maya Tiwari, therefore, falsified the narration of events of the respondents and if the evidence of Dr. Maya Tiwari is accepted, then nothing took place on 8-11-1976 as stated by the respondents and, therefore, their version of the incident that the boy was weeping, he and his mother were confined inside the room and he had marks of injuries on his person is belied by the evidence of Dr. Maya Tiwari.

15. Dr. Maya Tiwari is definite that the injuries on the person of the boy were 4 or 6 hours old and thus if the incident took place on 18-11-1976, the injuries would have come on the person of the boy either on 17-11-1976 or 18-11-1976 and this totally falsified the respondents' version of the incident. If at all Dr. Maya Tiwari found injuries on the person of Manish, they must have been caused either by the respondents or at their instance to support their defence of maltreatment by the petitioners.

16. The case was heard on 14-1-1977 and till that date, no affidavit in support of the injuries on the person of the boy was filed. Even during the course of arguments, no indication was given that the child was seen by Dr. Maya Tiwari on 8-11-1976. Though Shrimati Maya Tiwari herself did not report the matter to the police, yet she admitted that she had advised the respondent Kailashnarayan to lodge a report with the police. We questioned the respondent Kailashnarayan who stated that he had not lodged any report with the police, because it was a family affair.

17. The respondents, in the past, did not urge that the boy had injuries on his person or was examined by Dr. Shrimati Maya Tiwari. They were served with a notice by the petitioners, but they did not send any reply mentioning that the boy was maltrated by the petitioners and had injuries on his person which were confirmed by the examination of Dr. Maya Tiwari. Non-reference of Dr. Shrimati Maya Tiwari till the date of arguments on 14-1-1977 also indicated that the respondents' version that the boy had suffered injuries at the hands of the parents is definitely untrue.

18. We are, therefore, of the view that the affidavit of Dr. Shrimati Maya Tiwari and her oral evidence did not support the respondents' case and we hold that on 8-11-1976, when the respondents removed the boy from his parents, he was neither mal-treated, nor injured, nor was he and his mother wrongly detained in the house.

19. The respondents' case of maltreatment or wrongful confinement is also disproved from the recitals in para 3 of the respondents' return. The respondents stated that they approached the petitioners to give the boy in view of the shock suffered by the grand-mother and after the grand-mother recouped her health, they would return the boy. If all the contentions urged by the respondents had any grain of truth in them, then there was no question of the respondents thinking of returning the child to the petitioners after pacifying the grand-mother. We are, therefore, of the view that the petitioners neither maltreated, nor caned, nor wrongfully confined the boy and the respondents' return on this aspect of the case is definitely false.

20. We have considered the allegations of both the parties regarding the present custody of the child and the circumstances under which they are claiming its custody. We find that there is no substance in the respondents' contention that the petitioners were ill-treating the child or were not giving it parental affection. On the other hand, we find substance in the contention of the petitioners that the minor Manish Dixit was taken away by the respondents against their wishes and was being detained by them. There is no evidence that the petitioners have consented to the living of the boy with the respondents or his grand-mother.

21. The respondents' main opposition was based on the orders passed by the Sub-Divisional Magistrate, Sehora on 8-12-1976 and 24-12-1976. The boy was produced by the respondent Kailashnarayan in Court and he went to the respondent Kailashnarayan. The Sub-Divisional Magistrate felt that the boy wished to live with the respondent Kailashnarayan and, therefore, dropped the proceedings. The boy, aged 4½ years, has no independent volition of his own and will prefer to live with the person in whose custody he is then. The association of a boy with persons, especially relations and the grand-mother for sometime will make him dear to them, but the respondents, in preference to the father and mother, have no legal right to the custody of the minor and the

welfare of the boy lies in his living with his natural guardians who are best suited persons to take care of him and rear him in their own traditions.

22. We find no substance in the contention of the respondents that the petitioners can take recourse to the Guardians and Wards Act. Since the respondents have no legal right to the custody of the minor son of the petitioners, their refusal to return back the boy to the petitioners results in an illegal detention of the boy. The fact that the petitioners have a right to relief under the Guardians and Wards Act is no justification for denying the petitioners the clear right for the custody of the minor. See Gohar Begum v. Suggi, AIR 1960 SC 93. The following observation will also be material (at p. 96):—

"When an infant is brought before the Court by habeas corpus, if he be of an age to exercise a choice, the Court leaves him to elect where he will go. If he be not of that age, and a want of direction would only expose him to dangers or seductions, the Court must make an order for his being placed in the proper custody."

....

"Where, as frequently occurs in the case of infants, conflicting claims for the custody of the same individual are raised, such claims may be enquired into on the return to a writ of habeas corpus, and the custody awarded to the proper person."

23. In Kalimunnisa v. Shah Salimkhan Rehmankhan, 1976 MPLJ 621, it has been held that welfare of the minor is paramount. In Veena Prahlad Das Agarwal v. Prahlad Das Agarwal, 1976 MPLJ 41 : (AIR 1976 Madh Pra 92) the following observations are material (at p. 93 of AIR):—

"Section 6 (a) of the Hindu Minority and Guardianship Act which provides that the custody of a minor who has not completed the age of 5 years shall ordinarily be with the mother, gives legislative sanction to the well-established principle that although the father is the natural guardian of the minor child and entitled as such to the custody of the minor, the prime and paramount consideration is the welfare of the minor and custody of a minor of tender age should, therefore, remain with the mother unless there are grave and weighty considerations which require that the mother should not be permitted to have the minor with her. The fact that even the father can arrange to look after the child is not a good ground for depriving the mother of the custody of the child."

"For the custody of a minor child the ordinary remedy lies under the Hindu Minority and Guardianship Act or the Guardians and Wards Act as the case may be and it is only in exceptional cases that the rights of the parties to the custody of the child shall be determined on a petition for habeas corpus which is an extraordinary remedy. The guardian's claim to custody of the child is not a right in the nature of property, but in the nature of trust for benefit of minor."

24. In Mrs. Annie Besant v. G. N. Narayaniah, AIR 1914 PC 41, it is observed as under:—

"Whatever may be the jurisdiction of the High Court to declare infants to be Wards of Court, an order declaring a guardian can only be made if their interest require it. On such an issue, the necessity of the infants being properly represented before the Court, and ascertaining what they themselves desire, can hardly be overlooked. And further, no order declaring a guardian can, by reason of S. 19 of the Guardians and Wards Act, 1890, be made during the lifetime of the father unless in the opinion of the Courts he is unfit to be their guardian."

25. In Bhagwati Bai v. Yadav Krishna Awadhiya, 1968 MPLJ 685 : (AIR 1969 Madh Pra 23), it is held as under (at pp. 24, 25 of AIR) :—

"The writ of habeas corpus is a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from an illegal or improper detention. The writ also extends its influence to restore the custody of a minor to his guardian when wrongfully deprived of it. The detention of a minor by a person who is not entitled to his legal custody is treated for the purpose of granting the writ, as equivalent to imprisonment of the minor. It is, therefore, not necessary to show that any force or restraint is being used against the minor by the respondent.

The paramount consideration in every such case when custody of minor is sought either under the provisions of Art. 226 of the Constitution by a writ of habeas corpus or by S. 491 of the Criminal Procedure Code, is the welfare of the minor. The best interest of the child is the primary consideration; the right of the guardian is secondary and it will

not be enforced by issuance of the writ when it is in conflict with the former consideration. If that paramount consideration does not call for the writ to be issued, it will be refused and the applicant would be left to resort to the remedy provided under the ordinary law. Where there is imminent danger to the health or safety or morals of the minor, an interim order for production of the minor becomes necessary."

26. Shri J. P. Gupta, Advocate for the respondents referred to a decision of this Court in Misc. Cr. Case No. 471 of 1970, decided on 18-11-1970 (MP). In that case, the scope of enquiry was whether the infant should be taken away from the foster parents and delivered to the natural father. In that case it was not as if the respondents, by force or fraud, removed the minor from the lawful guardianship. The initial entrustment of the infant's custody to the respondents was with the petitioner's consent. It was further found that the petitioner had to go to the factory for work and there was no grown up female to look after the infant. On these facts, the infant remained with the foster mother. The facts of our case are distinguishable and, therefore, this decision can have no application to the case in hand.

27. We have scrutinised the petitioners' allegations, the return of the respondents, the affidavit of Dr. Shrimati Maya Tiwari and the facts and circumstances of the case. We find that the petitioners are living happily. They have also stated before us that their relations are cordial and there is no conflict or misunderstanding between them. It could not, therefore, be urged that the conflict between the husband and wife will have adverse effect on the rearing of the minor. The parents, being the natural guardians, could not be deprived of the custody of their own son aged 4½ years in the absence of any weighty considerations. We find that the respondents' stand of cruelty to the minor by his parents is without foundation. The boy, if kept away from his parents, will be deprived of the parental affection and will, after some time, become stranger to them. This will not be in the interest of the minor.

28. The petitioners, when questioned by us, told the Court that they will treat the minor with care and attention and will give him the desired affection and will not ill-treat him. They also assured that they will permit the respondents and the grand-mother to occasionally visit the boy and fondle him. Such visits may either be weekly or fortnightly. In case the respondents find that the petitioners are not taking proper care or ill-treating the boy, they may, if so advised, take recourse to any remedy available to them under law. The respondents, on the facts of this case, are not entitled to retain the custody of the minor and their insistence to keep him with them amounts to illegal detention of the boy. The boy, being of tender age, should live with his parents and we find no grave or weighty consideration to refuse custody of the boy to his parents. The interests of the minor can be best served if he is under the care and custody of the parents.

29. We have considered the minor's material and physical well-being, his prospects of education, his up-bringing as well as happiness and moral welfare in the light of the law as stated above. We are of the view that the interests of the minor will be best served if he is placed in the care and custody of his natural parents. We, therefore, think it proper to give a direction to the respondents to return the minor Manish Dixit alias Babloo to the petitioners.

30. For the reasons given above, the petition succeeds and is allowed. The respondents are directed to return the minor Manish Dixit alias Babloo to the petitioners forthwith. Parties shall bear their own costs as incurred.

Petition allowed.

AIR 1978 MADHYA PRADESH 29

(GWALIOR BENCH)

S. R. VYAS AND U. N. BHACHAWAT, JJ.

Manoj Kumar Mundi and another, Appellants v. Hari Gopal Rao Devasthale and others, Respondents.

First Appeal No. 34 of 1976, D/- 21-1-1977.*

Motor Vehicles Act (4 of 1939), S. 110 (1) — "Arising out of the use of motor vehicle" — Meaning of — Accident must arise out of the use of a motor

*(From decree of D. R. Shrivastava, Addl. Motor Vehicle Claims Tribunal, Gwalior, D/- 8-2-1976.)

vehicle as a motor vehicle — Accident caused by parked trailer — Not covered by S. 110 (1).

The basis of an application for adjudication upon a claim for compensation must be an accident to a person arising out of the use of a motor vehicle. A claim for compensation under S. 110 read with S. 110-A of the Act would not be maintainable unless the allegation in the application is that the accident involving bodily injury to the applicant arose out of the use of a motor vehicle as a motor vehicle. The words "arising out of the use of motor vehicles" occurring in Section 110 (1) of the Act are very material. (Paras 7, 11)

In the instant case, even on the allegations made in the application by the applicants, the accident did not arise out of the use of the two trailers which were parked on a public lane. It was not alleged that at the time of the accident, the two trailers, one of which caused injuries, were in use as a motor vehicle. All that was contended was that the two trailers, placed one over the other, were parked on the side of a public lane and were not in motion or used as a motor vehicle at the time when the accident took place. As the accident involving the bodily injury did not arise out of the use of a motor vehicle, a claim for compensation was not maintainable. 1967 Acc CJ 104 (MACT Jodhpur), Rel. on. (Para 8)

Cases Referred: Chronological Paras
1967 Acc CJ 104 (MACT Jodhpur) 10

B. G. Apte, for Appellant.

S. R. VYAS, J.:— This is an appeal under S. 110-D of the Motor Vehicles Act, 1939, (hereinafter referred to as the Act) against the award made by the Additional Motor Accidents Claims Tribunal, Gwalior in Case No. 11/1975 dated 8th July, 1976.

2. Briefly stated, the facts giving rise to this appeal are these:—

The appellant 1 Manoj Kumar is the minor son of appellant 2 Keshavrao. An application under S. 110-A of the Act was filed by the appellants before the Tribunal on the following allegations:—

On 30-1-1975 two trailers bearing registration Nos. MPW 5234 and 5192 belonging to some of the respondents were parked on a public lane known as 'Jatar Sahab-ki-Gali' in the town of Lashkar in such a negligent manner that one trailer was placed over the other in a tilting position. At about 10.15 A.M. when the appellant Manoj Kumar a minor boy aged about 10 years, passed by the side of these two trailers placed in the above position, one of the trailers bearing registration No. MPW 5234 slipped from above the trailer on which it was placed, and fell down on the person of the appellant Manoj Kumar with the result that he was seriously injured. He was rushed to the hospital and examined by the doctors and it was ultimately decided that his life could be saved only if the left leg, which was completely crushed because of the fall of the trailer, would be amputated. On the advice of the doctors the left leg was amputated and the boy thus suffered a permanent injury of the loss of one of his two legs. A claim was, accordingly, made against the respondents, some of whom were the owners, for a total compensation of Rs. 1,30,500 on different counts.

3. The claim was denied both on merits as well as on the ground that such an application under S. 110-A of the Act was not maintainable inasmuch as no injury was suffered by the appellant Manoj Kumar on account of the use of a motor vehicle. The learned Tribunal upheld the preliminary objection and came to the conclusion that such an application was not maintainable. The application was, accordingly, rejected.

4. Feeling aggrieved by the aforesaid order the present appeal has been filed. It was urged on behalf of the appellants that the learned Tribunal erred in rejecting the application on the objection raised by the respondents; that under the Act the definition of a motor vehicle in sub-sec. (18) of S. 2 of the Act includes a trailer; that according to the allegations made in the application the accident was due to the use of a motor vehicle and that the application should have been decided on its own merits.

5. Having considered these contentions in the light of the relevant provisions of the Act, we have come to the conclusion that the learned Tribunal was justified in rejecting the application as not maintainable.

6. The provisions of the Act which are relevant for the decision of the question raised in this appeal are these:—

"S. 2. In this Act, unless there is anything repugnant in the subject or context,—

(1) x x x x
to
(17) x x x x

(18) 'Motor vehicle' means any mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external and internal source and includes a chassis to which a body has not been attached and a trailer; but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises;

(18-A) x x x x
to
(31) x x x x

(32) 'trailer' means any vehicle other than a side car, drawn or intended to be drawn by a motor vehicle;

(33) x x x x
to
(35) x x x x."

"S. 110. (1) A State Government may, by notification in the Official Gazette, constitute one or more Motor Accidents Claims Tribunals (hereinafter referred to as Claims Tribunals) for such area as may be specified in the notification for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to persons arising out of the use of motor vehicle or damages to any property of a third party so arising or both:

Provided x x x x
(2) x x x
(3) x x x
(4) x x x."

"S. 110-A (1) An application for compensation arising out of an accident of the nature specified in sub-sec. (1) of S. 110 may be made—

(a) x x x
(b) x x x
(c) x x x
(2) & (3) x x x."

7. From the aforesaid provisions, it therefore, becomes clear that though according to sub-sec. (18) of S. 2 of the Act a trailer, as separately defined in sub-sec. (32) of S. 2 is included in the definition of a motor vehicle, an application for compensation, as contemplated by sub-sec. (1) of S. 110 of the Act, can be made only for adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to persons arising out of the use of motor vehicles, or damage to any property of a third party so arising or both. In other words the basis of an application for adjudication upon a claim for compensation must be an accident to a person arising out of the use of a motor vehicle.

8. In the instant case, even on the allegations made in the application by the appellants the accident did not arise out of the use of the two trailers which were parked on a public lane. It is not alleged that at the time of the accident, the two trailers, one of which caused injuries to the appellant 1, were in use as a motor vehicle. All that is contended is that the two trailers, placed one over the other, were parked on the side of a public lane and were not in motion or used as a motor vehicle at the time when the accident took place. On the contrary, the allegation is that the trailer which caused the injury, was placed in such a negligent manner that it slipped and caused injuries to the appellant 1. In these circumstances, it cannot be contended that the accident involving the bodily injury to the appellant 1 arose out of the use of a motor vehicle.

9. The appellants may be having any other remedy in law for claiming damages on account of the alleged negligence of the owners of the trailers; but, certainly, an application under S. 110-A of the Act was not the proper remedy to be availed of by the appellants. To illustrate our view, we may take the following instance. A motor vehicle which is a mechanically propelled vehicle has a complete break-down while on the road. In order to get it repaired, the vehicle is being carried mounted on a bullock-cart and while being so carried it accidentally falls either because of some negligence or because of some other reason, and causes an injury to a person going on the road. The injury in these circumstances, though may be attributed to the motor vehicle, but, certainly, is not caused because of the motor vehicle as a motor vehicle, and if an application is made under S. 110-A of the Act for award of compensation, the same would not be entertainable.

10. The learned Tribunal has relied upon a decision in Shrikrishan v. Dayaram (1967 Acc CJ 104) (MACT Jodhpur). In that case, the chassis of a truck without engine was being pushed by a couple of boys and while it was so being pushed one of the boys fell down and was run over. An application was made for award of compensation and it was urged that the bodily injury was caused because of the accident resulting from the use of the motor vehicle. The learned Judge took the view that it was not a

case where it could be said that the accident was because of the use of a motor vehicle. It was also held that unless the vehicle is mechanically propelled and an accident takes place because of the use of such a mechanically propelled vehicle, any claim for compensation for injuries arising from such an accident would not be maintainable. We fully agree with the view taken by the learned Judge in the abovementioned case.

11. Accordingly, in our opinion, a claim for compensation under S. 110 read with S. 110-A of the Act would not be maintainable unless the allegation in the application is that the accident involving bodily injury to the applicant arose out of the use of a motor vehicle as a motor vehicle. The words "arising out of the use of motor vehicle" occurring in sub-sec. (1) of S. 110 of the Act are very material and the jurisdiction of the Tribunal to adjudicate upon a claim for compensation under this section can be exercised only when the application is based on the allegation that the bodily injury occurred because of the accident arising out of the use of the motor vehicle.

12. In the instant case, as we have already stated above there is no allegation that the accident took place because of the use of the trailers as a motor vehicle. The appellants may, if they so desire, pursue their remedy under any other law, if they are entitled to, but, so far as the present application is concerned it was rightly rejected by the learned Tribunal.

13. Accordingly, in our opinion, the claim made by the appellants was rightly rejected by the learned Tribunal. We find no justifiable grounds to entertain this appeal which is hereby dismissed summarily.

Appeal dismissed.

AIR 1978 MADHYA PRADESH 32
(GWALIOR BENCH)

G. L. OZA, J.

Puranchand and another, Appellants v. Anandi Bai, Respondent.

Second Appeal No. 45 of 1971, D/- 5-5-1977.*

*(Against judgment and decree of D. N. Bhargava, 2nd Addl. Dist. J., Gwalior, D/- 13-1-1970).

IU/IU/D390/77/SBB/VSS

(A) T. P. Act (4 of 1882), S. 106 — Notice demanding rent — Validity — Notice valid even if issued prior to grant of sale certificate, to purchaser as he became landlord within meaning of M. P. Accommodation Control Act — (M. P. Accommodation Control Act (23 of 1955), S. 4-A).

The right of a landlord under the M. P. Accommodation Control Act to recover rent is different from acquisition of title in the property. Where a person purchased house from custodian, Evacuee Property and the authority informed the tenants that they were to pay rent to the purchaser from a certain date, the purchaser would be entitled to recover rent from that date and the purchaser would become landlord under the M. P. Accommodation Control Act and notice of demand of arrears issued even prior to grant of sale certificate by the authority to the purchaser would be a valid notice and objection under S. 29 of Displaced Persons (Compensation and Rehabilitation) Act could not be raised. Case law discussed. (Para 11)

(B) T. P. Act (4 of 1882), S. 105 — Commencement of lease — Date of commencement — Determination of — Sale of property by Government — Letter of Government authority to tenant directing tenant to pay rent to purchaser from 1st day of every month — Sufficient proof to prove that the tenancy commenced from 1st day of every month.

(Para 12)

Cases Referred: Chronological Paras

1967 Jab LJ 117 8, 9, 11
AIR 1964 Punj 99 9
AIR 1962 Madh Pra 307 : 1961 Jab LJ 1191 9, 11
AIR 1958 SC 289 9, 10

N. K. Jain, for Appellants; J. P. Sharma, for Respondent.

JUDGMENT:— This second appeal has been filed by the plaintiff-appellant against judgment and decree passed by Additional District Judge, Gwalior, in Civil Appeal No. 89-A of 1969 confirming the judgment and decree passed by Civil Judge Class II, Gwalior in Civil Suit No. 145 of 1965 dismissing the plaintiff-appellants' suit for eviction.

2. The facts giving rise to the present appeal are that the plaintiff-appellant filed a suit for arrears of rent and eviction on the grounds covered by Section 12 (1) (a), (c), (e) and (i) of the M. P. Accommodation Control Act, 1961 against the defendant-respondent. The

Courts below dismissed the claim as far eviction is concerned.

3. The respondent-defendant is in occupation of two rooms on the ground floor in house No. 2/1884 situate at Lohiya Bazar, Lashkar. At one time, the whole house vested in the management of the Managing Officer-cum-Custodian, Gwalior, as this house was declared as an evacuee property. The respondent-defendant was inducted in the suit accommodation as a tenant on monthly rent of Rs. 3/- per month and the rent note was executed by her in favour of the Custodian, Evacuee Property. This house was purchased by the plaintiff-appellants in an auction-sale held on 24-6-1960 and at that time besides the defendant-respondent, other tenants were also in occupation of portions of the house. One of the tenants vacated the premises on 9-12-1965 and thereafter the plaintiff-appellant has occupied this accommodation before filing of this suit.

4. Plaintiff-appellants served a notice dated 14-11-1962 (Ex. P-4) on the defendant terminating his tenancy by the end of the next month and also demanded the arrears of rent. This was replied by Ex. P-3 dated 22-11-1962. A sale certificate in respect of this house was issued on 30-12-1964, which is Ex. P-6. The defendant-respondent after the service of writ of summons within the stipulated time deposited the arrears of rent and further subsequent monthly rent. According to the plaintiff after the auction sale on 20-4-1960 (sic) provisional possession of the house to the plaintiff was given on 18-4-1961 and a written order to that effect (Ex. P-4) was issued by the Competent Officer in the name of the plaintiff. The tenants in occupation were intimated to pay rent to the plaintiff from 1st of May 1961 and onwards. According to the plaintiff, therefore, he became the landlord of the suit accommodation and the defendant-respondent committed default in payment of rent to him. It is also alleged that the house was purchased by the plaintiff for genuine requirement as the plaintiff had no other accommodation within the Municipal limits of Gwalior. The plaintiff also sought eviction on the grounds under Ss. 12 (1) (i) and 12 (1) (c) of the M. P. Accommodation Control Act.

5. The learned lower appellate court held that the grounds under S. 12 (1) (a) and 12 (1) (e) are made out, but the learned Judge of the lower appellate Court maintained the dismissal of the suit for eviction on the ground that as the suit was filed within two years of the certificate of sale issued in favour of the plaintiff-appellant, the suit is barred under S. 29 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954. The learned lower appellate Court also held that as plaintiff has failed to prove that the tenancy commenced from 1st of every month, the notice for termination of tenancy is bad and, therefore, the suit for eviction could not be decreed.

6. Learned counsel appearing for the appellant contended that although the sale certificate was issued on 30-4-1964, (sic) but possession was given to the plaintiff-appellant and the tenants were informed to pay rent to the appellant from 1st of May, 1961 and in pursuance of this as a notice for payment of arrears of rent was served on the defendant-respondent and admittedly she did not pay rent within the prescribed time, the objection under S. 29 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954 will not be available as provided for in proviso to sub-cl. (a) of Cl. (1) of S. 29 ibid.

7. Learned counsel for the appellant also contended that the learned Court below has found that the plaintiff has failed to prove that the tenancy commenced from 1st of every month and therefore, held that the notice to quit is invalid. But the learned Court below failed to consider that the defendant-respondent pleaded that the tenancy commences from 10th of every month, but she has also failed to prove it and in such a situation, the learned Court below should have held that in absence of any evidence about commencement of the tenancy it should be deemed to have commenced from 1st of very calendar month and this also finds support in the circumstance that the tenants were informed, after the provisional possession was given to pay rent from 1st of May 1961 and in this view of the matter, therefore, the notice served on the defendant could not be said to be invalid.

8. Learned counsel appearing for the respondent contended that the notice issued before the sale certificate itself is invalid as held in the decision reported in Sadashiv Balkrishna v. Jagdish Chandra (1967 Jab LJ 117). Therefore, the failure of the tenant to pay the arrears

in response to the notice cannot be used in order to attract the proviso of S. 29. Learned counsel, therefore, contended that the suit is apparently barred by S. 29 of the Displaced Persons (Compensation and Rehabilitation) Act. As regards the validity of notice, learned counsel contended that the defendant in her statement has categorically stated that the tenancy commences from 10th of every month and the finding arrived at by the learned lower appellate court that plaintiff has failed to prove that the tenancy commences from 1st is a finding of fact, which could not be interfered with in second appeal.

9. The first question raised in this appeal, therefore, is as to whether the period of two years will start from the day provisional possession was given to the appellant or it will start running from the day on which the sale certificate was issued. Learned counsel for the appellant placed reliance on the decision reported in Jaimal Singh v. Smt. Gini Devi (AIR 1964 Punj 99) whereas learned counsel for the respondent placed reliance on the decisions reported in Motandas v. Gopaldas Basarmal (AIR 1962 Madh Pra 307), M/s. Bombay Salt and Chemical Industries v. L. J. Johnson (AIR 1958 SC 289) and Sadashiv Balkrishna v. Jagdish Chandra (1967 Jab LJ 117).

10. In fact, in view of the decision reported in AIR 1958 SC 289, there appears to be no controversy; but in the peculiar facts of this case, in my opinion, it is not even necessary to go into that question, even assuming that the period under S. 29 shall commence from the date of sale certificate. It is clear, in view of the proviso to sub-cl. (1) of this section that in the present case the protection under this section will not be available to the respondent. Section 29, Displaced Persons (Compensation and Rehabilitation) Act, 1954, runs as follows:—

"29. Special protection from ejectment to certain classes of persons.— (1) Where any person to whom the provisions of this section apply, is in lawful possession of any immovable property of the class notified under sub-s. (2), which is transferred to another person under the provisions of this Act, then, notwithstanding anything contained in any other law, such person shall, without prejudice to any other right which he may have in the property, be deemed to be a tenant of the transferee on the same terms and conditions as to payment of rent or otherwise on which he held the property immediately before the transfer:

Provided that notwithstanding anything contained in any such terms and conditions, no such person shall be liable to be ejected from the property during such period not exceeding two years as may be prescribed in respect of that class of property, except on any of the following grounds, namely: —

(a) that he has neither paid nor tendered the whole amount of arrears of rent due after the date of the transfer within one month of the date on which a notice of demand has been served on him by the transferee in the manner provided in S. 106 of the Transfer of Property Act, 1882;

(b) x x x x

(c) x x x x

(2) The Central Government may....."

It is clear and it is found by the Courts below that the respondent-tenant neither paid nor tendered the whole amount of arrears of rent due after the date of transfer within one month of the date on which the notice of demand had been served on her by the transferee in the manner provided in S. 106 of the T. P. Act, 1882.

11. Learned counsel for the respondent contended that before the sale certificate even the notice issued by the appellant could not be a good notice and the tenant-respondent is not expected to comply and in absence of such a notice, sub-cl. (a) of the proviso to S. 29 (1) will not come into play and the learned counsel placed reliance for this proposition on the decision reported in 1967 Jab LJ 117. This decision, no doubt, holds that a suit by the purchaser could not be filed in absence of a certificate issued by the authorities, placing reliance on the decision reported in Motandas v. Gopaldas, 1961 Jab LJ 1191 : (AIR 1962 Madh Pra 307). It is also held in this case that period of two years mentioned in proviso to S. 29 (1) of the Act will have to be counted from the date of the sale certificate and not from the date of the provisional transfer or provisional delivery of possession. But, this case does not lay down that before a sale certificate is issued a notice could not be given. The suit in that case was filed before the certificate was issued and in that context it was observed :

"Therefore, the notice of demand cannot be considered to be a valid notice of demand for the purposes of S. 4-A of the M. P. Accommodation Control Act, 1955. It could certainly be a valid notice of demand, if the suit in the Civil Court had been tenable;"

Apparently, therefore, this decision instead of helping the respondents supports the case of the appellant. In the suit from which that second appeal arose the observations of which have been quoted above, the suit was filed before the certificate was issued. This is not the situation in the present case. Admittedly, the certificate has been issued in favour of the plaintiff-appellant. It cannot be doubted that the right of a landlord under the Accommodation Control Act to recover rent is different from acquisition of title in the property. It is not disputed that when the Authority informs the tenants that they were to pay rent from 1st of May 1961 to the appellant, the appellant is entitled to recover rent from that day. It is also not in dispute that after this intimation for purposes of M. P. Accommodation Control Act, the appellant became the landlord, although even if the contention of the respondent is accepted, complete title did not pass in favour of the appellant unless the certificate was issued. Still it could not be doubted that as the appellant became landlord within the meaning of the definition of "Landlord" under the M. P. Accommodation Control Act and it is not in dispute that he is entitled to recover rent from 1st of May, 1961, the appellant could give a valid notice of demand asking the defendant-respondent the arrears of rent. In this view of the matter, therefore, it cannot be disputed that the respondent-tenant did not comply with the notice of demand and did not pay all the arrears within one month of the service of notice as provided in sub-cl. (a) of the proviso to sub-sec. (1) of S. 29 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954. Consequently, the objection to the suit of the plaintiff-appellant under proviso to S. 29 could not be raised in the present second appeal, and, therefore, the learned Court below committed an error of law in holding that the suit could not be decreed because of S. 29 of the Displaced Persons (C & R) Act, 1954.

11-A. The next question that arises in this appeal is about the validity of the notice terminating the lease. According to the plaintiff-appellant the tenancy commenced from 1st of every month and, therefore, the notice was served on the defendant-respondent (Ex. P-2 (P-4 ?)) D/- 14-11-1962. In this notice the appellant stated that the tenancy commences from 1st of every month and it was, therefore, stated in this notice that the lease is terminated on 31st of December, 1962. A reply to this notice was sent by the respondent-tenant which is Ex. P-3 and in this reply the question of commencement of the tenancy was not disputed. Learned Court below came to the conclusion that the plaintiff-appellant has failed to prove that the tenancy commences from 1st of every month and it is contended that this is a finding of fact, which should not be interfered with.

12. It is pertinent to note that the Managing Officer of the Department of Rehabilitation, Gwalior, by his letter dated 20th April, 1961 intimated the tenants that they are supposed to pay rent from 1st of May 1961 onwards to the plaintiff-appellant. It is also not in dispute that the respondent-tenant, has failed to pay the rents, which were in arrears commencing from 1st May 1961. Learned Court below has found a case made out under S. 12 (1) (a) of the M.P. Accommodation Control Act. Although, the rent-note executed by the respondent in favour of the Custodian Evacuee Property (Ex. P-1) has not been proved but it cannot be disputed that the liability to pay rent to the appellant started from 1st of May 1961.

13. It is also clear from the finding arrived at by the Court below that the rent due from 1-5-1961 was not paid within two months from the receipt of notice and it is also significant that in reply to the notice (Ex. P-3) the tenant-respondent did specifically challenge the allegation made in Ex. P-2 that the tenancy commences from 1st of every month. In these circumstances it is no doubt true that the plaintiff having failed to prove the rent-note (Ex. P-1) has not been able to prove positively by his evidence that the tenancy commences from 1st of every month. It appears that the learned Judge of the lower appellate Court failed to consider these circumstances and also failed to consider that even the respondent's assertion in her statement that the tenancy commences from 10th of every month is not supported by her reply notice and she in her deposition even could not say whether the 10th of every month means

Hindi month or English month. Apparently, therefore, the learned Court below has failed to consider the material documentary evidence while considering the question of the commencement of the tenancy.

14. The learned Court below has also failed to consider that in case either party fails to establish the date of the commencement of the tenancy, ordinarily, it should be held that it commences from 1st of every calendar month. But as indicated above, in this case it is not in dispute that the plaintiff-appellant became entitled to the rent of these premises from 1st of May, 1961. The terms of earlier contract, if any, have not been established and the plaintiff's assertion in the notice that the tenancy commences from 1st of every month has not been denied by the defendant-respondent and that the defendant-respondent in reply to the notice did not even allege that the tenancy commences from 10th of every month. It could not, therefore, be doubted that the conclusion arrived at by the learned Court below is not based on any evidence.

15. The learned Court below merely dilated at length about the admissibility of the certified copy of the rent-note executed by the respondent in favour of the Custodian Evacuee Property and holding that that could not be admitted in evidence, arrived at a conclusion that plaintiff has led no evidence to prove that the month of tenancy commences from 1st of every month and omitted to consider the material documents in the case viz., notice, reply to the notice, intimation to the tenants sent by the Managing Officer and the circumstance that the liability to pay rent from 1-5-1961 is not in dispute and, therefore, this finding arrived at by the learned Court below cannot be accepted. Consequently, in my opinion, the Court below was wrong in coming to the conclusion that plaintiff has failed to establish that the tenancy commences from 1st of every month. There is abundant evidence in the case to come to the conclusion that the tenancy commences from 1st of every month. Consequently, the conclusion that the notice terminating the tenancy is not valid also is bad and it is held that the tenancy was validly terminated by the notice given by the plaintiff-appellant.

16. No other question was raised in this appeal. There is already a finding that the plaintiff appellant is entitled to a decree on the ground under Ss. 12 (1) (a) and 12 (1) (e) of the M. P. Accommodation Control Act. About S. 12 (1) (a), it appears that after the suit was filed, the arrears were deposited, still the plaintiff is entitled to a decree under S. 12 (1) (e) of M. P. Accommodation Control Act.

17. As the plaintiff-appellant is getting a decree for eviction for the first time in this Court, it would be reasonable that the respondent be given sometime to vacate the premises. She is, therefore, permitted to vacate within four months from the date of the decree of this Court.

18. Consequently, the appeal is allowed. The judgment and decree passed by the learned Court below is set aside. The plaintiff-appellant's suit for eviction and rent and mesne profits is decreed. The appellant shall be entitled to costs of this Court as well as of the Court below. It is, however, ordered that the appellant shall not execute the decree for eviction within four months of the passing of the decree by this Court.

Appeal allowed.

AIR 1978 MADHYA PRADESH 36

(GWALIOR BENCH)

FULL BENCH

SHIV DAYAL, C. J., C. P. SINGH, C. M. LODHA, R. L. MURAB AND P. D. MULEY, JJ.

Munnalal and others, Applicants v. B. S. Baswan and others, Opposite Parties.

Misc. Petn. Case No. 71 of 1972, D/- 22-7-1977.

(A) M. P. Nagariya Sthawar Sampatti Kar Niyam, 1964, R. 4 (9) — R. 4 (9) is not ultra vires Hindu Law. (Hindu Law).

Rule 4 (9) cannot be said to be ultra vires the Hindu Law merely because it requires special proof in the form of documentary evidence or a decree of a Court of law in support of the allegation of partition of a house and does not recognise oral partition. (Para 8)

It is obvious that R. 4 (9) is intended to safeguard against defeating the provisions of the Act. By pleading orally that the different portions belong to different persons, tax could easily be evaded. Special rule of evidence has, therefore, been provided for safeguarding against

the evasion of tax. This special rule of evidence which is contained in R. 4 (9), is confined to the purposes of the Act. It is apparent that what is intended by the rule is not to confer jurisdiction in the Assessing Authority to adjudicate upon the question of ownership when it is alleged that different portions of a particular building — a single building — belong to different owners. Such allegation can be proved before the Assessing Authority either by a registered document or a decree of a Court of law, but by no other means.

Rule 4 (9) is a special rule of evidence made for the purposes of a special law. It is not that a partition among the members of a joint Hindu family whereby portions are allotted to joint owners by metes and bounds, would be rendered invalid because of rule. There can be no doubt that there is nothing in the rule which in any way affects the substantive rights or liabilities of parties which may accrue from an oral partition, nor does it invalidate any such transaction. AIR 1966 SC 1471, Disting. (Para 8)

(B) M. P. Nagariya Sthawar Sampatti Kar Adhiniyam (14 of 1964), S. 35 (1), (2) (ii), M. P. Nagariya Sthawar Sampatti Kar Niyam 1964, R. 4 (9) — R. 4 (9) is not in excessive exercise of rule making power — Rule making power contained in S. 35 (1) is very wide and general. AIR 1966 SC 1852, Foll. AIR 1966 SC 1471, Disting. (Para 11)

Cases Referred: Chronological Paras

AIR 1966 SC 1471 : (1966) 2 SCR 863 8, 11

AIR 1966 SC 1852 : (1966) 1 SCR 335 11

AIR 1964 SC 264 : (1964) 1 Cri LJ 156 11

AIR 1945 PC 156 11

K. L. Mangal, for Applicant; S. K. Dube, for the State.

SHIV DAYAL, C. J.: — This Bench has been constituted under Art. 228-A of the Constitution to determine the validity of cl. (9) of R. 4 of the Madhya Pradesh Nagariya Sthawar Sampatti Kar Niyam, 1964. That rule reads thus:

"(9) If a building contains more than one portion not belonging to the same owner, every such portion may be treated as a separate building for the purposes of these rules but not until satisfactory evidence, which shall be either a decree of a Court of Law or a registered document, has been given in proof of the separate ownership thereof."

The petitioners are the owners and are in occupation of a house situate at Sadar Bazar, Morar, District Gwalior. The Property Tax Officer, constituted under the Act, issued a notice to the petitioners of the provisional assessment list and assessed the annual letting value of the house at Rs. 3,492/- to be enforced from April 1, 1970. The petitioners, on April 4, 1970, filed objections before the Property Tax Officer, in which they alleged, inter alia, that there was an oral partition among the owners, so that the portion allotted to each one of them had to be assessed separately. They produced a deed of sale in their favour. The Property Tax Officer did not recognise the oral partition. The Additional Property Tax Commissioner, who heard two revision petitioners against the orders dated May 16, 1970 and October 16, 1971 passed by the Property Tax Officer, held that oral partition could not be recognised in view of the impugned R. 4 (9). Aggrieved by the order of the revisional authority, the petitioners invoked the jurisdiction of this Court by a writ petition under Art. 226 of the Constitution. It is not necessary to state the other facts or the contentions which have been raised in the writ petition.

2. The petitioner's contention is that since they are Hindus, governed by the Hindu Law, an oral partition can be validly effected without reducing it into writing, while the impugned Rule forbids its recognition for the purposes of the Property Tax Act. The Rule is, therefore, ultra vires the law.

3. The Act provides for the levy of tax on lands and buildings in urban areas in Madhya Pradesh. Section 4 is charging section. It enacts that there shall be charged, levied and paid for each year, a tax on the lands or buildings or both situate in the areas specified in that Section at the specified rates percentum of the annual letting value of the land or building.

4. The expression "annual letting value" is defined in S. 2, meaning the annual letting value as determined under S. 5.

5. Section 5 enacts the manner in which annual letting value is to be determined and revised. Section 6 enumerates certain exemptions. Clause (b) exempts "buildings and lands or part thereof in actual occupation of the owners thereof when the annual letting value of such buildings and lands or part thereof does

not exceed three thousand" (Substituted by the words "Eighteen Hundred rupees" by virtue of the Amendment Act No. 3 of 1971).

6. Section 7 requires the preparation of "provisional assessment list", a notice of which is to be given in the manner prescribed. Section 8 enables a person aggrieved by any entry in the provisional assessment list, to file objections. Section 9 provides for the decision of the objections and finalisation of the assessment of the list finalised under S. 9. Section 11 deals with escaped assessment. Section 12 confers conclusiveness on the entries in the assessment list. Section 14 enacts the machinery for realisation of the tax. S. 15 confers right of appeal from orders passed under Ss. 9, 10 or 11. Section 18 vests the Commissioner with revisional jurisdiction. Section 35 confers power on the State Government to make rules to carry out the purposes of the Act. For the purposes of the question we are dealing with, it is not necessary to recapitulate the other provisions of the Act.

7. In exercise of the said rule making power, the State Government framed rules from time to time. They are contained in the Madhya Pradesh Nagariya Sthawar Sampatti Kar Niyam, 1964; published in the Madhya Pradesh Gazette, dated November 20, 1964. Rule 4 deals with the preparation of provisional assessment list. Duty is cast on the Assessing Authority to prepare it. He has to ascertain the annual letting value. Clause (9) of R. 4 enacts that if a building contains more than one portion not belonging to the same owner, then every such portion may be treated as a separate building for the purposes of the rules. But, this can be done only when the fact that the portions do not belong to the same owner is proved either by a registered document or by a decree of a Court of law. In this Rule, the word "partition" does not occur. It applies to building which has more portions than one and it is claimed that the different portions belong to different owners. If that fact is proved then, obviously enough, the annual letting value is divided amongst those portions and when tax is assessed, it may be found to be below taxable limit and be, thus, exempted from levy of property Tax. It is obvious enough the R. 4 (9) is intended to safeguard against defeating the provisions of the Act. By pleading orally that the different portions belong to different persons, tax could easily be evaded. Special rule of evidence has, therefore, been provided for safeguarding against the evasion of tax. This special rule of evidence which is contained in R. 4 (9), is confined to the purposes of the Act. It is apparent that what is intended by the Rule is not to confer jurisdiction in the Assessing Authority to adjudicate upon the question of ownership when it is alleged that different portions of a particular building — a single building — belong to different owners. Such allegation can be proved before the Assessing Authority either by a registered document or a decree of a Court of law, but by no other means.

8. Thus, R. 4 (9) is a special rule of evidence made for the purposes of a special law. It is not correct to think that a partition among the members of a joint Hindu family whereby portions are allotted to joint owners by metes and bounds, would be rendered invalid because of the impugned Rule. There can be no doubt that there is nothing in the impugned Rule which in any way affects the substantive rights or liabilities of parties which may accrue from an oral partition, nor does it invalidate any such transaction. The decision of the Supreme Court in Rohtak and Hissar Distt. Electric Supply Co. v. State of Uttar Pradesh, (AIR 1966 SC 1471) relied on by the petitioners is not apposite. The Rule is purely a rule of evidence prescribing the particular mode of proof. Having regard to the scheme of the Act and the Rules and in view of the obvious intention of the impugned Rule and its scope, it cannot be held to be unreasonable. The Rule does not say that an oral partition or an oral transfer of any portion would be inoperative or ineffective. On the other hand, when the Rule permits that a fact can be proved by a decree of a Court of law, it contemplates the validity of such partition or transfer. It will be for the Civil Court to see whether such partition or transfer is valid and it creates ownership in different persons in respect of different portions of the building.

9. During the hearing before us, a question arose whether the impugned Rule would be invalid in respect of an oral partition alleged to have been effected before the Rules came into force. It is unnecessary to consider that question in this petition inasmuch as in the present case the petitioners have not

pleaded that the alleged partition was effected before the Rules came into force. The petitioners did not specify any date of partition in their objections dated April 4, 1970, which were filed before the Property Tax Officer, nor in the revision before the Commissioner, nor even in this petition. Even today, after a lapse of four years, the learned counsel could not tell us the date of the alleged oral partition.

10. A copy of the sale-deed which was filed before the Property Tax Officer (as averred in para 5 of the writ petition) has been shown to us by the learned counsel for the non-petitioners. That deed of sale is dated October 14, 1964. As averred in the same paragraph 5 of the writ petition, the entire house was purchased by the petitioners. There is absolutely nothing to show that they became the separate owners of separate portions on a partition by metes and bounds.

11. Shri Mangal, learned counsel for the petitioners, then urged that R. 4 (9) was made in excessive exercise of the delegated power. He strenuously relies on cl. (ii) of sub-s. (2) of S. 35 which reads thus:

"In particular and without prejudice to the generality of the foregoing powers such rules may provide for all or any of the following matters, namely:—

(ii) the procedure to be followed in the preparation and publication of the provisional assessment list and the final assessment list and the particulars to be contained therein."

We do not find any substance in this contention. In the first place, the language of cl. (ii) is comprehensive enough to make special rule of evidence as contained in R. 4 (9). Furthermore, it is now settled law that if power is conferred to make subordinate legislation in general terms, the particularisation of topics is construed as merely illustrative and does not limit the scope of the general power. In AIR 1966 SC 1471 their Lordships laid down thus (at pp. 1477, 1478):

"It is well-settled that the enumeration of the particular matters by sub-sec. (2) will not control or limit the width of the power conferred on the appropriate Government by sub-s. (1)....." See also: Emperor v. Shibnath Banerjee, (AIR 1945 PC 156 at page 160) and Afzalullah v. State of Uttar Pradesh, (AIR 1964 SC 264 para 13): (1964) 1 Cri LJ 156). It is only when the rule making power given to the State Government is not expressed in the usual form, that is, is not to the effect that the State Government may make rules for the purposes of the Act, that the rule making power is limited to what is stated in the clauses as was the case in Sant Saran Lal v. Parsuram, (AIR 1966 SC 1852). Relevant observations of their Lordships run as under (at page 1855):—

"It is significant to note that the rule-making power given to the State Government is not expressed in the usual form, i.e. is not to the effect that the State Government may make rules for the purposes of the Act."

The rule-making power as contained in sub-s. (1) of S. 35 is very wide and general. It runs thus:

"The State Government may, after previous publication in the Gazette, make rules to carry out the purposes of this Act."

12. In the result, we return the following opinion:

"(1) Rule 4 (9) of the Madhya Pradesh Nagariya Sthawar Sampatti Kar Niyam, 1964, being a special rule of evidence, made exclusively for the purposes of this Act, is valid.

(2) However, it is unnecessary to express any opinion on the further question which may arise whether the said special rule of evidence will also govern transactions effected before the commencement of the said Rules."

Order accordingly.

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K. K. DUBE AND J. S. VERMA, JJ.

Mathew Elenjical and another, Appellants v. The Nagpur Roman Catholic Diocesan Corpn. (P) Ltd., Respondent.

First Appeal No. 158 of 1977, D/- 5-10-1977.*

Civil P. C. (5 of 1908), O. 8, Rr. 1 & 10 (as amended by Act (104 of 1976)) — Consequence of non-filing of written statement as required by R. 1 — Whether the Court is obliged to decree the suit without any discretion to pass any other order.

Rule 10, in its ordinary meaning gives the Court a discretion either to pro-

*(From decree of M. L. Sharma, Addl. Dist. J., Betul, D/- 16-7-1977).

nounce judgment against the defendant on mere non-filing of the written statement or to make such order in the suit as it thinks fit. This would mean that the Court may in its discretion even grant more time to the defendant by adjourning the case. The Court is not obliged necessarily to pronounce judgment against a defendant merely because the defendant has failed to file the written statement within the time given by the Court. (Para 10)

The rule, no doubt, says initially that the Court shall pronounce judgment against the defendant on his failure to file the written statement required under R. 1 or R. 9 but it then proceeds to enable the Court to "make such order in relation to the suit as it thinks fit." The use of the word 'or', which is normally disjunctive, after "shall pronounce judgment against him" to separate it from the words "make such order in relation to the suit as it thinks fit" shows that the discretion of the Court has been retained in such a situation as well. Moreover, the latter expression would be redundant and meaningless if the Court had no option except to pronounce judgment against the defendant. (Para 8)

The rule of harmonious construction also requires such a meaning to be given to R. 10. On failure of the defendant to file the written statement required under R. 1, the Court's power under sub-r. (2) of Rule 5 is attracted which gives a discretion to the Court to either pronounce a judgment in plaintiff's favour for mere non-filing of the written statement or not to do so, depending on the facts of a particular case. If R. 10 is construed to mean that it leaves no discretion with the Court on defendant's failure to file a written statement under R. 1 and the Court must necessarily pronounce judgment against the defendant for that reason alone, then sub-r. (2) of R. 5 and R. 10 also cannot be reconciled. The plain meaning of R. 10 giving the word 'or' occurring therein its ordinary meaning as a disjunctive instead of needlessly reading it as 'and' leaves a discretion with the Court and on that construction there is no disharmony between these two provisions. For this reason also the plain meaning of the rule leaving a discretion with the Court must obviously be preferred. (Para 8)

Anno: AIR Comm., Civil P. C. (1908) (8th Edn.), O. 8, R. 1, N. 1; O. 8, R. 10, N. 1.

Cases Referred: Chronological Paras

AIR 1936 Bom 285 7

Y. S. Dharmadhikari with M. I. Shareef and Ku. Kanti Rao, for Appellants; R. K. Pandey with Fakhruddin, for Respondent.

VERMA, J.:—This is a defendants' first appeal against the judgment and decree dated 16-7-1977 passed by the Additional District Judge, Betul, in Civil Suit No. 2-A of 1977, acting under O. VIII, R. 10, Civil P. C.

2. The point for decision in the present case is; the true effect of sub-rule (1) of R. 1; sub-rule (2) of R. 5 and R. 10 of O. VIII, Civil P. C., as they now exist after the recent amendment of the Code by the C. P. C. (Amendment) Act No. 104 of 1976. We shall now state the facts which alone are relevant for the decision of this point.

3. The suit was filed in the trial Court on 26-3-1977. Summonses were issued to the defendants in which the date of first hearing was mentioned as 15-4-1977 and a direction was given for filing the written statement a week before that date. Defendants failed to appear or file the written statement as required and consequently on that date, the Court ordered that the suit be heard ex parte and 30-4-1977 was fixed for recording plaintiff's evidence. Meanwhile on 21-4-1977, defendants applied for setting aside the ex parte order. That application was allowed on 11-5-1977 and the ex parte order made earlier was set aside. By the same order, the defendants were required to file their written statement on 1-7-1977. On 1-7-1977, the defendants filed their written statement but omitted to file the schedule thereto which was mentioned therein. That schedule was referred for describing the properties specified therein. The case was then adjourned to 16-7-1977. Obviously the incomplete part of the written statement, i. e., the schedule, had to be filed by that day. This was not done and the schedule remained to be filed even on 16-7-1977.

4. In the above circumstances, on 16-7-1977 the trial Court came to the conclusion that it had no option in the matter and construing O. VIII, R. 10 Civil P. C., as containing a mandate to decree the suit in plaintiff's favour for non-filing of the written statement, the trial Court proceeded to decree the entire suit for this reason alone. This has led to the present appeal.

5. The main question before us is whether the trial Court was right in

reaching the conclusion that failure to file the written statement on a date fixed for the purpose obliges the Court after the recent amendments made in O. VIII, Civil C. P., to decree the suit under O. VIII, R. 10, without giving any discretion to the Court to pass any other order. The answer to this question depends mainly on the meaning and true effect of the provisions noted earlier by us. We shall now consider the meaning of those provisions.

6. Sub-rule (1) of R. 1 of O. VIII reads as under:—

"1. Written statement.—(1) The defendant (***) shall, at or before the first hearing or within such time as the Court may permit, present a written statement of his defence."

By the recent amendment, the earlier R. 1 has been renumbered as sub-r. (1) of R. 1 and the words 'may, and, if so required by the Court' have been omitted therein. These omitted words occurred earlier within the brackets. The remaining sub-rules added by the recent amendment do not concern us for deciding the point involved in this appeal. The plain meaning of this provision after its amendment in this manner clearly is that the defendant must file his written statement within the time allowed by the Court. In short, filing of the written statement by defendant has now been made obligatory. Omission of the words indicated earlier from the provision reinforces this conclusion.

7. Sub-rule (2) of R. 5 then is as under:—

"(2) Where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability but the Court may, in its discretion, require any such fact to be proved."

The earlier R. 5 continues after amendment as sub-rule (1) and the subsequent sub-rules added to R. 5 are new. The present sub-rule (1) provides that every allegation of fact made in the plaint unless denied specifically or by necessary implication, is to be taken as admitted except against a person under disability. The proviso therein, however, gives a discretion to the Court to require any fact so admitted to be proved otherwise than by such admission. As earlier stated, the old R. 5 has been retained as sub-rule (1) thereof. While construing that provision, the majority of the High Courts had taken the view that non-filing of a written statement did not fall within its ambit. The view of the Bombay High Court, however, was contrary and it had held that non-filing of a written statement must be construed under this provision as an admission of the plaint; Shriram Surajmal v. Shriram Jhunjhunwalla (AIR 1936 Bom 285). Obviously, sub-rule (2) of Rule 5 has been enacted to give effect to this view of the Bombay High Court and sub-rules (3) and (4) thereafter have been introduced as consequential provisions. The plain meaning of the unambiguous sub-rule (2) of R. 5 is that the non-filing of written statement by the defendant can be construed as an admission of the plaint by the defendant and it will be lawful for the Court to pronounce judgment in plaintiff's favour for this reason alone. It, however, also gives a discretion to the Court to require the facts alleged in the plaint to be proved otherwise than by such implied admission notwithstanding the non-filing of the written statement. As in the case of sub-rule (1), this provision also is not to apply against a defendant under a disability. It is obvious that the discretion given to the Court under sub-rule (2) to require the proof of a fact notwithstanding the non-filing of a written statement is similar to that given by the proviso in sub-rule (1). Thus, sub-rule (2) lays down that as a result of non-filing of the written statement by the defendant, the Court in its discretion shall have the power to pronounce judgment treating the averments made in the plaint as admitted. It has also been made clear that the Court has a discretion in the matter so that the choice is left to the Court to act in one way or the other depending on the facts of each case. In short, by virtue of sub-rule (2) of R. 5, the Court is empowered to decree the suit in plaintiff's favour merely as a result of non-filing of the written statement but it is not necessary to do so and the Court has been given a discretion to act one way or the other in each case depending on the facts thereof. Sub-rule (3) specifically provides that while exercising its discretion under sub-rule (1) or sub-rule (2), the Court shall have due regard to the fact whether the defendant was represented by a lawyer or had the capacity to engage a lawyer. It is obvious that the Court's discretion would depend on the facts of each case and it has to be a judicial discretion. Sub-rule (4) merely provides that where

the suit is decreed for non-filing of the written statement under sub-rule (2), a decree shall be drawn up so that the further appeal would be against the decree.

8. We now come to R. 10 which is as under:—

10. Procedure when party fails to present written statement called for by Court.— Where any party from whom a written statement is required under rule 1 or rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on the pronouncement of such judgment, a decree shall be drawn up."

This rule provides the consequence of non-filing of the written statement as required by R. 1 or R. 9. In the present case, we are not concerned with Rule 9. The amendment made in this rule leaves no doubt that it applies also to a case of non-filing of written statement as required by Rule 1. The rule, no doubt, says initially that the Court shall pronounce judgment against the defendant on his failure to file the written statement required under R. 1 or R. 9 but it then proceeds to enable the Court to "make such order in relation to the suit as it thinks fit." The use of the word 'or', which is normally disjunctive, after "shall pronounce judgment against him" to separate it from the words "make such order in relation to the suit as it thinks fit" shows that the discretion of the Court has been retained in such a situation as well. Moreover, the latter expression would be redundant and meaningless if the Court had no option except to pronounce judgment against the defendant. There is no reason why the word "or" should not be given its plain and ordinary meaning as a disjunctive to indicate that the two powers contained in the rule before and after that word were meant to lay down distinct and separate powers leaving the discretion to the Court to exercise one or the other depending on the facts of a particular case. The rule of harmonious construction also requires such a meaning to be given to R. 10. As already noticed, on failure of the defendant to file the written statement required under R. 1, the Court's power under sub-rule (2) of R. 5 is attracted which gives a decretion to the Court to either pronounce a judgment in plaintiff's favour for mere non-filing of the written statement or not to do so, depending on the facts of a particular case. If R. 10 is construed to mean that it leaves no discretion with the Court on defendant's failure to file a written statement under R. 1 and the Court must necessarily pronounce judgment against the defendant for that reason alone, then sub-rule (2) of R. 5 and R. 10 also cannot be reconciled. As already pointed out, the plain meaning of R. 10 giving the word "or" occurring therein its ordinary meaning as a disjunctive instead of needlessly reading it as "and" leaves a discretion with the Court and on that construction there is no disharmony between these two provisions. For this reason also the plain meaning of the rule leaving a discretion with the Court must obviously be preferred. We may usefully refer to the settled principle for construing the word 'or' as summarised in Justice G. P. Singh's Principles of Statutory Interpretation, Second Edition, at page 247 as follows:—

"The word 'or' is normally disjunctive and 'and' is normally conjunctive but at times they are read as vice versa to give effect to the manifest intention of the legislature as disclosed from the context. As stated by Scrutton L. J. "You do sometimes read 'or' as 'and' in a statute. But you do not do it unless you are obliged because 'or' does not generally mean 'and' and 'and' does not generally mean 'or'. And as pointed out by Lord Halsbury the reading of 'or' as 'and' is not to be resorted to unless some other part of the same statute or the clear intention of it requires that to be done."

9. There is yet another incongruity which is saved by this construction. Obviously when defendant fails to appear and the suit proceeds ex parte, the plaintiff is required to make out a prima facie case by leading evidence and the suit cannot be decreed forthwith merely on account of the absence of the defendent. If R. 10 were construed to leave no discretion with the Court making it incumbent that the suit must invariably be decreed on non-filing of written statement, it would result in giving greater benefit to a defendant who does not even care to remain present, as against a defendant who appears in Court and assigns good reason to the Court's satisfaction for grant of more time to file written statement. Such a result, no doubt, would be illogical.

10. Rule 10, therefore, in its ordinary meaning gives the Court a discretion either to pronounce judgment against the defendant on mere non-filing of the written statement or to make such order in the suit as it thinks fit. This would mean that the Court may in its discretion even grant more time to the defendant by adjourning the case. What really matters is that the Court is not obliged necessarily to pronounce judgment against a defendant merely because the defendant has failed to file the written statement within the time given by the Court. It follows that the Court must first decide the question whether a case for granting more time for filing the written statement is made out or not. It is only when the defendant's prayer for grant of more time for filing the written statement has been refused, the question of pronouncing judgment against him for non-filing of the written statement or making any other order in relation to the suit, such as for example, requiring proof of the facts otherwise than by such admission, can arise. Each case has obviously to be decided on its own facts.

11. The net result of these provisions is that the defendant must, under sub-rule (1) of R. 1 file his written statement within the time allowed for this purpose by the Court; on failure of the defendant to file the written statement within the time allowed, the Court has the power to pronounce judgment against him for mere non-filing of the written statement; the Court has, however, a discretion in the matter to be exercised judicially on the facts of each case and it is not incumbent on the Court to pronounce judgment against the defendant simply because he has failed to file the written statement as required under R. 1; the Court in its discretion is empowered to make any order in relation to the suit as it thinks fit when such a situation arises; the Court can in its discretion even grant a further adjournment for filing the written statement and when the Court does not consider it a fit case for grant of further time to file the written statement, any other order which the Court considers proper in a particular case can be passed; such other order after refusing further time to file the written statement, may even be of requiring the plaintiff to prove the plaint averments notwithstanding the absence of the written statement, as laid down in sub-rule (2) of R. 5. For obvious reasons, we are only giving a few examples of the orders which may be passed where the Court refuses to grant further time to file written statement and yet does not think it proper to pronounce judgment against the defendant for mere non-filing of the written statement. The examples are only illustrative and not intended to be exhaustive.

12. The statement of objects and reasons for making these recent amendments in the Civil P. C. also indicate that the view taken by us is in consonance with the same. It is stated therein that amendments in O. VIII were being made to give effect to the recommendations of the law Commission for the purpose of ensuring that written statements and documents were filed without delay. It is clearly said therein that the amendment made in R. 1 of O. VIII was to make the filing of the written statement obligatory; sub-rule (2) of R. 5 was being inserted to confer a discretion in the Court to treat allegations in the plaint as admitted and to pronounce judgment on the basis of such allegations when no written statement had been filed by the defendant; and R. 10 was amended to provide for the consequences of non-filing of a written statement (vide, Gazette of India, Extraordinary, Part II, Section 2, dated April 8, 1974, pages 294, 295, 296, 314 and 315). Thus, the view taken by us is not only a harmonious construction of all these provisions giving them their plain and ordinary meaning but is also in conformity with the Objects and Reasons for making these amendments. The result of this view is to give the Courts power to pronounce judgment in case of a contumacious defendant but at the same time it retains the Court's power to make such other order in the suit including grant of an adjournment as may be considered appropriate in the particular facts of the case. It, therefore, draws a proper balance between the necessity of an expeditious trial and the desirability of leaving the ultimate discretion to the Court to decide how much time should be granted in a particular suit for performance of a particular act by the defendant.

13. We have, therefore no doubt that the learned trial Judge was in error when he took the view that under O. VIII, R. 10, C. P. C., he had no discretion in the matter and it was incumbent upon him to decree the suit in plaintiff's favour simply because schedule to the written

statement had not been filed on 16-7-1977. We are satisfied that in the facts of the present case, the exercise of proper discretion required the grant of some more time to enable filing of the schedule which had already been referred in the written statement filed by the defendants. Learned counsel for the appellants states that he is prepared to file this schedule in this Court. We, however, think it proper that the schedule should be filed in the trial Court itself since the case has to go back for a fresh decision on merits in accordance with law.

14. It was also argued before us that the present is not a case non-filing of the written statement since only a schedule thereto had remained to be filed, the written statement having been filed on 1-7-1977. In view of the conclusion reached by us, it is not necessary to decide whether the written statement minus the schedule could be treated as a written statement so that the power under O. VIII, R. 10, C. P. C., invoked by the trial Court, was not available.

15. Consequently, we allow this appeal and set aside the judgment and decree of the trial Court. The defendants are permitted to file the schedule to their written statement on or before 28-10-1977 on which date the parties shall appear before the trial Court. No further notice of appearance in the trial Court is required to be given. The trial Court shall then proceed to decide the suit on merits in accordance with law treating the written statement as duly filed by the defendants and 28-10-1977 as the date of first hearing in the suit. Costs shall abide the ultimate result of the suit.

Appeal allowed.

AIR 1978 MADHYA PRADESH 44

K. K. DUBE AND J. S. VERMA, JJ.

Ravishanker, Applicant v. Smt. Sharda Vishwakarma, Respondent.

First Appeal No. 160 of 1977, D/- 21-9-1977.*

Hindu Marriage Act (25 of 1955), Section 13-B (as inserted by Hindu Marriage Laws (Amendment) Act, 68 of 1976) — Divorce by mutual consent — Grounds for — Ground provided in Section 13-B is sufficient — Additional ground unnecessary.

There is nothing to indicate that the parties seeking divorce by mutual consent are required to prove anything in addition to that laid down in S. 13-B. The view that a ground which existed earlier, in addition to that contained in Section 13-B, should also be proved, would result in nullifying the very object of providing this new ground of divorce by insertion of S. 13-B. It is obvious that on proof of another ground which already existed, a decree for divorce could be obtained without recourse to S. 13-B. For this reason, adding any further requirement to that provided in S. 13-B is not even a reasonable and practical construction of the provision apart from being contrary to its clear meaning.

(Para 5)

S. C. Dutt, for Applicant.

J. S. VERMA, J.:— This appeal is against the Judgment dated 5th July, 1977, passed by the Fourth Additional District Judge, Jabalpur, in Civil Suit No. 82-A of 1976. By that Judgment, the trial Court dismissed a joint application made by a married couple for grant of a divorce by mutual consent under S. 13-B of the Hindu Marriage Act which has been inserted by the Marriage Laws (Amendment) Act, 1976 (No. 68 of 1976). The trial Court has held that a divorce by mutual consent in accordance with the newly added S. 13-B alone cannot be granted and it is necessary to prove the existence also of some other ground to enable grant of divorce. This has led to the present appeal also filed jointly by the couple.

2. There is no controversy about the facts.

3. The facts pleaded and also adequately proved by evidence adduced in the trial Court are these: The parties were married at Jabalpur on 19th June, 1975. They lived together only for 22 days thereafter and have, since then, been unable to live together. The joint petition for divorce by mutual consent in accordance with the newly added S. 13-B was filed on 23-11-1976. It was alleged therein that the parties lived together for only 22 days after their marriage at Jabalpur on 19th June, 1975; that they had been living separately since then for a period of more than one year upto the date of petition, that there was no chance of their reconciliation and living together

*(From decree of P. L. Rathore 4th Addl. Dist J. Jabalpur, D/-5-7-1977).

at any time in future and that they had mutually agreed that their marriage should be dissolved in the best interest of both the parties and their families. Thereafter, evidence, was recorded in the trial Court on 2-7-1977. The husband and the wife both examined themselves in the Court and proved these very facts reiterating their desire to obtain the divorce by mutual consent.

4. As earlier stated, the trial Court dismissed the petition taking the view that the proof of the ingredient contained in the newly added S. 13-B alone is not sufficient for grant of divorce. The only question is whether this conclusion is correct.

5. Section 13-B of the Hindu Marriage Act, which was inserted by the Marriage Laws (Amendment) Act. 1976 (No. 68 of 1976), in May, 1976, reads as under:—

"13-B. Divorce by mutual consent:—

(1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together; whether such marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976, on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.

(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-s. (1) and not later than 18 months after the said date, if the petition is not withdrawn in the meantime, the Court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree."

A plain construction of the section shows that there is no ambiguity therein and it was inserted for the purpose of providing a new ground for divorce by mutual consent, as was existing in S. 28 of the Special Marriage Act, 1954. Sub-sec. (1) requires the petition to be based on the ground that both the parties to a marriage have been living separately for a period of one year or more; that they have not been able to live together; and that they have mutually agreed that the marriage should be dissolved. These are the only requirements of a petition filed under the provision claiming divorce by mutual consent. Sub-sec. (2) then provides for the requirements to be fulfilled at the trial. There has to be a joint motion by both the parties made not earlier than 6 months after the date of the presentation of the petition and not later than 18 months after that date. The motion being made by the parties in this manner, the Court is required to be satisfied, after hearing the parties and making such inquiry as it thinks fit, that a marriage has been solemnized and that the averments in the petition are true. On satisfaction of the Court about these matters, the Court is required to pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree. These are all the requirements laid down in S. 13-B. There is nothing to indicate that the parties seeking divorce by mutual consent are required to prove anything in addition to that laid down in S. 13-B. The view that a ground which existed earlier, in addition to that contained in S. 13-B, should also be proved for obtaining the relief of divorce by mutual consent available under S. 13-B, would result in nullifying the very object of providing this new ground of divorce by insertion of S. 13-B. This provision is similar to S. 28 in the Special Marriage Act, 1954. It is obvious that on proof of another ground which already existed, a decree for divorce could be obtained without recourse to S. 13-B. For this reason, adding any further requirement to that provided in S. 13-B is not even a reasonable and practical construction of the provision apart from being contrary to its clear meaning. The view taken by the learned Additional District Judge completely frustrates the object with which S. 13-B was inserted in the Hindu Marriage Act. The view taken by the trial Court on this point has, therefore, to be reversed.

6. It is obvious that all the requirements of S. 13-B have been fulfilled in the present case. Even the trial Court did not doubt this position. Both the parties to the marriage continue to agree that their marriage should be dissolved as prayed for by them jointly. Even the present appeal is filed jointly by both of them. We, therefore, do not find any reason to deny them the relief they claim. Even after lapse of this further time, that decision to have their marriage dissolved continues unchanged and

they have continued to live separately all this time. No useful purpose would be served by letting the marriage bond between them continue any longer. In the fitness of things, their marriage should be dissolved.

7. Accordingly, we allow this appeal and pass a decree of divorce declaring the marriage between the parties to be dissolved with effect from the date of the decree. Decree be drawn up accordingly.

Appeal allowed.

AIR 1978 MADHYA PRADESH 46

G. P. SINGH AND S. M. N. RAINA, JJ.

Mukutdhari Sharma, Petitioner v. The State of Madhya Pradesh and others, Respondents.

Misc. Petn. No. 597 of 1973, D/- 21-7-1977.

(A) M. P. Municipalities Act (37 of 1961) (as amended by Act 39 of 1973), Ss. 36, 43 (2) Proviso and S. 328 (6) — Applicability of S. 43 (2) Proviso—Municipal Council dissolved — President if continues in office.

Although S. 328 (6) does not in terms provide that on the dissolution of the Municipal Council the President or Vice-President shall vacate his office it is implicit under the scheme of the Act that the offices of the President and Vice-President can exist only when the Municipal Council is in existence and when the Council stands dissolved the President and Vice-President must vacate their offices and S. 43 (2) Proviso cannot be invoked for their continuance because the proviso applies only when the Council continues to exist and not when it is dissolved and there is no Council in existence which can elect a new President and it is not correct to say that even when a Council is dissolved the Municipality continues as corporate body because a Municipality only means a local area notified under S. 5 for which a Council can be constituted and the corporate body is the Council and not the Municipality and when the Council is dissolved the corporate body comes to an end and so there cannot be any President of such a non-existing body. 1974 Jab LJ 466 and AIR 1959 SC 107, Rel. on. (Paras 5, 6, 7, 8, 9, 10)

(B) M. P. Municipalities Act (37 of 1961), Ss. 36 and 328 (1) — Municipal Council dissolved by efflux of time — Govt. if bound to hold fresh elections within reasonable time.

When a Municipal Council stands dissolved by expiry of its term under S. 36 the second part of S. 328 (1) that "the State Govt. may order a fresh election to take place" applies and the aforesaid words in S. 328 (1) mean that the Govt. shall order a fresh election to take place within a reasonable time and hence when an elected Council stands dissolved by efflux of time the State Govt. is bound to hold fresh elections within a reasonable time since the Act provides no date for holding the same. AIR 1951 Nag 181, Rel. on. (Paras 11, 12)

(C) Constitution of India, Art. 226 — M. P. Municipalities Act (37 of 1961), Ss. 36 and 328 (1) — Municipal Council dissolved — Reasonable time for holding fresh elections — What is — Failure to hold elections within reasonable time — Mandamus when can be issued — Govt. busy with Emergency programmes — Mandamus not issued.

The question as to what is a reasonable time within which the Govt. must hold fresh elections after the disolution of the Municipal Council by efflux of time depends upon the circumstances of each case and a writ of Mandamus under Art. 226 directing the holding of fresh elections can be issued only in a very clear case when the breach of duty to hold elections is clearly made out and where the term of the Municipal Council expired on 23-9-73 and fresh elections were not held for nearly three years it was held that normally the period of nearly three years would be held to be more than a reasonable time for holding elections and a writ of Mandamus could be issued but since the Govt. being busy during the Emergency in the implementation of socio-economic programmes had no time for holding elections the High Court could not compel the Govt. to leave the Emergency programmes and hold elections and therefore a writ of Mandamus could not be issued.

(Para 12)

Cases Referred:	Chronological Paras
1974 Jab LJ 466	9
AIR 1959 SC 107	5
AIR 1951 Nag 181	11

Gulab Gupta, for Petitioner; M. V. Tamaskar, Govt. Advocate, for Respondents.

SINGH, J.: — Two principal questions arise for decision in this petition under

Art. 226 of the Constitution: (1) Whether the President of a Municipal Council constituted under the Madhya Pradesh Municipalities Act, 1961, continues in office after the Council stands dissolved by efflux of time; and (2) whether the Government is bound to hold elections within a reasonable time from the date of dissolution of a Council.

2. The facts giving rise to this petition are that elections to the Municipal Council, Umaria, were held in May 1969. The petitioner, Mukutdhari Sharma, was elected as President to the Council on 22nd May 1969. The term of the President expired after two years on 21st May 1971; but as no election to fill up the vacancy was held, the petitioner continued as President. Four years, which is the normal term of a Council, expired on 21st May 1973. By a notification published in the Gazette dated 19th Sept. 1973, the term of the Council was extended from 21st May 1973 to 22nd Sept. 1973. The Council stood dissolved on 23rd Sept. 1973. By another notification dated 22nd Sept. 1973, the State Government passed an order under S. 328 (6) of the Act appointing the Tahsildar as Administrator to exercise all powers and duties of the Council under the Act until the reconstitution of the Council. Even after the dissolution of the Council and appointment of the Tahsildar as Administrator of the Council, the petitioner claimed that he did not vacate his office as President. The petitioner filed the present petition praying for a declaration that he continues to be President and that he will continue to hold the office until a new President is elected to take charge of the office in accordance with the provisions of the Act. The petitioner also prays for issuance of a writ in the nature of Mandamus directing the State Government to hold elections for reconstitution of the Council.

3. To appreciate the questions raised in this petition, it is necessary first to refer to certain provisions of the Act. Section 3 (18) of the Act defines "Municipality" to mean

"the local area declared to be a Municipality under S. 5 and any other area which the State Government may, by notification, include in such area."

"Council" is defined by S. 3 (8) to mean a "Municipal Council constituted by or under the Act." A Municipality is created by a notification issued under S. 5. A notification under this section only declares the area to be a Municipality or the area to be included in or excluded from a Municipality. Section 18 provides that there shall be constituted for each Municipality a Council having authority over the Municipality. Every Council so constituted is a body corporate having perpetual succession and a common seal. The constitution of the Council is provided in S. 19. The Council consists of elected and selected Councillors. Section 36, which relates to the term of Council and Councillors, read as follows before its amendment by Act 39 of 1973.

"36. Term of Council and office of Councillors. (1) Every Council shall continue for four years from the date appointed under sub-s. (2) of S. 55 for its meeting.

Provided that the State Government may, by a notification, for reasons to be stated therein extend the term of the Council, from time to time, for a total period not exceeding one year in the aggregate.

(2) Notwithstanding the expiry of the term of the Council under sub-s. (1) every Council shall continue to function till the date appointed under sub-s. (2) of S. 55 for the first meeting of the Council newly constituted in its place or till the expiry of six months from the date of expiration of its term under sub-s. (1), whichever is earlier.

(3) If within the period mentioned in sub-s. (2) the Council is not newly constituted, the Council shall on the expiry of such period be deemed to have been dissolved and the provisions of S. 328 shall apply in respect thereof.

(4) The term of office of every Councillor shall be co-terminus with the term of the Council of which he is a Councillor."

By Act 39 of 1973, which came into force from 21st Sept. 1973, sub-s. (2) was omitted and for sub-s. (3) the following subsection was substituted:

"(3) If within the period of 4 years mentioned in sub-s. (1) or if the said period is extended under the proviso thereto, within the period extended, the Council is not newly constituted, the Council shall, on the expiry of the said period of four years or the extended period, as the case may be, be deemed to have been dissolved and the provisions of S. 328 shall apply in respect thereof."

Section 42 provides that a person who ceases to be a Councillor shall automatically vacate all the offices which he holds by virtue of being a Councillor. Section 43, which relates to President and Vice-President, reads as follows:

"43. Election and term of office of President and Vice-President. (1) A Council shall elect:

(a) a President from its members or from other persons residing in the Municipality possessing the qualifications of a candidate for election under S. 34 and not disqualified under S. 35 or any other provision of this Act;

(b) Two Vice-Presidents to be designated as Senior Vice-President and Junior Vice-President from amongst its members.

Provided that no person shall be eligible for being elected as a President or Vice-President of a Council if he holds such similar office in any other local authority.

(2) (a) After every general election the Council shall elect the President and the Vice-Presidents at its first meeting held under sub-s. (2) of S. 55 and the President and the Vice-Presidents so elected shall hold office for a period of 2 years from the date on which they enter upon the offices.

(b) On the expiry of the term of the office of the President and the Vice-President elected under cl. (a), the Council shall, at a meeting convened for the purpose within one month thereof, elect new President and Vice-President who shall hold office for the unexpired term of the Council.

(c) ... ...

Provided that the President and the Vice-President shall continue in office until their successors enter upon their respective offices in accordance with the provisions of this Act.

(3) ... ...

(4) ... ...

(5) The President who is not a Councillor shall unless otherwise expressly provided, be deemed to be a Councillor for all purposes of this Act."

Section 50 provides that subject to the provisions of this Act and the rules and bye-laws made thereunder, the Municipal Government of a Municipality shall vest in the Council. Sub-sec. (1) of S. 328 confers power on the State Government to dissolve or supersede a Council. Sub-sec. (6) provides for the consequences of dissolution and supersession. Sub-sections (1) and (6) of S. 328 read as follows:

"328 (1) If at any time upon representation made or otherwise it appears to the State Government that —

(a) the Council is not competent to perform, or persistently makes default in the performance of the duties imposed on it by or under this Act or any other law for the time being in force, or exceeds or abuses its powers or fails to carry out any order passed by the State Government under this Act;

(b) the President of the Council or any of its Committees is not competent to perform, or persistently makes default in the performance of the duties imposed on him or it by or under this Act or any other law for the time being in force, or exceeds or abuses his or its powers or fails to carry out any order passed by the State Government under this Act and the Council has failed or neglected to take action against the President or the Committee,

the State Government may, by an order stating the reason therefor published in the Gazette, dissolve such Council and may order a fresh election to take place.

... ...

(6) If the Council is dissolved or superseded as provided in the preceding sub-sections, the following consequences shall ensue:—

(a) all the Councillors of the Council shall, as from the date of the order, vacate their offices as Councillors;

(b) all powers and duties of the Council under this Act may, until the Council is reconstituted, be exercised and performed by such person or a Committee of persons as the State Government may appoint in that behalf;

(c) all properties vested in the Council shall, until the Council is reconstituted, vest in the State Government;

(d) when more than one person are appointed under cl. (b) any one of them, duly authorised in this behalf by a resolution passed by them, may sue or institute or defend any action-at-law by or against the Council."

4. The first contention raised by the learned counsel for the petitioner is that athough under S. 328 (6) all Councillors of the Council vacate their office as Councillors on dissolution of a Council and all powers and duties of Council thereafter are exercised by the person appointed by the Government for that purpose, the President continues in office

because the section does not provide that the President shall vacate his office. In this connection it is pointed out that under S. 43 President may be a person who is not a member of the Council and, therefore, it cannot be said that a person who is elected as President holds his office by virtue of being a Councillor within the meaning of S. 42. It is further pointed out with reference to the same section that the President after expiry of his term continues in office until his successor enters upon the office in accordance with the provisions of the Act. It is argued that the petitioner continues to hold the office of President and that he will so continue in his office until a new President is appointed after the Council is reconstituted and a new President is elected.

5. A perusal of the relevant provisions referred to above goes to show that a Municipality is only a local area declared to be a Municipality under S. 5. The corporate body in which is vested the Municipal Government of a Municipality is the Municipal Council. The term of a Municipal Council is fixed by S. 36. The normal period of a Council is four years which can be extended by the State Government up to one year. Before Act 39 of 1973, a Council could function even after expiry of its term till the first meeting of the new Council or till the expiry of 6 months from the date of expiration of its term whichever was earlier. After the amendment, this statutory extension of the life of the Council for a period of six months from the date of expiry of the term is not available. If elections do not take place within four years or within the extended term, the Council automatically stands dissolved and the provisions of S. 328 become applicable as provided in S. 36 (4). The dissolution of a Council means that the Council which is a corporate entity comes to an end: Radheshyam v. State of M.P., AIR 1959 SC 107 at p. 113.

6. A Council consists of elected and selected Councillors. The elected and selected Councillors at their first meeting elect a President and Vice-President under S. 43. The President may not be a Councillor. The Vice-President has to be a Councillor. If a person who is not a Councillor is elected as President, he is deemed to be a Councillor. The term of the offices of President and Vice-President is two years. After expiry of this term, the Council has to elect a new President and Vice-President who hold office for the unexpired period of the term of the Council. As the term of the offices of President and Vice-President is two years, normally there is always a possibility of another election for the offices of President and Vice-President during the currency of the term of the Council. Even on expiry of their term, the President and the Vice-President continue in their offices until their successors enter upon their respective offices. This is the effect of the proviso contained in sub-s. (2) of S. 43. It is this proviso on which great reliance has been placed by the learned counsel for the petitioner. It is submitted that although the petitioner's term may have expired he will continue in office until the Council is reconstituted and a new President is elected. In our opinion, however, the proviso applies only in those cases where the Council continues to exist. The proviso will have no application when there is no Council in existence which can elect a President or Vice-President. Although sub-s. (6) of S. 328 does not in terms provide that the President and Vice-President shall vacate their offices, it is implicit under the scheme of the Act that the President and Vice-President cannot exist when a Council is dissolved. The offices of President and Vice-President of a Council can only exist when the Council is in existence. When a Council stands dissolved, the President and Vice-President must vacate their offices.

7. Sub-section (1) of S. 328 contains the grounds on which a Council may be dissolved or superseded by the State Government, although its term has not expired. One of the grounds on which such an action may be taken is when it appears to the State Government that the President of the Council is not competent to perform or persistently makes default in the performance of the duties imposed on him or exceeds or abuses his powers or fails to carry out any order passed by the State Government and the Council has failed or neglected to take action against him. Now when an action is taken for dissolution or supersession of a Council under sub-s. (1) of S. 328 on the ground of incompetence of or abuse of powers by the President, it would be incongruous to hold that although the Council stands dissolved or superseded, the President continues in his full glory. The very object of dissolution or supersession in such a case is to remove the President who is incompetent or who is

abusing his power. The dissolution or supersession of a Council, therefore, must necessarily lead to the vacation of the office by the President, otherwise the result would be that the dissolution or supersession would not meet the object for which it is provided for in S. 328. All powers and duties of a Council referred to in cl. (b) of sub-s. (6) of S. 328 must be construed in general terms to include every power and duty of any functionary acting for and on behalf of the Council. When the Council stands dissolved, all these powers which may have been previously exercised by the Council itself or by the President or by any Committee or other authorities can only be performed by the person or Committee appointed by the State Government in that behalf under cl. (b). In our opinion, dissolution of a Council must result in vacation of the office of President, even though this result is not specifically provided for in sub-s. (6).

8. It is not correct to say that even when a Council is dissolved the Municipality continues as a corporate body. We have already pointed out that a Municipality only means a local area notified under S. 5 for which a Council can be constituted. The corporate body is the Council and not the Municipality. When the Council is dissolved, the corporate body comes to an end and so there cannot be any President of such a non-existing body. Learned counsel for the petitioner has drawn our attention to S. 15 of the Act which provides for the effect of withdrawing the whole area comprised in any Municipality from the operation of the Act. One of the consequences provided in this section is that the President, Vice-Presidents and Councillors of the Council shall vacate their offices. It is argued that where the intention of the Legislature was to provide that the President and the Vice-President shall vacate their offices, express provision was made to that effect and, as there is no such express provision in S. 328 (6), it cannot be held that the President vacates his office on dissolution of a Council. It is true that S. 15 expressly provides for vacation of office by President and Vice-President whereas there is no such express provision made in S. 328 (6), but this difference is not material, for the dissolution of a Council under Ss. 36 and 328, as earlier seen, inevitably leads to the vacation of office by President, Vice-President and Councillors. Section 15, it may be noticed, does not expressly provide for dissolution of the Council, although that must follow from the withrawal of the whole area of a Municipality from the operation of the Act. Ss. 36 and 328, on the other hand, expressly provide for dissolution. All consequences inevitably flowing from dissolution including the vacation of office by President and Vice-President must follow, more so when the continuance of President and Vice-President may defeat the very object of dissolution under S. 328 (1) (b). Omission to provide expressly for vacation of office by President and Vice-President in S. 328 (6) only shows careless drafting and is not of any consequence.

9. The conclusion reached by us that on a dissolution of a Council the President vacates his office is in line with the view taken by another Division Bench in Niranjan Prasad Kesharwani v. State of M. P. Misc. Petn. No. 888 of 1973, decided on 30-4-1974 : (1974 Jab LJ 466).

10. The petitioner, as earlier stated, was elected as President on 22nd May, 1969. His term of two years expired on 21st May, 1971. The petitioner could, however, continue as President under the proviso to sub-s. (2) of S. 43 till the election of a new President. But this could be possible only upto the continuance of the Council. When the Council stood dissolved on 23rd Sept. 1973, the petitioner could not continue as President. The dissolution of the Council inevitably resulted in depriving the petitioner of his office. When the Council ceased to exist, the office of the president which was inextricably connected with the Council also came to an end. The petitioner, therefore, vacated his office.

11. The next contention of the learned Counsel for the petitioner is that it is the duty of the State Government to hold elections after dissolution of a Council as soon as possible. In our opinion, this contention is well founded. Until the whole of the local area comprised in a Municipality is not withdrawn under Section 15 from the operation of the Act, the administration of that local area under the scheme of the Act is to vest in a Council. S. 18 very clearly says that there shall be constituted for each Municipality a Council having authority over the Municipality. As provided in S. 50, the Municipal Government of a Muncipality vests in the Council. When a Council stands dissolved by expiry of its term under S. 36, the provisions of S. 328 begin to

apply. Sub-s. (1) of S. 328, which empowers the State Government to dissolve a Council, provides that "the State Government may, by an order stating reasons therefor published in the Gazette, dissolve such Council and may order a fresh election to take place." Now in case of a dissolution by efflux of time it is certainly not necessary for the State Government to make an order dissolving the Council, but the second part of sub-s. (1), that the State Government may order a fresh election to take place, has its application. The vesting of the powers of the Council in a person or committee appointed under Cl. (b) of sub-s. (6) is only an interim measure to continue till the reconstitution of the Council. The idea behind S. 328 is that after the Council is dissolved, steps should be taken for holding fresh elections within a reasonable time. This inference is further supported by sub-ss. (2) and (5) of S. 328 which deal with supersession. If after fresh elections the new Council continues to be incompetent, the Government can supersede the Council. But the supersession cannot be for a period of more than two years or the unexpired term of the Council whichever is less. Now when the maximum period of supersession is provided in sub-s. (5), it is clear that there is an obligation cast on the Government to hold fresh elections and to reconstitute the Council soon after that period. Indeed, when a Municipal Committee was not constituted after the expiry of the maximum period of supersession under corresponding provisions of the Central Provinces and Berar Municipalities Act, a writ of mandamus was issued for holding elections; (see Gopal Jairam v. State of Madhya Pradesh AIR 1951 Nag 181). The words "may order a fresh election to take place" in sub-s. (1) of S. 328, in our opinion, mean that the State Government shall order fresh election to take place within a reasonable time. Till the local area notified under S. 5 continues to be a Municipality and is not withdrawn from the operation of the Act under S. 15, it is clear that when an elected Council stands dissolved by efflux of time it is the duty of the State Government to take steps for reconstitution of the Council by holding elections within a reasonable time.

12. The next question is: Has the State Government failed in the discharge of its duty in failing to hold elections? In the instant case the term of the Council expired on 23rd Sept. 1973. It is now nearly three years from the date of dissolution of the Council that elections for reconstitution of the Council have not been held. Normally, the expiry of a period of nearly three years after the dissolution of a Council would be held to be more than a reasonable time for holding elections and the Government's failure to hold elections for such a long period would make out a case for issuing a writ of mandamus. When a statute provides no date for holding an election, it can be inferred that elections must be held within a reasonable time; and when the authority entrusted with the duty to hold elections abuses its discretion by not holding elections for inordinately long period, the Court can control its action by directing it to hold elections and by fixing a date for the same: (Ferris, Extraordinary Legal Remedies p. 386). The difficulty in the way of the petitioner is, however, created by the special circumstances of this case and the declaration of Emergency. The State Government in its return has stated that in April 1972 some new area was included within the Municipality by a notification under S. 5. By inclusion of new area it became necessary to redistribute the wards and to include the extended area in the adjoining wards. Steps were being taken in that behalf. The learned Government Advocate has further stated in his arguments that he had instructions to state that the Government being busy during Emergency in the implementation of Socio-economic programmes, it has no time to make arrangement for holding elections to reconstitute dissolved Councils, till the Emergency continues. The Government Advocate also said that there are 56 Councils in the State which have to be reconstituted as a result of dissolution. The Court has no jurisdiction to go behind the order of the President declaring Emergency. We have also no ground to doubt the statement made by the Government Advocate that the State's hands are full in the implementation of the Socio-economic programmes to tide over the Emergency. The question as to what is reasonable time within which the Government must hold elections for a Municipality is a question depending upon the circumstances of each case. We cannot compel the Government to leave the implementation of the programmes undertaken during the Emergency and to hold elections. A writ of mandamus directing the holding of elections can be

issued only in a very clear case when the breach of duty to hold election is clearly made out: (see Ferris, p. 384). As we have to accept the statement made by the Government Advocate that the Government being busy in other important programmes has no time for holding elections, we cannot hold that in the special circumstances, the case of breach of duty is made out. No writ of mandamus can, therefore, be issued to compel the Govt. to hold elections. We may however, point out that the Prime Minister in a recent Press Interview, in the context of general elections, said that the elections are not directly connected with the Emergency and that the country had half the Emergency from 1971 and in spite of that there were elections in 1972: (see The Indian Express of July 7, 1976). We hope that the Government will keep in mind that there is a statutory duty to reconstitute dissolved Municipal Councils and the municipal elections will be held as soon as possible.

13. The petition fails and is dismissed. There shall be no order as to costs. The security amount shall be refunded to the petitioner.

Petition dismissed.

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(GWALIOR BENCH)

SHIV DAYAL, C. J., AND U. N. BHACHAWAT, J.

Omprakash, Appellant v. Ramcharan, Respondent.

Second Appeal No. 370 of 1976, D/- 7-5-1977.*

M. P. Accommodation Control Act (41 of 1961), S. 12 (1) and (6) — Compensation — When necessary to be paid to tenant before evicting him under a decree under S. 12 — Compensation payable only when decree is exclusively under Cl. (f) of S. 12 (1) — No compensation payable when the decree is on other grounds coupled with the ground under Cl. (f). Observation in S. A. No. 292 of 1975, D/- 20-12-1975 (Madh Pra) held obiter. S. A. No. 127 of 1966 decided on 7-11-1968 (Madh Pra) and AIR 1973 Madh Pra 299, Foll. (Paras 4 & 5)

*(Against judgment and decree passed by V. D. Bajpai Addl. Dist J., Gwalior, D/- 1-4-1976).

KU/KU/E83/77/ABO/VBB

Cases Referred: Chronological Paras

(1975) S. A. No. 292 of 1975 D/- 20-12-1975 (Madh Pra) 1

AIR 1973 Madh Pra 299 : 1973 MPLJ 465 1, 7

(1968) S. A. No. 127 of 1966, D/- 7-11-1968 (Madh Pra) 6

H. B. Mangal, for Appellant; A. R. Naokar, for Respondent.

SHIV DAYAL, C. J.:— This case has come up before us on reference by the learned single Judge on the question whether compensation is payable to the tenant under sub-s. (6) of S. 12 of the M. P. Accommodation Control Act, 1961, even when the decree for eviction is made not only on the ground contained in S. 12 (1) (f) but also on other grounds. He thought that conflicting views were expressed in Dindayal v. Vimalchand (1973 MPLJ 465) : (AIR 1973 Madh Pra 299), and, Nathuram v. Gyanchand (Civil Second Appeal No. 292 of 1975 decided on 20-12-1975) (Madh Pra).

2. In the plaintiff's suit for eviction on several grounds contained in S. 12 (1) of the M. P. Accommodation Control Act, 1961, (hereinafter called 'the Act'), the trial Court passed a decree for eviction under Cls. (a) and (f) of S. 12 (1) of the Act. The defendant appealed. The learned Addl. District Judge dismissed the appeal but made the following direction:—

"The executing Court, while executing the decree for eviction, shall enquire into what compensation is payable to the appellant as required under S. 12 (6) of the Act." By this last mentioned direction the plaintiff is aggrieved.

3. In this Second Appeal the plaintiff's contention is that since the decree for eviction has not been passed only on ground contained in Cl. (f) of S. 12 (1), but also on other grounds, he is not liable to pay compensation under S. 12 (6) of the Act. When this Second Appeal was placed before the learned Single Judge, the abovesaid decisions were referred to him by the contesting parties.

4. Section 12 of the Act imposes restrictions on the right of the landlord in the matter of eviction of the tenant. Two further restrictions are imposed in case a decree for eviction is passed on the ground specified in Clause (f):—

(i) the landlord cannot obtain possession before the expiration of period of two months from the date of the decree;

(ii) if the accommodation is situate in the cities specified and under that sub-

section the landlord is not entitled to obtain possession unless he pays to the tenant compensation as prescribed in that sub-section.

These further restrictions as enacted in sub-s. (6) are superimposed only on the decree for eviction under Cl. (f), but not on a decree on any other grounds specified in other clauses of sub-s. (1). Therefore, where a decree is passed on any ground specified in any other clause of sub-s. (1) of S. 12, the landlord cannot be prevented from obtaining possession by imposing restrictions contained in sub-s. (6). That being the clear and undoubted position it cannot be said that if the landlord has obtained a decree also on any ground other than that specified in Cl. (f), the decree obtained on any other ground has also become the subject of the restrictions contained in sub-s. (6). The landlord who has obtained a decree on the grounds specified in any other Clauses cannot be placed in a disadvantageous position because of the fact that the decree is also on the ground specified in Cl. (f). This will obviously be anomalous.

5. The decree for eviction is good and operative even on one of the grounds contained in sub-s. (1). Therefore, the restrictions imposed in sub-s. (6) cannot come in the way of the landlord who has obtained possession on any ground other than that specified in Cl. (f). In the ultimate analysis it must be held that sub-sec. (6) comes into play only when the decree for eviction is passed on a sole ground specified in Cl. (f). However, if the decree for eviction is made also on any ground other than that specified in Cl. (f), the restrictions imposed in sub-s. (6) do not apply although the decree is also under Cl. (f).

6. This question arose in Second Appeal No. 127 of 1966 (Ramcharan v. Nehneram) which was decided on 7-11-1968 (Madh Pra), by one of us (Shiv Dayal J.) there it was said as follows:—

"6. Adverting now to the plaintiff's cross-objections the question is whether compensation is payable to the tenant under sub-s. (6) of S. 12 even when the decree for eviction is made not only on a ground specified under S. 12 (1) (f), but also on a ground specified in another clause of S. 12 (1). The respondent's contention is that since the decree for eviction passed in her favour is also under S. 12 (1) (b) she should not be called upon to pay compensation just because her ground under S. 12 (1) (f) has also been accepted. In my opinion, the contention is right. It is quite clear from the meaning and intention of the provisions contained in S. 12 (1) (f) read with Section 12 (6) that the latter comes into play only when a decree for eviction is passed exclusively on the grounds contained in S. 12 (1) (f). Where a decree for eviction is passed on another ground as well, it will be anomalous to say that the landlord will have to pay compensation just because the judgment in his favour is also on the ground contained in Section 12 (1) (f). A decree for ejectment is good and operative even on one of the grounds specified in S. 12 (1). The landlord cannot be penalised when he succeeds on another ground besides that specified in S. 12 (1) (f). The compensation is allowed under S. 12 (6) just because the tenant has to vacate for no fault of his, but simply because the landlord requires the premises for his own business.

7. It is clear beyond doubt that where a decree for ejectment of the tenant is passed on any ground other than the one specified in Cl. (f), the tenant is not entitled to compensation notwithstanding that a decree for ejectment is also based under S. 12 (1) (f)."

7. In Dindayal v. Vimalchand (1973 MP LJ 465) : (AIR 1973 Madh Pra 299) referred to by the referring Judge, the same view was taken.

8. We have perused the other decision which has been mentioned in the order of reference. In that case no contrary decision was rendered. That was an appeal which was heard by a learned Single Judge. It was a tenant's appeal from a decree which was on two grounds, viz. :—

(i) sub-letting under Cl. (b), and

(ii) bona fide requirement under Cl. (f).

The learned Judge dismissed the appeal summarily without notice to the other party. However, the operative part of that order reads as follows :—

"This appeal is dismissed summarily without notice to the other party. It is, however, ordered that the execution court while executing the decree for eviction shall enquire into what compensation is payable to the appellants under S. 12 (6) of the Act and shall pass a suitable order for payment of the same after hearing both the parties."

When the appeal was dismissed summarily without notice to the landlord, no order could be made against him. Therefore, the latter direction made in the

operative part of the judgment reproduced above must be read as obiter dictum. Moreover, it cannot be read as a precedent inasmuch as the point was neither considered nor decided.

9. Our answer to the question referred to us is:

"When a decree for eviction is passed on a ground specified in Cl. (f) of sub-sec. (1) of S. 12 and also on a ground specified in another clause of sub-s. (1) of S. 12, the restrictions contained in sub-sec. (6) of S. 12 do not apply and the landlord is entitled to obtain possession under the other ground as if the decree on the ground specified in Cl. (f) was not passed."

10. The learned single Judge has referred the case to us for hearing of the appeal on merits. However, in our opinion, the reference falls within the purview of R. 9 (2) (b) of Chapter I of Part I of the High Court Rules. That being so Cl. (5) of R. 9 comes into play so that a stated question or questions on which the decision requires reconsideration had to be stated. We have answered that question. The case shall now go back to the learned single Judge for deciding the appeal in accordance with the above said Cl. (5) of R. 9.

Reference answered accordingly.

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FULL BENCH

SHIV DAYAL, C. J., M. L. MALIK AND C. P. SEN, JJ.

Smt. Mankunwar Bai and others, Appellants v. Sunderlal Jain, Respondent.

Second Appeal No. 372 of 1972, D/- 19-11-1977.

M. P. Accommodation Control Act (41 of 1961), Ss. 13, 12 — Suit for eviction of tenant on ground of default within S. 12 (1) (a) — Tenant, if bound to deposit time-barred arrears of rent in order to earn protection under S. 13 (5) or S. 12 (3) — 1973 MPLJ 179, Overruled, AIR 1962 Punj 256 (FB) held no longer good law in view of AIR 1975 SC 1637.

Section 12 (1) (a) does not require the tenant to pay or tender any arrears of rent, the remedy for the recovery of which was barred. The tenant's liability disappears, if he pays the whole of the arrears of rent legally recoverable from him, within two months of the service of notice. It is in that context that S. 13 (1) requires the tenant to pay arrears of rent for the period of the default, because this section is enacted to afford a further opportunity to the tenant to pay arrears of rent, although he committed default, when the notice of demand was served on him. Such payment or deposit, coupled with the compliance with the second part of the section, i.e., 'continues to make payment of current rent regularly, without default,' would eventually earn him the protection under sub-s. (5) of S. 13, which, in its impact, is the same as S. 12 (3). Thus the "default" in S. 13 (1) is referable to the default described in S. 12 (1) (a). In other words, if there was no default under S. 12 (1) (a), which would afford a ground to the landlord to sue for eviction, then there is no requirement under the first part of S. 13 (1) to deposit or pay. 1966 Jab LJ 1028, Followed. (Para 9)

Section 13 applies not only to a suit for eviction based on the ground contained in cl. (a) of S. 12 (1) but it equally applies to a suit which may be instituted on any other ground referred to in S. 12. To the expression "period for which the tenant may have made default" in S. 13 (1), only one meaning can be assigned. If in a suit for eviction founded on any ground other than that in S. 12 (1) (a), it cannot be said that the tenant will be required to deposit time-barred rent, a different meaning cannot be given to that phrase, when the suit for eviction of tenant is instituted on the ground of default within the meaning of S. 12 (1) (a). (Paras 10, 11)

Section 13 does not constitute a new source or foundation of a right to claim rent otherwise time-barred. If a claim in the suit includes time-barred arrears, that claim will at once be rejected under O. 7, R. 11, Civil P. C. What will then remain would be arrears "legally recoverable". Thus the dispute will be confined to the rent legally recoverable, for which the word used in S. 13 (2) of the Act is 'payable'. To put it differently, when a dispute is raised as to the amount of rent payable, it is relatable only to those arrears which are legally recoverable and are not time-barred. AIR 1976 SC 1637, Rel. on. (Paras 12, 13, 14)

Hence under S. 13 (1) it is not necessary for the tenant to pay to the landord or deposit in Court the amount of rrears of rent the recovery of which as become barred by limitation and as uch irrecoverable by the landlord. 1973 MPLJ 179, Overruled, AIR 1962 Punj 256 FB) held no longer good law in view of AIR 1976 SC 1637, ILR (1959) 2 Cal 490, followed. (Para 19)

Cases Referred:	Chronological Paras
AIR 1976 SC 1637	4, 12, 13, 15
1973 MPLJ 179	4, 15, 16, 20
1966 Jab LJ 1028	9
AIR 1962 Punj 256 (FB)	15
ILR (1959) 2 Cal 490	16
AIR 1954 Cal 102	16
AIR 1952 Cal 879 (FB)	16
AIR 1933 PC 63	13

K. M. Agarwal, for Appellants; P. C. Naik, for Respondent; S. L. Garg, Advocate General as amicus curiae.

SHIV DAYAL, C. J.:— The following question has been referred to this Bench or opinion:—

"Whether in compliance with the requirement of sub-sec. (1) of S. 13, is it necessary for the defendant-tenant to pay to the landlord or deposit in Court the amount of arrears of rent, the recovery of which has become barred by limitation and which the landlord-plaintiff on his part cannot recover by process in the Court?"

2. The appellants' suit instituted in the court of the Fourth Civil Judge, Class II, Raipur, was for ejectment of the defendant-tenant and for recovery of Rs. 648 as arrears of rent and Rs. 90 as damages for use and occupation. It appears that the plaintiffs claimed in the suit arrears of rent for the period from July 1, 1962 to Aug. 31, 1969. The suit was instituted on February 10, 1970, which means that the claim included partly arrears which had become barred by time. A notice of demand of arrears of rent and to quit had been served on the defendant on July 19, 1969, in which arrears had been claimed from as back as July 1, 1959. The tenant had paid Rs. 649, which the landlord adjusted towards the arrears from July 1, 1959, to June 30, 1962, and then claimed in the suit arrears for the aforesaid period i.e., July 1, 1962 to Aug. 31, 1969.

3. After the institution of the suit, the defendant-tenant deposited Rs. 828 and it is not in dispute that this deposit was within one month from the date of service of the summons of the suit on him and it is also not in dispute that thereafter he continued to deposit regularly monthly rent as required under the second part of S. 13 (1) of the M. P. Accommodation Control Act, 1961 (hereinafter called 'the Act').

4. The trial Court dismissed the suit by giving the defendant benefit of the statutory protection under sub-sec. (3) of S. 12 of the Act. The plaintiffs appealed but their appeal was dismissed by the learned District Judge. The plaintiffs preferred second appeal to this Court. At the hearing before a learned single Judge it was urged that the defendant had not deposited the entire arrears of rent under S. 13 (1) of the Act.It is again not in dispute that the defendant deposited all rent for which the suit, on the date of its institution had not become barred by time. The appellants' contention before the learned single Judge, so far as this aspect of the case is concerned was that in order to entitle the defendant to the protection under S. 12 (3) of the Act, it was necessary for him to deposit all arrears of rent irrespective of whether their remedy by way of a suit for the recovery of a part of it was barred by time.

On the other hand, it was contended for the defendant-respondent that his only obligation under S. 13 of the Act was to deposit such arrears of rent as were legally recoverable, but not those which were barred by limitation and, therefore, not recoverable. For the appellants reliance was placed on Abdul Gafoor v. Abde Ali, 1973 MPLJ 179. The learned single Judge was of the opinion that in view of the observations in New Delhi Municipal Committee v. Kalu Ram AIR 1976 SC 1637 the decision in Abdur Gafoor v. Abde Ali (1973 MPLJ 179) (supra), which was decided by a Division Bench, required reconsideration. That is how the matter has come before us.

5. The contest between the parties before us is the same as was before the learned single Judge.

6. Learned Advocate-General appeared as amicus curiae.

7. Section 12 of the Act imposes restrictions on eviction of tenants. Sub-sec. (1) of S. 12 enumerates the grounds on one or more of which alone a suit can be filed against a tenant for his eviction from any accommodation. Cl. (a) of sub-sec. (1) affords a ground to the

landlord for eviction, if the tenant neither paid nor tendered the whole of the arrears of rent legally recoverable from him, within two months of the date on which a notice of demand for the arrears of rent had been served on him by the landlord in the prescribed manner. When a suit is instituted on that ground and the tenant makes a deposit or payment as required by S. 13 of the Act, sub-section (3) of S. 12 steps in to protect the tenant so that no order for eviction of the tenant shall be made subject to the proviso (The proviso is not relevant for the present opinion).

Patently enough, the Legislature in providing a new statutory protection under sub-sec. (3), intended to give the tenant a further and final protection, that is to say, even if he was a defaulter before the notice of demand and even if he did not pay the arrears of rent within two months of the service of notice of demand within the meaning of sub-sec. (1) whereupon the right of eviction ripened. Sub-sec. (3) reads as follows:—

"(3) No order for the eviction of a tenant shall be made on the ground specified in cl. (a) of sub-sec. (1), if the tenant makes payment or deposit as required by S. 13:

Provided that no tenant shall be entitled to the benefit under this sub-section if, having obtained such benefit once in respect of any accommodation, he again makes a default in the payment of rent of that accommodation for three consecutive months."

In the implementation of sub-sec. (3), the Court has no discretion. If the tenant has earned the protection, no decree for eviction can be passed. On the other hand, any non-compliance with the requirement of S. 13 (1) of the Act—even a single default—will not allow the tenant to acquire protection which is given to him under S. 12 (3). The question for enquiry, therefore, is whether under S. 13, the tenant is required to deposit the arrears of rent, including such arrears as were barred by time on the date of the suit.

8. Sub-sec. (1) of S. 13 of the Act enacts the obligation of the tenant to deposit arrears of rent and current rent during the pendency of the suit. It is in two parts, into which we are breaking the sub-section, while reproducing it as under:—

"13. When tenant can get benefit of protection against eviction.—(1) On a suit or proceeding being instituted by the landlord on any of the grounds referred to in S. 12, the tenant shall, within one month of the service of the writ of summons on him or within such further time as the Court may, on an application made to it, allow in this behalf, deposit in the Court or pay to the landlord an amount calculated at the rate of rent at which it was paid for the period for which the tenant may have made default including the period subsequent thereto up to the end of the month previous to that in which the deposit or payment is made;

and shall thereafter continue to deposit or pay, month by month, by the 15th of each succeeding month a sum equivalent to the rent at that rate."

Since we will be referring to the other sub-sections in the course of discussion, it will be useful to reproduce them just now:—

"(2) If in any suit or proceeding referred to in sub-sec. (1), there is any dispute as to the amount of rent payable by the tenant, the Court shall fix a reasonable provisional rent in relation to the accommodation to be deposited or paid in accordance with the provisions of sub-sec. (1) till the decision of the suit or appeal.

(3) If, in any proceeding referred to in sub-sec. (1) there is any dispute as to the person or persons to whom the rent is payable, the Court may direct the tenant to deposit with the Court the amount payable by him under sub-section (1) or sub-sec. (2) and in such a case no person shall be entitled to withdraw the amount in deposit until the Court decides the dispute and makes an order for payment of the same.

(4) If the Court is satisfied that any dispute referred to in sub-sec. (3) has been raised by a tenant for reasons which are false or frivolous, the Court may order the defence against eviction to be struck out and proceed with the hearing of the suit.

(5) If a tenant makes deposit or payment as required by sub-sec. (1), or sub-sec. (2), no decree or order shall be made by the Court for the recovery of possession of the accommodation on the ground of default in the payment of rent by the tenant, but the Court may allow such cost as it may deem fit to the landlord.

(6) If a tenant fails to deposit or pay any amount as required by this section,

the Court may order the defence against eviction to be struck out and shall proceed with the hearing of the suit."

9. Under the first part of sub-sec. (1) of S. 13 of the Act, the period for which the tenant has to deposit the arrears of rent is "the period for which the tenant may have made default". It is really this phrase which has to be interpreted. The question is whether this period includes the period the remedy for the recovery of rent for which had become barred on the date of the suit. The word 'default' necessarily refers to the default described in cl. (a) of S. 12 (1). It reads thus:—

"12. Restriction on eviction of tenants.

(1) Notwithstanding anything to the contrary contained in any other law or contract, no suit shall be filed in any Civil Court against a tenant for his eviction from any accommodation except on one or more of the following grounds only, namely:

(a) that the tenant has neither paid nor tendered the whole of the arrears of the rent legally recoverable from him within two months of the date on which a notice of demand for the arrears of rent has been served on him by the landlord in the prescribed manner."

In this sub-section, the expression "arrears of rent legally recoverable from him" is significant. It excludes the arrears which had become barred by time, so that if the tenant, on receipt of the notice of demand, had paid the arrears of rent, which were within limitation, this ground for eviction would not be available to the landlord. This sub-section does not require the tenant to pay or tender any arrears of rent, the remedy for the recovery of which was barred. The tenant's liability disappears, if he pays the whole of the arrears of rent legally recoverable from him, within two months of the service of notice. It is in that context that S. 13 (1) requires the tenant to pay arrears of rent for the period of the default, because this section is enacted to afford a further opportunity to the tenant to pay arrears of rent, although he committed default, when the notice of demand was served on him. Such payment or deposit, coupled with the compliance with the second part of the section, i.e., 'continues to make payment of current rent regularly, without default' would eventually earn him the protection under sub-section (5) of S. 13, which, in its impact, is the same as S. 12 (3). See Chitrakumar Tiwari v. Gangaram, 1966 Jab LJ 1028 (para 28).

Thus the 'default' in S. 13 (1) is referable to the default described in S. 12 (1) (a). In other words, if there was no default under S. 12 (1) (a), which would afford a ground to the landlord to sue for eviction, then there is no requirement under the first part of S. 13 (1) to deposit or pay. The expression "for the period for which the tenant may have made default including the period subsequent thereto upto the end of the month previous to that in which the deposit or payment is made" refers to two periods: (i) The period for which the tenant may have made default; and (ii) period subsequent thereto. Now, the word 'thereto' necessarily refers to the first period and the first period necessarily refers to the period of default within the meaning of S. 12 (1) (a). Then alone the expression 'period subsequent thereto' will have a meaning.

10. Let it be seen at once that S. 13 applies not only to a suit for eviction based on the ground contained in cl. (a) of S. 12 (1), but it equally applies to a suit which may be instituted on any other ground referred to in S. 12. The opening words of S. 13 are:

"On a suit..... being instituted by the landlord on any of the grounds referred to in S. 12, the tenant shall....."

Let sub-sec. (6) be at once adverted to. It provides that if the tenant does not deposit or pay any rent as required by the section, the Court may order the defence against eviction to be struck out. If we accept the interpretation as suggested by the appellant, nothing will be easier than to recover time barred arrears of rent by just instituting a suit on any supposed or false ground under S. 12. For example, your tenant is in arrears of rent for 10 years. You know you cannot recover the arrears for more than 3 years. Now, you have just to institute a suit against him, say on the pretended ground of requirement for building under clause (h), or for repairs under cl. (g), or for residence under cl. (e), or for carrying on business under cl. (f), although no such ground is in truth available, nor do you really mean eviction on that ground.

However, what you will achieve is that the tenant under the compulsion under S. 13 (1) (according to the interpretation pleaded by the appellant) will

deposit the entire arrears, including the time-barred 7 years' arrears, or will incur the liability of his defence being struck out under sub-sec. (6). The latter he cannot afford, otherwise, there will be every probability of a decree for eviction being passed against him. And, as soon as all the arrears are deposited and you withdraw them, you suffer the suit to be dismissed. You may merely have to pay the costs of the suit, but your time-barred rent is recovered. This illustration would demonstrate that S. 13 (1) would then become a machinery or a handle for recovering time-barred arrears of rent, or, in the words of their Lordships (in Delhi Municipality's case) would become a source or foundation of a right to claim arrears otherwise time-barred. It is not possible to accept such a position.

11. To the expression 'period for which the tenant may have made default' in S. 13 (1), only one meaning can be assigned. If in a suit for eviction founded on any ground other than that in S. 12 (1) (a), it cannot be argued that the tenant will be required to deposit time-barred rent, a different meaning cannot be given to that phrase, when the suit is instituted on the ground of default within the meaning of S. 12 (1) (a).

12. It is strenuously urged for the landlord that S. 13 (5) or S. 12 (3) of the Act affords a 'second concession' to the tenant. Therefore, the Legislature intended that if he wanted to avail himself of it, he had to pay the entire rent, including the time-barred rent. It must be remembered that S. 13 does not constitute a new source or foundation of a right to claim rent otherwise time-barred. In the present socio-economic set up, the Accommodation Control Act cannot be interpreted to be a handle to recover time-barred rent, which otherwise the landlord could not have done. New Delhi Municipal Committee v. Kalu Ram (AIR 1976 SC 1637) (supra).

13. The view that we take is fortified when we refer to sub-sec. (2) of S. 13. Under that section, when there is a dispute as to the amount of rent payable by the tenant, the Court is enjoined to fix a reasonable provisional rent to be deposited by the tenant. Now what is the 'dispute' as contemplated in sub-sec. (2)? If a claim in the suit includes time-barred arrears, that claim will at once be rejected under O. 7, R. 11, Civil P. C. What will then remain would be arrears 'legally recoverable'. Thus the dispute will be confined to the rent legally recoverable, for which the word used in sub-sec. (2) is 'payable'. To put it differently, when a dispute is raised as to the amount of rent payable, it is relatable only to those arrears which are legally recoverable and are not time-barred. In New Delhi Municipal Committee v. Kalu Ram (AIR 1976 SC 1637) (supra) their Lordships had to consider the expression 'arrears of rent payable' as employed in S. 7 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1958, which runs thus:—

"7. Power to recover rent or damages in respect of public premises as arrears of land revenue.

(1) Where any person is in arrears of rent payable in respect of any public premises, the estate officer may, by order, require that person to pay the same within such time and in such instalments as may be specified in the order.....".

It was held:—

"The word 'payable' is somewhat indefinite in import and its meaning must be gathered from the context in which it occurs. 'Payable' generally means that which should be paid. If the person in arrears raises a dispute as to the amount, the Estate Officer in determining the amount payable cannot ignore the existing laws. If the recovery of any amount is barred by the law of limitation, it is difficult to hold that the Estate Officer could still insist that the said amount was payable. When a duty is cast on an authority to determine the arrears of rent, the determination must be in accordance with law."

In Hansraj v. Dehra Dun-Mussorie Electric Tramway Co. Ltd., 60 Ind App 13 : (AIR 1933 PC 63) to which their Lordships referred, it was observed:—

"It is the section which creates a special procedure for obtaining payment of moneys; it is not a section which purports to create a foundation upon which to base a claim for payment. It creates no new rights."

The Supreme Court then held:—

"We are clear that the word 'payment' in S. 7 in the context in which it occurs, means 'legally recoverable'."

14. There can be no doubt that if there is any dispute as to the amount of rent payable by the tenant under sub-sec. (2) of S. 13, the Court shall not, while fixing reasonable provisional rent to be

deposited, include the arrears of rent time-barred. It will then be anomalous that if the tenant takes recourse to sub-sec. (2) of S. 13, he has not to pay time-barred rent also, and by paying arrears of rent legally recoverable, it would be compliance with S. 13 (1), but if he does not take recourse to sub-sec. (2) and wants to deposit rent directly under sub-sec. (1), then he must also deposit time-barred arrears of rent; otherwise, it would not be full compliance with the requirements of sub-sec. (1). Such a position can never be accepted.

15. It appears to us that in Abdul Gafoor v. Abdeali, 1973 MPLJ 179 (supra), the Division Bench concentrated its attention to a case of a defaulter and was then influenced by the considerations, such as, the moral obligation of the tenant to pay, when he was in occupation of the accommodation also during the period for which the rent became barred by time and also by S. 114 of the T. P. Act. If the illustrations for eviction on grounds other than that contained in cl. (a) of S. 12 (1) are taken into consideration, a flood of light is thrown on the expression 'period for which the tenant may have made default'. The Division Bench relied on Rullia Ram v. Fateh Singh, AIR 1962 Punj 256 (FB). It can be seen from the discussion contained in paragraphs 5 and 6 of that decision that the learned Judges of Punjab High Court were influenced by the expression "rent due by him" when neither the words 'legally due' nor the word 'recoverable' were used. It was observed in that decision:—

"In order to accept the contention of the learned counsel for the petitioner, namely, that only that rent is due or is in arrears which is legally recoverable, one has to read something extra in this legislative provision."

These observations now do not hold good in view of their Lordships' decision in New Delhi Municipal Committee v. Kalu Ram, AIR 1976 SC 1637 (supra).

16. In Abdul Gafoor v. Abdeali, 1973 MPLJ 179 (supra) although Calcutta decisions were cited, which support the view we are taking, the Division Bench preferred to follow the Punjab case. In Nashiban Bibi v. Parul Bala Dutt, ILR (1959) 2 Cal 490 the provisions of the West Bengal Premises Tenancy Act, 1956, were under consideration. Sec. 17 (1) of that Act employs the same words as S. 13 (1) of the M. P. Accommodation Control Act. The words of S. 17 (1) are:

"The tenant shall within one month of the service of the writ of summons on him deposit in court or pay to the landlord an amount calculated at the rate of rent at which it was last paid, for the period for which the tenant may have made a default including the period subsequent thereto upto the end of the month previous to that in which the deposit or payment is made."

The earlier decisions of the Calcutta High Court are T. S. R. Sarma v. Nagendra Bala Debi, AIR 1952 Cal 879 (FB) and Krishna Chandra v. Radharani, AIR 1954 Cal 102.

17. It may be mentioned that the long phrase 'amount calculated at the rate of rent at which it was paid, for the period for which the tenant may have made default' appears to have been studiously used for 'arrears' of rent in the strict sense; as they are sometimes distinguished from "damages for use and occupation."

18. The learned Advocate General supported the view that we have now taken.

19. As a result of this discussion, we answer the question referred to us in the negative. The tenant is not obliged to deposit time-barred rent under the first part of Section 13 (1) of the M. P. Accommodation Control Act, 1961.

20. It must be said with respect that Abdul Gafoor v. Abdeali 1973 MPLJ 179 (supra) did not lay down the correct law.

21. We desire to record our thanks to the learned Advocate General for his valuable assistance.

22. The appeal shall now be placed before a Single Bench.

Answered accordingly.

AIR 1978 MADHYA PRADESH 59
FULL BENCH

SHIV DAYAL, C. J., J. S. VERMA AND J. P. BAJPAI, JJ.

Omprakash, Petitioner v. The State of Madhya Pradesh and another, Respondents.

Misc. Petn. No. 192 of 1977, D/- 23-11-1977.

(A) Constitution of India, Arts. 320, 323 — Functions of Public Service Commission — Selection of candidates — Re-

commendations — Government whether bound to appoint accordingly.

The policy underlying the establishment of a Public Service Commission is threefold; to ensure a selection of the best available person for appointment in a post because the Public Service Commission is constituted by persons of high ability, varied experience and undoubted integrity and further assisted by experts on the subject; secondly, to avoid possibility of arbitrariness and nepotism, inter alia, in the matter of appointments; and, thirdly, to protect persons at the helm of a democratic Government, who are elected by the common man, from pressures in the matter of appointment, etc. The appointments on the Public Service Commission are no doubt by the Government, but once they are appointed, their independence is secure by the constitutional provisions. The true position of law is this:

(i) Where the Government is required to consult the Public Service Commission in the matter of selection of candidates to higher public office, the selection has to be made by the Commission. The Government has to fill up posts by appointing those who are selected by the Public Service Commission. The Government has to adhere to the order of merit in the list of candidates sent by the Public Service Commission. However, the selection by the Public Service Commission is recommendatory in character, so that the Government may decline to accept a list of candidates selected by the Commission. But, in that case, the Government has to place on the table of the Legislative Assembly its reasons and report for doing so. Thus, the Government is answerable to the House for any departure (Art. 323 of the Constitution). This, however, does not confer any right on a candidate to claim that the Government must accept the recommendation of the Public Service Commission.

(ii) Where the Government does not accept the recommendation of the Public Service Commission the matter is not justiciable except on ground of fraud or mala fide.

(iii) Once the Public Service Commission is asked by the Government to make a selection it is entirely in the wisdom and discretion of the Commission what mode or method it would adopt. This is subject to statutory provisions, if any. Where minimum qualifications for eligibility are prescribed by a statute or by the Government, the Public Service Commission cannot select a candidate who does not possess those qualifications. However, the Public Service Commission is free to screen the applicants, classify them in various categories according to their plus qualifications and/or experience, and call for interview only those candidates who fall within those categories, eliminating others who do not satisfy those criteria. Such classification does not tantamount to any hostile discrimination. Practicability may also require such categorisation.

(iv) Any person, who possesses the qualifications requisite for eligibility, has a right to apply for the post but there is no right to be called for interview, merely because he is eligible for being appointed. If the Public Service Commission has made categories of persons, either of plus qualifications or of those possessing experience, no applicant can question his elimination at the threshold, if he does not come within such category. (Paras 10, 11)

(B) M. P. Educational Service (Collegiate Branch) Recruitment Rules (1967), R. 13 (3) — Recommendation of Public Service Commission — How far binding on Government.

It is not incumbent on the State Government under R. 13 (3) to fill the vacant post in accordance with recommendations of the Public Service Commission. However if the vacancy is to be filled up the Government has to make appointment strictly in accordance with the list sent by the Public Service Commission. The Government cannot alter the order of merit. It cannot appoint No. 2 ignoring No. 1 unless for other good reasons No. 1 is found unsuitable for appointment, for instance because of bad conduct or character. Nor can the Government make appointment of a person whose name does not appear in the list. Barring these two constraints, the Government is not bound to make any appointment. (Paras 6, 11)

Cases Referred: Chronological Paras

AIR 1973 SC 2216 : 1973 Lab IC 1212 9
AIR 1972 SC 1546 : 1972 Lab IC 824 9
AIR 1965 SC 532 9
AIR 1956 SC 520 9

D. M. Dharmadhikari, for Petitioner; S. L. Garg, Advocate General with S. L. Saxena and A. P. Tare, Govt. Advocates, for the State.

SHIV DAYAL, C. J.:— Six questions have been referred to this Bench for answer.

2. The Madhya Pradesh Educational Service (Collegiate Branch) Recruitment Rules, 1967 (hereinafter called the 'Recruitment Rules') came into force with effect from May 2, 1969. Rule 13 (5) provides for emergency appointment. It reads thus:—

"13 (5) Emergency appointments.— If Commission's panel of selected condidates is not available, the post may be filled by emergency appointments in the following manner:—

(a) an advertisement shall be issued by Government;

(b) Applications for emergency appointments shall be submitted in the form prescribed in Schedule V.

(c) Applications received shall be registered and tabulated according to the following criteria:—

Category	Qualifications Division in M.A./M.Sc./M.Com.
(1)	(2)
A	(i) I plus Ph.D. plus experience of teaching for at least 6 months in a Government College of M. P. (ii) I plus Ph.D.
B	(i) II plus Ph. D. plus experience of teaching for at least 6 months in a Govt. College in M. P. (ii) II plus Ph.D.
C	(i) I plus experience of teaching for at least 6 months in a Govt. College of M. P. (ii) I
D	(i) II plus experience of teaching for at least 6 months in a Govt. College of M. P. (ii) II

The names will be arranged in each subcategory according to the marks secured by the candidates at the M. A./M. Sc./ M. Com. Examination:

Provided if and when Public Service Commission panel for these subjects is available, these teachers will be liable to be removed without notice."

By order dated Sept. 8, 1972, the petitioner was appointed a Lecturer in Military Science in the pay scale of Rupees 325-600 on temporary and emergency basis until further orders and was posted to the Government Science College, Jabalpur. This appointment was made on the petitioner's application which he had made in response to an advertisement. In 1973, the M. P. Public Service Commission (respondent No. 3) (hereinafter called the 'Commission') published advertisement No. 6/73 for filling 10 posts of Lecturers in Military Science. The petitioner applied; he was interviewed and he was selected for appointment to the post of Lecturer in Military Science, his name being at serial No. 2 in the merit list of selected candidates. The petitioner's case is that in spite of the recommendations of the Public Service Commission, he was not appointed in the vacant post. Subsequently, in the year 1975, the Public Service Commission issued another advertisement. The petitioner again applied but this time he was not called for interview at all. The Public Service Commission informed the petitioner that he could not be selected for interview, as he did not fall within the criterion fixed by the Commission, vide para 8 of the general instructions to candidates. The petitioner made representations but to no effect. On these premises, the petitioner filed this petition under Art. 226 of the Constitution, contending inter alia that the State Government had no right to override and ignore the list of candidates selected by the Public Service Commission in the year 1973, and, secondly, the Public Service Commission was bound to call him for interview when he applied in pursuance to the second advertisement No. 8 of 1975.

3. The case for the State Government (respondent No. 1) is that since complaints challenging the impartiality of the experts for the interview held in 1973 were received, the Government decided to have a thorough high level probe. However, that enquiry is still pending and no appointment order on the basis of the recommendations of the Public Service Commission made in 1973, has been made. By virtue of the executive instructions, the list of 1973 lapsed on the expiry of one year so that the list of 1973 became inoperative. The selection by the Public Service Commission does not create any title to the post in any candidate. The Public Service Commission is merely a recommending body whose recommendations are not at all binding on the State Government. The Commission's decision about the eligibility or otherwise of the candidates is final as per Rule 11 of the Recruitment Rules.

4. The case for the State Government further is that the University Grants

Commission recommended a higher scale of pay of Rs. 700-1600 for a Lecturer of Post Degree College and the U.G.C. recommended requisite qualifications for appointment of a Lecturer, on the basis of which the Government of India issued a letter to the State Government. A substantial grant of 80% was to be given to the State Government by the Government of India to meet the rise in the scales of pay. A letter was accordingly addressed to the Public Service Commission prescribing better qualifications for direct recruits. It was in these circumstances that the Public Service Commission issued advertisement No. 8/75, prescribing higher qualifications, namely, post-graduate degree in First Class and also B. A./B. Sc. in Second Division.

5. The learned counsel for the petitioner relies on Art. 323 (2) of the Constitution in support of his contention that the Government is bound to accept the advice of the Public Service Commission and consequently to appoint him in the vacant post. Clearly, this contention is not right. Article 323 (2) only makes the Government answerable to the Legislature of the State, but it does not confer any right upon any candidate to get the recommendations of the Public Service Commission enforced through the Court.

6. For the petitioners reliance is then placed on R. 13 (1) and (2) of the M. P. Educational Service (Collegiate Branch) Recruitment Rules, 1967, which reads thus:—

"R. 13. List of candidates recommended by the Commission.— (1) The Commission shall forward to the appointing authortiy the names and other details of candidates whom they consider most suitable duly arranged in order of preference and candidates belonging to Scheduled Caste and Scheduled Tribes who, though (do) not qualify by that standard, are declared by Commission to be suitable for appointment to the service with due regard to the maintenance of efficiency of administration.

(2) Candidates on the Commission's panel shall be appointed strictly in the order in which they have been placed. For instance, if the name of a lecturer already working as an emergency measure occurs lower in the panel, his services be terminated if necessary, to appoint a candidate who ranks higher on the panel."

That rule merely enjoins the Government to make appointment strictly in accordance with the list sent by the Public Service Commission. The Government cannot alter the order of merit. It cannot appoint No. 2 ignoring No. 1 unless for other good reasons No. 1 is found unsuitable for appointment, for instance because of bad conduct or character. Nor can the Government make appointment of a person whose name does not appear in the list. Barring these two constraints, the Government is not bound to make any appointment.

7. It is a misconception that selections made by the Public Service Commission tantamount to appointment of the candidate selected. The function of the Public Service Commission is merely to select candidates suitable for appointment, but the appointing authority is the Government. It is undoubted position that an authority, which has the power to appoint, has also the power not to appoint. The Government may impose restrictions on itself by making rules, which then would become binding on it. The restrictions imposed in Rule 13 of the Rules do not make it mandatory for the Government to make appointment, once it has received the list of candidates selected by the Public Service Commission. Since it is not necessary to do so, we do not express any opinion whether the Government can within one year of the receipt of the list from the Public Service Commission, just ignore or brush it aside and ask the Public Service Commission to make a fresh selection.

8. In the absence of any rules it is open to the Government to issue administrative instructions, according to which a list of selected candidates received from the Public Service Commission may automatically lapse on the expiry of one year.

9. In Banarsidas v. State of U. P. AIR 1956 SC 520, their Lordships observed thus (at p. 521):—

"In our opinion, it is open to the appointing authority to lay down the requisite qualifications for recruitment to Government service and it is open to the authority to lay down such prerequisite conditions of appointment as would be conducive to the maintenance of proper discipline amongst Government servants." Their Lordships further observed at p. 522):—

"Like all other employers, Government are also entitled to pick and choose

from amongst a large number of candidates offering themselves for employment under the Government."

In State of Mysore v. K. N. Chandrasekhara, AIR 1965 SC 532, it was observed (at p. 537):—

"The Commission is undoubtedly a body constituted pursuant to the provisions of the Constitution and has to exercise powers and perform functions entrusted to it by the Rules framed under Article 309."

Shri Dharmadhikari relied on State of Haryana v. Shamsher Jang, AIR 1972 SC 1546, where it was observed (at p. 1547):

"Undoubtedly the instructions issued by the Government add to those qualifications. By adding to the qualifications already prescribed by the rules, the Government has really altered the existing conditions of service."

Clearly, these observations are not apposite. That was a case regarding promotion. The Government is not competent to alter the rules framed under Art. 309 of the Constitution, by means of administrative instructions. In State of Haryana v. Subhash Chander, AIR 1973 SC 2216, their Lordships observed that the list of candidates sent by the Public Service Commission is of great importance inasmuch as there can be no departure from the list, either by the Public Service Commission, the High Court, or the State Government. The service rules made in consultation with the Public Service Commission and the High Court are binding on all. Vacancies must be filled in accordance with the selected list and in the order they have been placed in that list. However, it is open to the Government to decide how many appointments shall be made. The mere fact that a candidate's name appears in the list will not entitle him to a mandamus that he be appointed. It was further observed in that case (at p. 2220):

"There is no constraint that the Government shall make an appointment of a Subordinate Judge either because there are vacancies or because a list of candidates has been prepared and is in existence..... there is no constraint on the Government fixing a higher score of marks for the purpose of selection."

If the State Government, while making the selection for appointment had departed from the ranking given in the list, there would have been a legitimate grievance on the ground that the State Government had departed from the rules in this respect.

10. It seems to us clear that the policy underlying the establishment of a Public Service Commission is threefold; to ensure a selection of the best available person for appointment in a post because the Public Service Commission is constituted by persons of high ability, varied experience and undoubted integrity and further assisted by experts on the subject; secondly, to avoid possibility of arbitrariness and nepotism, inter alia, in the matter of appointments; and, thirdly, to protect persons at the helm of a democratic Government, who are elected by the common man, from pressures in the matter of appointment, etc. The appointments on the Public Service Commission are no doubt by the Government, but once they are appointed, their independence is secure by the Constitutional provisions (Arts. 316 and 317 of the Constitution). The true position of the law is this:—

(i) Where the Government is required to consult the Public Service Commission in the matter of selection of candidates to higher public office, the selection has to be made by the Commission. The Government has to fill up posts by appointing those who are selected by the Public Service Commission. The Government has to adhere to the order of merit in the list of candidates sent by the Public Service Commission. However, the selection by the Public Service Commission is recommendatory in character, so that the Government may decline to accept a list of candidates selected by the Commission. But, in that case, the Government has to place on the table of the Legislative Assembly its reasons and report for doing so. Thus, the Government is answerable to the House for any departure (Art. 323 of the Constitution). This, however, does not confer any right on a candidate to claim that the Government must accept the recommendation of the Public Service Commission.

(ii) Where the Government does not accept the recommendation of the Public Service Commission the matter is not justiciable except on ground of fraud or mala fide.

(iii) Once the Public Service Commission is asked by the Government to make a selection, it is entirely in the wisdom and discretion of the Commission what mode or method it would adopt. This is subject to statutory provisions, if any. Where minimum qualifications for eligibility are prescribed by a statute or by

the Government, the Public Service Commission cannot select a candidate who does not possess those qualifications. However, the Public Service Commission is free to screen the applicants, classify them in various categories according to their plus qualifications and/or experience, and call for interview only those candidates who fall within those categories, eliminating others who do not satisfy those criteria. Such classification does not tantamount to any hostile discrimination. Practicability may also require such categorisation. For instance, if for three posts there are 3000 applicants, all eligible, the Commission cannot afford to spend months together in selecting three out of 3000.

(iv) Any person, who possesses the qualifications requisite for eligibility, has a right to apply for the post but there is no right to be called for interview, merely because he is eligible for being appointed. If the Public Service Commission has made categories of persons, either of plus qualifications or of those possessing experience, no applicant can question his elimination at the threshold, if he does not come within such category.

11. In view of the above discussion we may now answer the questions thus:
Question No. (1)—

Whether on the request of the State Government when the Public Service Commission invites applications and selects the candidates and a candidate is declared as selected, is it open to the State Government not to appoint him when the post is still vacant "except by taking action under Art. 323 (2) of the Constitution?"

Answer: (a) It is open to the State Government not to appoint any one from the list of candidates selected by the Public Service Commission. However, it is not open to the Government (i) to appoint any person whose name does not appear in the list; or (ii) to appoint out of turn any person whose name appears in the select list by disturbing the order of merit of that list, unless, under the rules for the time being in force, the candidates ranking above him in the said list are ineligible for appointment in Government service.

(b) Where the Government does not accept the advice of the Public Service Commission, it has to report its reasons to the Legislature of the State. Thus, the Government is answerable to the Legislature, but not to any candidate; nor is the matter justiciable except when there is violation of any statutory rule. For instance, where a person is appointed whose name does not appear in the list at all or when in making an appointment the Government alters the order of merit in which the Public Service Commission made the selection.

(c) The Court can interfere in an action of the Government on the ground of fraud or mala fide.

Question No. (2)—

Whether a list published by the Public Service Commission of the candidates selected in pursuance of the advertisement in an interview automatically lapses on expiry of one year?

Answer— In the absence of any statutory rule to the contrary, the Government may issue executive instructions under which the list may automatically lapse on the expiry of one year.

Question No. (3)—

Whether the State Government can override the selection made by the Public Service Commission, by not filling the post for a period of one year, "so that the list of selected candidates lapses", and whether by this method the Government can defeat the purpose of the Public Service Commission and disregard its recommendations?

Answer— The Public Service Commission merely selects suitable candidates, but the appointing authority is the State Government. For reasons of its own it may not fill the post at all. It is not bound to make an appointment. If by omission to make an appointment the list lapses on the expiry of one year, there is no violation of any statutory rule, for which the Court can interfere. It is different matter that the Government may be answerable to the Legislature.

Question No. (4)—

Whether, when the posts remained unfilled, can the State Government request the Public Service Commission for a fresh selection by ignoring and superseding the former list of selected candidates?

Answer:— (a) After the list of selected candidates lapses, the Government may request the Public Service Commission for a fresh selection.

(b) Since it is not necessary to answer in the context of the present case, we reserve our opinion as to whether before the expiry of one year the Government can ignore and supersede the list of

selected candidates and ask the Commission for a fresh selection.

Question No. (5)—

Whether under R. 13 (3) of the M. P. Educational Service (Collegiate Branch) Recruitment Rules, 1967, is it incumbent on the State Government to fill the vacant post in accordance with recommendations of the Public Service Commission?

Answer:— (a) The Government is not bound to fill any vacant post.

(b) The Government cannot fill the vacant post by appointing a person whose name does not appear in that list, nor the order of merit in the selected list can be disturbed by the Government in making an appointment.

Question No. (6)—

Whether the Public Service Commission can fix any criterion other than those given in the advertisement on the fulfilment of which a candidate is eligible for appointment?

Answer:— (a) The Public Service Commission has unfettered right to evolve its own method or modus operandi for selection of most suitable candidates and for that purpose it may fix any criterion, subject to the eligibility fixed by the Statute or by the Government being satisfied. The Commission will be within its rights to classify the numerous applications into certain categories and to call for interview only those candidates, who come within certain specified categories.

(b) There is no contravention of any rule in fixing the minimum standard for selection. The Commission can fix a category on the basis of plus qualifications and/or plus experience. That matter is in the absolute discretion of the Commission.

12. The petition shall now be placed before a Division Bench.

Reference answered accordingly.

AIR 1978 MADHYA PRADESH 65
= 1978 LAB. I. C. 290

FULL BENCH

SHIV DAYAL C. J., J. S. VERMA AND C. P. SEN, JJ.

Sudhir Kumar Mishra and others, Petitioners v. Municipal Corporation, Jabalpur and another, Respondents.

Misc. Petn. No. 1150 of 1974, D/-25-10-1977.*

M. P. Municipal Corporation Act (23 of 1956), S. 58 (1) Second Proviso — Appointments to certain posts by Corporation — Consultation with Public Service Commission is mandatory — Non-compliance renders appointment invalid — 1966 MPLJ 426, Overruled.

The provision requiring consultation with the State Public Service Commission as required by the second proviso to sub-sec. (1) of S. 58 of the M. P. Municipal Corporation Act, 1956 is mandatory. It necessarily follows that an appointment made without any such consultation with the Commission renders the appointment invalid. The provision for consultation made in S. 58 (1) is complete in itself and capable of operation without the aid of any further rules to bridge the gap. Therefore, it cannot be said that unless rules are framed specifying the details of the mode of consultation the provision contained in the second proviso to Sec. 58 (1) cannot operate. The words "in the manner prescribed" occurring in the second proviso only mean that if and when rules are framed laying down the details of procedure for consultation, they will be followed. Till then the consultation, with the Commission will be made in a reasonable manner thought fit by the Corporation. 1966 MPLJ 426 Overruled; AIR 1963 Madh Pra 17, Approved; AIR 1971 SC 1696 and AIR 1962 SC 574, Relied on.

(Paras 5 to 9)

*(Decided by Full Bench on order of reference made by Shiv Dayal C. J. and J. S. Verma J. on 5-10-1977).

LU/LU/E449/77/DVB

Cases Referred: Chronological Paras

AIR 1971 SC 1696 : 1971 Tax LR 957	5
1966 MPLJ 426	1, 2, 6, 9
AIR 1963 Madh Pra 17	1, 2, 6, 9
AIR 1962 SC 574	8

Gulab Gupta with S. K. Mukherjee, for Petitioners; M. Mukherjee (for No. 1) and Y. S. Dharmadhikari with Rajendra Tiwari (for No. 2), for Respondents.

VERMA, J.:— This reference has been made to resolve the conflict between two Division Bench decisions of this Court reported in Narayan Keshav Dandekar v. R. C. Rathi, AIR 1963 Madh Pra 17 : 1963 MPLT 709 and Ras Bihari Pande v. Municipal Corporation, Jabalpur, 1966 MPLJ 426. The question for decision is whether the requirement of consultation with the State Public Service Commission laid down by the second proviso to sub-sec. (1) of S. 58 of the M. P. Municipal Corporation Act, 1956, is mandatory, so that an appointment purporting to be made in accordance with the power given by sub-sec. (1) of Section 58 without any such consultation is invalid. This question arises in the context of the validity of appointment of respondent No. 2 S. K. Chaudhary as City Engineer of the Municipal Corporation, Jabalpur.

2. The earlier Division Bench deciding Dandekar's case (AIR 1963 Madh Pra 17) (supra) held that this requirement of consultation with the State Public Service Commission is mandatory and such an appointment made by the Corporation without consultation with the Commission was invalid. On the other hand, the latter Division Bench deciding Pande's case (1966 MPLJ 426) (supra) took the view that the failure to consult the State Public Service Commission in making such an appointment did not render the appointment invalid, the status of the State Public Service Commission being merely advisory. It may be mentioned that no reference is made to Dandekar's case in this latter decision which means that the earlier Division Bench decision in Dandekar's case was apparently not brought to the notice of the subsequent Division Bench. This is how the conflict arises which we are called upon to resolve.

3. Section 58 of the M. P. Municipal Corporation Act, 1956, reads as under:—

"58. Appointment and salary of City Engineer, etc.

(1) Subject to the provisions of this Act the Corporation shall appoint a City Engineer, a Health Officer, a Revenue Officer, a Municipal Secretary and a Municipal Accountant and may appoint a Deputy Municipal Commissioner and such other officers and servants as are necessary for the efficient carrying out of the purposes of this Act and may assign to them such duties and pay them such salaries and allowances, pensions and gratuities and make on their behalf such payments to the provident or annuity funds as the Corporation may determine by bye-laws made in this behalf under S. 427:

Provided that:—

(1) the power of appointing any person on a municipal post which carries a maximum monthly salary exceeding 150 rupees shall vest in the Standing Committee;

(2) the power of appointing any person on a municipal post which carries a maximum monthly salary not exceeding 150 rupees shall vest in the Commissioner;

(3) any appointment made within his power by the Commissioner shall be reported for its information to the Standing Committee:

Provided further that the appointment to be made by the Standing Committee shall be so made in consultation with State Public Service Commission in the manner prescribed:

Provided also that in case of any difference of opinion between the Standing Committee and the State Public Service Commission, the matter shall be laid before the Corporation. If the Corporation agrees with the State Public Service Commission, the appointment shall be

made accordingly. In other cases, a reference shall be made by the Corporation to the Government whose decision shall be final.

(2) Notwithstanding anything contained in sub-sec. (1), the Standing Committee may make appointments for a period not exceeding six months without consultation with the State Public Service Commission."

4. Sub-sec. (2) of S. 58 enables the making of appointment for a period not exceeding six months without consultation with the State Public Service Commission. Obviously, these are intended to be temporary appointments. Sub-sec. (1) provides for the general power of appointment and specifies some particular officers include in that category. The first proviso lays down the authority in the Corporation competent to make the appointments of the several categories of officers. The second proviso then requires that the appointments which are to be made by the Standing Committee, i. e. according to Cl. (1) of the first proviso, are to be made in consultation with the State Public Service Commission in the manner prescribed. The third proviso further lays down that in case of difference of opinion between the Standing Committee and the State Public Service Commission, the matter shall be considered afresh by the Corporation obviously in the light of the Commission's opinion. If the Corporation agrees with the opinion of the State Public Service Commission, the appointment will be made accordingly. In other cases where there is no such agreement by the Corporation with the opinion of the State Public Service Commission, a reference shall be made by the Corporation to the Government whose decision thereon shall be final. The scheme clearly is that all such appointments requiring consultation with the Commission can be made by the Corporation only if the State Public Service Commission and the Corporation are of the same opinion. In other cases where the Corporation does not agree with the opinion of the State Public Service Commission, the Corporation is bound to refer the matter to the State Government whose decision is final. In short where there is no agreement between the Corporation and the State Public Service Commission, the Corporation is given no option except to refer the matter to the State Government and await its decision since no power is given to the Corporation to ignore the opinion of the State Public Service Commission. It is obvious that the power to overrule the Public Service Commission is given to the Government and not to the Corporation. As earlier stated, sub-sec. (2) enables only temporary appointments not exceeding six months being made without such consultation with the State Service Commission, the reason for which is obvious.

5. In our opinion, the decision in Prakash Chand Maheshwari v. Zila Parishad, Muzaffarnagar, AIR 1971 SC 1696 leaves no room for any controversy on this point. In that case, the Supreme Court was called upon to decide a similar point with reference to Section 43 of the U. P. Kshettra Samitis and Zila Parishads Adhiniyam (33 of 1961) which obviously was in pari materia with Section 58 of the M. P. Municipal Corporation Act, with which we are concerned. Under that provision, the appointment of a Kar Adhikari had to be made in consultation with the State Public Service Commission and in case of a difference of opinion between the Commission and the Parishad the matter was to be referred to the State Government whose decision was to be final. The Kar Adhikari not having been so appointed in consultation with the State Public Service Commission, the appointment was held to be invalid. Their Lordships summarised the position as follows:

"The last point raised by the petitioners relates to the appointment of the Kar Adhikari on the ground that it was not done in consultation with either Public Service Commission of the State or any other Commission or body appointed in that behalf by the State Government under Section 43 of the U. P. Kshettra Samithis and Zila Pari-

shads Adhiniyam, 1961, i. e. U. P. Act XXXIII of 1961. The appointment of respondent No. 2 in this case took place on 8th Aug. 1965; the impugned assessment was made on 8th March 1968 i. e. more than two years after the date of appointment. Under S. 43 the appointment of this officer to the post which carried an initial salary of more than Rs. 200 p. m. could be made by the Parishad in consultation with the Public Service Commission or other Commission or selection body as might be constituted by the State Government and if there was a difference of opinion between the Commission and the Parishad the matter was to be referred to the State Government whose decision was to be final. Counsel for the respondents on the materials before this Court was only in a position to inform us that the State Public Service Commission had been notified of the appointment and they had not expressed any disapproval of the same. We do not think that this was sufficient compliance with S. 43. ....."

"Appointing respondent No. 2 as Kar Adhikari and merely sending the papers relating to such appointment to the Public Service Commission would not therefore be in compliance with Sec. 43 of the Act. Even if it be regarded as a temporary appointment, it could only be effective for two years and as the assessment in this case was made beyond that date it must be held that the assessment was by a person not competent to make it."

6. The above decision of the Supreme Court concludes the point and it is obvious that there is no room for contending any longer that the provision requiring consultation with the State Public Service Commission as required by the second proviso to sub-sec. (1) of S. 58 of the M. P. Municipal Corporation Act, 1956 is not mandatory. It necessarily follows that an appointment made without any such consultation with the commission where the same is mandatory, renders the appointment invalid. In the face of the above Supreme Court decision, Shri Y. S. Dharmadhikari appearing for the respondent No. 2 did not question the correctness of this conclusion. It also follows that the decision in Ras Bihari Pande v. Municipal Corporation, Jabalpur 1966 MPLJ 426 on this point as contained in paragraph 6 cannot be considered as correct and the view of the earlier Division Bench on this point in Narayan Keshav Dandekar v. R. C. Rathi, AIR 1963 Madh Pra 17 must be upheld.

7. Shri Mukerji appearing on behalf of respondent No. 1 Municipal Corporation, argued that no rules prescribing the mode of consultation with the State Public Service Commission having been framed, the second and third provisos to subs. (1) of S. 58 have not yet come into operation. It is not possible to accept this contention. The provision for consultation so made in Section 58 (1) is complete in itself and capable of operation without the aid of any further rules to bridge the gap. For this reason, there is no need or room to take the view that unless rules are framed specifying the details of the mode of consultation till then this provision cannot operate. The words "in the manner prescribed" occurring in the second proviso only mean that if and when rules are framed laying down the details of procedure for consultation, they will be followed. Till then the consultation with the Commission will be made in a reasonable manner thought fit by the Corporation. Nothing more was required to be prescribed by the law when it laid down the need of consultation with the Commission as a necessary requirement of a valid appointment under S. 58 (1). It is not shown to us as to how the consultation with the State Public Service Commission cannot be made without rules being framed regulating the details of procedure and what is that thing, if any, that remains to be laid down to enable an effective consultation with the Commission.

8. We are fortified in this view which we are taking by the decision in Dargah Committee, Ajmer v. State of Rajasthan, AIR 1962 SC 574. It was argued before the Supreme Court that the proceedings

under Section 234 of the Ajmer Merwara Municipalities Regulation (6 of 1925) for recovery of dues was incompetent because a demand had not been made "in the manner prescribed." In other words the argument was that unless rules are framed and the form of notice is prescribed for making a demand under S. 222 (1), no demand could be said to have been made "in the manner prescribed" by the rules, and an application under Sec. 234 was incompetent. This argument was rejected by the Supreme Court and it was held as follows:—

"If the rules are not prescribed then all that can be said is that there is no form prescribed for issuing a demand notice; that does not mean that the statutory power conferred on the Committee by S. 222 (1) to make a demand is unenforceable." ... ...

"That is the plain effect of the relevant provision of the Regulation, and so, an amount which was claimable by virtue of S. 222 (1) does not cease to be claimable just because rules have not been framed prescribing the form of making the said demand. In our opinion, the contention that the application made under S. 234 was incompetent must be rejected."

There is, thus, no reason to construe the expression "in the manner prescribed" in the present context to mean that framing of rules is a condition precedent to operation of the provision. We have noticed this argument simply because the point was urged by Shri Mukerji with great conviction about its correctness.

9. We are, therefore, of the opinion that the view taken by the Division Bench deciding Narayan Keshav Dandekar's case (AIR 1963 Madh Pra 17) (supra) on this point is correct. It must be said with great respect that Ras Bihari Pande's case (1966 MPLJ 426) (supra) was not correctly decided on this point. The reference is answered accordingly. The case shall now go back to the Division Bench for decision of the petition on merits.

Reference answered accordingly.

AIR 1978 MADHYA PRADESH 69
FULL BENCH

SHIV DAYAL, C. J., K. K. DUBE, R. K. TANKHA, J. S. VERMA AND C. P. SEN, JJ.

The Kanhan Valley Coal Company Pvt. Ltd., Nagpur and another, Petitioners v. The Janapada Panchayat, Chhindwara and others, Respondents.

Misc. Petn. Nos. 351, 352 to 354, 491 to 493 and 500 of 1970, D/- 18-11-1977.

Constitution of India, Art. 14 — Imposition of coal cess within Chhindwara District alone in new M. P. — No discrimination — ((i) C. P. Local Self-Government Act (4 of 1920), Ss. 51, 79 (i), (xv) — (ii) C. P. Coal Cess Rules (1935), R. 3).

Where it is alleged that the continuance of Coal Cess Rules (1935) permitting the recovery of coal cess from the colliery owners of Chhindwara district after 1-11-1956 infringes Art. 14 because it amounts to a hostile discrimination of the colliery owners of Chhindwara district as against the colliery owners in the other districts of the new State of Madhya Pradesh but no facts or particulars are pleaded or material placed from which it may be possible to know whether this allegation of hostile discrimination made by the petitioners is correct or not and whether all the colliery owners in the State are similarly placed, the mere fact that the colliery owners in Chhindwara district are made to pay coal cess would not by itself amount to infringement of Art. 14 of the Constitution. AIR 1964 SC 1179, Followed. (Para 8)

Anno: AIR Comm. Constn. of India, 2nd Edn., Art. 14 N. 17 (aa).

Cases Referred: Chronological	Paras
AIR 1964 SC 1013	5
AIR 1964 SC 1179	7, 8
AIR 1961 SC 964	5

Y. S. Dharmadhikari, for Petitioners; S. K. Seth (for Nos. 1 (a) to 1 (e) and 2) and S. L. Saxena, Govt. Advocate (for Nos. 3 and 4), for Respondents.

J. S. VERMA, J.:— In this petition as well as Miscellaneous Petitions Nos. 352, 353, 354, 491, 492, 493 and 500 of 1970,

one common question has been referred for decision by this Full Bench. This decision shall govern the disposal only of that question in all these petitions.

2. The question for decision by this Full Bench is only one, which is as follows:—

"Whether the continuance of the Coal Cess Rules, 1935, made under the C. P. Local Self Government Act, 1920, on reorganization of the States after 1-11-1956 empowering the recovery of the coal cess thereunder within the district of Chhindwara alone in the new State infringes Art. 14 of the Constitution of India?"

Even though in the petition, violation of Art. 14 is alleged for several reasons, at the hearing before us Shri Y. S. Dharmadhikari, learned counsel for the petitioners in all these cases, expressly confined the petitioners' case on the basis of Art. 14 only to the above ground. We shall, therefore, confine our opinion to this question alone.

3. When these petitions came up for hearing before this Full Bench for the first time, on 13-7-77 we adjourned the cases since Shri Y. S. Dharmadhikari prayed for grant of some time to amend the petition so as to furnish the full particulars necessary for deciding the above question relating to infringement of Article 14 of the Constitution. We again granted further time to the petitioners' counsel on 5-8-1977 for this very purpose. Thereafter these petitions were listed before us on 14-11-1977. In spite of several months being granted to the petitioners for this purpose, no attempt to amend the petition and to supply the necessary particulars to support the petitioners' case based on Art. 14 has been made. Shri Dharmadhikari, counsel for the petitioner, stated at the commencement of the hearing on 14-11-1977 that the petitioners did not propose to make any amendment in the petition and he then invited us to decide the point on the basis of the existing material. It is in these circumstances that we are called upon to decide this question.

4. In short, the contention of Shri Y. S. Dharmadhikari, learned counsel for the petitioners, is that the continuance of Coal Cess Rules, 1935, permitting the Janapada Sabha, Chhindwara, to recover coal cess at the rate of 3 pies per ton on coal etc. from the colliery owners of Chhindwara district even after 1-11-1956 infringes Art. 14 of the Constitution because it amounts to a hostile discrimination of the colliery owners of Chhindwara district as against the colliery owners in the other districts of the new State of Madhya Pradesh. He states that we can take judicial notice of the fact that there are some other districts in the new State of Madhya Pradesh where collieries are in existence but this particular cess is confined only to collieries within the Chhindwara district. Merely on this ground itself i.e. absence of applicability of the Coal Cess Rules 1935, to other districts of the new State of Madhya Pradesh having collieries, according to the argument advanced, there is a violation of Art. 14 of the Constitution.

5. It is not necessary for us to give in detail the history of this levy since this is not the first time when the validity of this levy has been challenged in law courts. On an earlier occasion, the initial imposition of this levy and its continuance after enforcement of the Constitution of India by virtue of Article 277 was upheld when challenged by the colliery owners of Chhindwara district with reference to the tax claimed by the Janapada Sabha, Chhindwara, litigation ended with the Supreme Court decision reported in Amalgamated Coalfields Ltd. v. Janapada Sabha, Chhindwara, AIR 1961 SC 964. However, the question of increase in the rate of tax from 3 pies to 9 pies per ton was not decided as it had not been raised in the petition. Thereafter this increase in the rate over 3 pies per ton was again challenged by the colliery owners. The increase of tax in excess of 3 pies per ton was held to be bad and the Supreme Court decision ending that controversy is reported in Amalgamated Coalfields Ltd. v. Janapada Sabha, Chhindwara, AIR 1964 SC 1013. The material facts pertaining to the levy are stated in those reports and need not be reiterated. The argument now advanced, based on Article 14 of the Constitution, is a fresh ground to attack the same levy. It may be mentioned that such an argument was available to the colliery owners even in the very first round of the litigation which ended with the decision reported in Amalgamated Coalfields Ltd. v. Janapada Sabha, Chhindwara, because the period of tax involved therein was subsequent to 1-11-1956. However, that point was then not raised nor thereafter prior to this round of the litigation. It is in this manner that this question arises for our decision.

6. We may now state the substance of the petitioners' pleading on the point. Shri Dharmadhikari has referred to paragraphs 28, 29 and 30 of the petition in M. P. No. 351/70 as containing the entire material relied on by the petitioners for deciding this question. Learned counsel has argued with reference to the paper-book of M. P. No. 351/70 saying that the facts are identical in all these cases. We shall, therefore, refer only to the paper-book and material pertaining to M. P. No. 351/70. In substance, the pleading in these paragraphs of the petition is that the imposition of this levy in the district of Chhindwara alone amounts to hostile discrimination because there is no reason why the lessees of coal mines in Chhindwara district alone in the State should be treated on a separate footing. No facts or particulars are pleaded or material placed before us from which it may be possible to know whether this allegation of hostile discrimination made by the petitioners is correct or not. In short, the relevant averments in the petition amount only to stating the petitioners' opinion that all colliery owners, whether in Chhindwara district or in other districts of the State of Madhya Pradesh, are similarly placed and the mere fact that the colliery owners of Chhindwara district are made to pay this tax at the rate of 3 pies per ton is by itself an infringement of Art. 14 of the Constitution. We have, therefore, the petitioners' opinion on the point and not the relevant data on the basis of which this point can be decided. We have already pointed out that in spite of granting time of several months to the petitioners for supplying the requisite particulars by amending the petitions, the petitioners failed to supply these particulars and have insisted on our deciding this point on this basis alone.

7. Counsel for the petitioners has in all fairness placed before us the decision in State of Madhya Pradesh v. Bhopal Sugar Industries Ltd., AIR 1964 SC 1179, which, in our opinion, is a complete answer to his argument on the point. That was a case in which the continuance of agricultural income-tax in the Bhopal region of the new State of Madhya Pradesh had been challenged similarly on the basis of Art. 14 of the Constitution. The challenge was made only on the ground that imposition of such a levy in the Bhopal region amounted to infringement of Art. 14. No other particulars to justify the plea of infringement of Article 14 of the Constitution were pleaded by the petitioners. The High Court in that case struck down the levy merely on that ground but that decision was reversed by the Supreme Court and in doing so the necessary test applicable for deciding such a question was also indicated. In substance, it was pointed out that it is necessary to investigate the structure of tax burden imposed directly or indirectly on persons similarly placed taking into account the impugned levy; the difference, if any, in the overall tax liability between the persons similarly situated within the State in the matter of the levy; whether the burden between the persons similarly circumstanced was substantially dissimilar; and whether the continuance of the levy was justified. The plea taken in that case initially being substantially the same as in these petitions, the observations of the Supreme Court with regard to such a plea is also instructive. It was also pointed out by the Supreme Court in that case that the petition was deficient in furnishing particulars which would justify the plea of infringement of Art. 14 of the Constitution and it was stated that the applicant taking such a plea had to place full material before the Court from which it was possible to make out the nature of enquiry already indicated. The Supreme Court ultimately held that the plea taken in that case was by itself not sufficient to support the plea of infringement of Art. 14 of the Constitution. The case was accordingly remanded to the High Court to enable the parties to place all the relevant material for deciding the question.

8. We have already indicated that in the present case in spite of our giving opportunity of several months to the petitioners, they have refused to place any such material before us. On the only ground taken, the decision of the Supreme Court in State of Madhya Pradesh v. Bhopal Sugar Industries Ltd., AIR 1964 SC 1179 is an authority to hold that no case of infringement of Art. 14 of the Constitution can be made out simply for this reason, i.e., the continuance of levy on the colliery owners within the district of Chhindwara alone in the new State of Madhya Pradesh.

9. The result is that the petitioners have been unable to support their challenge to the continuance of the Coal Cess Rules, 1935, after 1-11-1956 on the basis

of alleged infringement of Art. 14 of the Constitution. The petitioners' contention on that ground has, therefore, no merit and is rejected. The reference is answered accordingly. These petitions shall now be placed before the appropriate Division Bench for deciding the remaining questions.

Reference answered in negative.

AIR 1978 MADHYA PRADESH 72
FULL BENCH

(INDORE BENCH)

SHIV DAYAL, C. J., G. L. OZA AND G. G. SOHANI, JJ.

Vijaysingh and another, Appellants v. Competent Authority, Sub-Divisional Officer, Tarana, Respondent.

Second Appeal No. 75 of 1970, D/- 25-1-1977.*

(A) M. P. Ceiling on Agricultural Holdings Act (20 of 1960), Ss. 11 and 46 — Suit pertaining to question of title — Civil Court's jurisdiction to entertain it — Not excluded by the Act.

The scheme of S. 11 of the Act clearly goes to show that so far as the decision on the question of title is concerned, the competent authority is not vested with jurisdiction to decide the matter finally. It is left to the decision of a Civil Court and the decision of the competent authority is described as a 'summary decision'. Therefore, the effect of Ss. 11 and 46 would be that so far as questions of title are concerned there is no bar of the jurisdiction of the Civil Court as S. 46 in the context of S. 11 could not be read to mean that there is any bar about the jurisdiction of the Civil Court so far as questions of title are concerned. If the Competent Authority has not decided the question of title under S. 11 (4) or if there has been no proceedings before a Competent Authority, Civil Court has jurisdiction to entertain a suit pertaining to question of title. But if an order is passed by Competent Authority deciding question of title summarily then the Civil Court will have jurisdiction only in a suit as contemplated by S. 11 (5). AIR 1976 Madh Pra 160 (FB), Rel. on.

(Paras 5, 6, 7)

*(Against decree of V. G. Vinchurkar, 2nd Addl. Dist. J., Ujjain, D/- 6-12-1969.)

(B) M. P. Ceiling on Agricultural Holdings Act (20 of 1960), S. 11 (3) — Limitation Act (1963), Ss. 5 and 29 — Objection application under S. 11 (3) — Section 5 of Limitation Act applies.

The provisions contained in the Ceiling Act do not specifically exclude the application of S. 5 of the Limitation Act. Consequently, in view of S. 29 (2) of the Limitation Act, 1963, S. 5 of the Limitation Act 1963 will be applicable for considering the question of limitation in regard to an objection petition filed under S. 11 (3) of the M. P. Ceiling on Agricultural Holdings Act, 1960.

(Paras 8, 9)

Anno: AIR Comm. Lim. Act (5th Edn.) S. 5 N. 5AC; S. 29 N. 5.

Cases Referred: Chronological Paras

AIR 1976 Madh Pra 160 : 1976 Jab LJ 278 (FB) 6

W. Y. Pandey, for Appellants; S. R. Joshi, G. A., for Respondent.

OZA, J.:— This reference has been made by a learned single Judge of this Court and the questions that are referred to us are:

(1) Whether the Civil Court has jurisdiction to entertain a suit independently of sub-sec. (4) of S. 11 of the Madhya Pradesh Ceiling on Agricultural Holdings Act 1960?

(2) Whether for preferring an objection under sub-sec. (3) of S. 11 of the Madhya Pradesh Ceiling on Agricultural Holdings Act 1960, S. 5 of the Limitation Act would be applicable in view of the provisions contained in S. 29 (2) of the Limitation Act (No. 36 of 1963)?

2. The facts giving rise to the present reference in brief are that proceedings under S. 11 of the Madhya Pradesh Ceiling on Agricultural Holdings Act 1960 (hereinafter referred to as 'the Ceiling Act') were initiated against the appellants. A draft statement was notified as contemplated in sub-sec. (3) of S. 11 by the Competent Authority. No objection to the draft statement had been made on behalf of the appellants within thirty days as provided for in that sub-section; but an objection petition was filed after the period of thirty days. This petition was rejected by the Competent Authority on the short ground that it was filed beyond the period prescribed under sub-sec. (3) of S. 11 of the Ceiling Act and that S. 5 of the Limitation Act 1963 was not applicable to an objection petition under sub-sec. (3) of S. 11 of the Ceiling Act. Aggrieved thereby the plain-

tiff appellants filed a suit before the Civil Court agitating certain questions of title and also challenging the order passed by the Competent Authority. The trial Court as well as the lower Appellate Court held that Civil Court had no jurisdiction in view of the provisions contained in sub-sec. (4) of S. 11; therefore, a second appeal was preferred to this Court. The learned single Judge of this Court by his order dated 17-7-1970 felt that the two questions mentioned above being questions of law of general importance should be decided by a larger Bench and referred the matter to Hon'ble the Chief Justice for constituting a larger Bench. Consequently, the matter has been placed before us.

3. Section 11 of the Madhya Pradesh Ceiling on Agricultural Holdings Act 1960 reads:

"11. Preparation of statement of land held in excess of the ceiling area— (1) On the basis of information given in the return under S. 9 or the information obtained by the competent authority under S. 10, the said authority shall after making such enquiry as it may deem fit, prepare a separate draft statement in respect of each person holding land in excess of the ceiling area, containing the following particulars:—

(i) the name and address of the holder;
(i-a) if the holder is a member of a family, names, addresses and ages of members of the family;
(i-b) if the holder, who is a member of a family has major sons, names, ages and addresses of his major sons and land held by each of them as on 1st January, 1971;
(ii) full particulars of land held by him and other members of his family within the State and the total area of such land;
(iii) the total area of land which the holder is entitled to hold in accordance with the provisions of this Act;
(iv) the description of land which he desires to retain;
(v) the description of the land which the competent authority proposes to declare surplus; and
(vi) such other particulars as may be prescribed:

Provided that if the holder fails to specify the portion of land which he wishes to retain, the competent authority shall, to the extent possible, include the encumbered and improved land in the land to be retained by the holder:

Provided further that a joint statement may be prepared in respect of holders who are members of a joint Hindu family or who hold land jointly or as tenants-in-common.

(2) The transferor shall, for the purpose of this Act, be deemed to be the holder of land the transfer of which—
(i) has been declared to be void under sub-sec. (1) of S. 4; or
(ii) has been found by the competent authority on such enquiry as may be prescribed to be in contravention of the provisions of sub-sec. (1) of S. 5.

(3) The draft statement shall be published at such place and in such manner as may be prescribed and a copy thereof shall be served on the holder or holders concerned, the creditors and all other persons interested in the land to which it relates. Any objection to the draft statement received within thirty days of the publication thereof shall be duly considered by the competent authority who after giving the objector an opportunity of being heard shall pass such order as it deems fit.

(4) If while considering the objections received under sub-sec. (3) or otherwise, the competent authority finds that any question has arisen regarding the title of a particular holder and such question has not already been determined by a court of competent jurisdiction, the competent authority shall proceed to enquire summarily into the merits of such question and pass such orders as it thinks fit:

Provided that if such question is already pending for decision before a competent court the competent authority shall await the decision of the court.

(5) The order of the competent authority under sub-sec. (4) shall not be subject to appeal or revision, but any party may, within three months from the date of such order institute a suit in the civil Court to have the order set aside, and the decision of such Court shall be binding on the competent authority but subject to the result of such suit, if any, the order of the competent authority shall be final and conclusive.

(6) After all such objections, pending proceedings and the suit, if any, filed under sub-sec. (5) have been disposed of, the competent authority shall, subject to the provisions of the Act and the rules made thereunder make necessary alterations in the draft statement in accordance with the orders passed on objections, the decision of the competent

Court and the decision of the civil suit as the case may be and shall declare the surplus land held by each holder. The competent authority shall, thereafter publish a final statement specifying therein the entire land held by the holder, the land to be retained by him and the land declared to be surplus and send a copy thereof to the holder concerned. Such a statement shall be published in such manner as may be prescribed and shall be conclusive evidence of the facts stated therein.

(7) Notwithstanding anything contained in sub-secs. (4), (5) and (6), where the competent authority finds that a person holds land, other than the land in respect of which a question of title has arisen or is pending before a competent Court, in excess of the ceiling area, it may proceed to declare such land to be surplus forthwith. The land so declared surplus shall be incorporated in the final statement published under sub-sec. (6).

(8) Notwithstanding anything contained in S. 7, if the land in excess of the ceiling area consists of a small strip of land, which cannot be cultivated economically or which cannot be detached from the land having regard to the efficient use thereof for agricultural purposes, the holder of the land may be permitted by the competent authority for reasons to be recorded in writing to retain the said strip of land subject to a maximum of one acre in excess of the ceiling area."

Sub-sec. (3) of this section provides for drawing up of a draft statement and its publication in the manner provided therein. It is also contemplated that if any objection to the draft statement is to be raised it must be filed within thirty days of the publication of the draft statement and on such objection being filed the competent authority will decide that objection giving the objector an opportunity of hearing. Sub-sec. (4) of this section further provides that whenever the competent authority finds either on the basis of any objection filed under sub-sec. (3) or otherwise that any question of title of a particular holder deserves to be considered that question shall be decided in accordance with the decision of a Civil Court if there is already a decision by a competent Court; otherwise it shall proceed to decide that question summarily and shall pass orders. It is further provided that if such a question is pending for decision before a competent Court the competent authority shall await the decision on that question. Sub-sec. (5) of this section provides that there shall be no appeal or revision against the order of the competent authority passed under sub-sec. (4) of Section 11; but any party to the proceedings could file a civil suit within three months from the date of such order in a Civil Court to set aside the order of the competent authority and the decision of the Civil Court shall be binding on the competent authority. It is further provided that subject to the decision of the Civil Court the order passed by the competent authority shall be final and conclusive.

4. Section 46 of the Ceiling Act provides for the bar of jurisdiction of the Civil Court:

"46. Save as expresly provided in this Act, no Civil Court shall have any jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by the competent authority."

This section thus provides that except in cases which have been specifically provided for in this Act a Civil Court will have no jurisdiction to settle, decide or deal with any question which under this Act is required to be settled, decided or dealt with by a competent authority. This provision therefore bars the jurisdiction of the Civil Court only about questions which are triable by the competent authority under the provisions of this Act. The questions which are not within the jurisdiction of the competent authority to decide cannot be held to be covered by the provisions of S. 46. It is also clear from this provision that even about those questions which are within the jurisdiction of the competent authority, but in respect of which there is an express provision for going to the Civil Court, the Civil Court will have jurisdiction to try those questions.

5. Section 11, sub-secs. (3), (4) and (5) to which reference has been made earlier clearly go to show that questions of title cannot be decided by the competent authority conclusively. The scheme of this section goes to show that whenever such a question arises before a competent authority he has to—

(a) decide it either in accordance with the decision of a competent Court if such a decision is already there;

(b) await the decision of the competent Court if the matter is pending before it;

(c) decide it summarily;

but this summary decision has further been made subject to a decision of the

Civil Court. This clearly goes to show that so far as the decision on the question of title is concerned the competent authority is not vested with jurisdiction to decide the matter finally. It is left to the decision of a Civil Court and the decision of the competent authority is described as a 'summary decision'.

6. In this view of the matter, therefore, the effect of Ss. 11 and 46 of the Ceiling Act would be that so far as questions of title are concerned there is no bar of the jurisdiction of the Civil Court as S. 46 in the context of S. 11 could not be read to mean that there is any bar about the jurisdiction of the Civil Court so far as questions of title are concerned. In Ramgopal v. Chetu, 1976 Jab LJ 278: (AIR 1976 Madh Pra 160) (FB) a Full Bench of this Court examining the question in the context of the provisions contained in Ss. 157 and 57 and 250 and 257 of the Madhya Pradesh Land Revenue Code held (at p. 163 of AIR):

"Determination of the question of title is the province of the Civil Court and unless there is any express provision to the contrary, exclusion of the jurisdiction of the Civil Court cannot be assumed or implied."

In view of this decision it is clear that the jurisdiction of the Civil Court in respect of questions of title could not be taken away without an express provision taking away the jurisdiction of the Civil Court with regard to such a question. But it also must be understood that when under sub-sec. (4) of S. 11 of the Ceiling Act the competent authority chooses to decide a question of title summarily, then either party to the proceeding before the competent authority can only file a civil suit within the prescribed period under sub-s. (5) of that section. The result therefore is that if the competent authority has not decided the question of title under sub-sec. (4), then the Civil Court has jurisdiction to entertain a suit independently of the provisions contained in S. 11 of the Ceiling Act. Similarly, if there are no proceedings before a competent authority, then too, the Civil Court will have jurisdiction to entertain a suit pertaining to the question of title. But if there are proceedings before the competent authority and an order is passed under sub-sec. (4) of S. 11 deciding the question of title summarily, then the Civil Court will have jurisdiction only in a suit as contemplated under sub-sec. (5) of S. 11 of the Ceiling Act.

7. Our answer, therefore, to the first question is that the jurisdiction of the Civil Court to entertain a suit pertaining to the question of title has not been excluded under the scheme of the Madhya Pradesh Ceiling on Agricultural Holdings Act, 1960 and the Civil Court will have jurisdiction to entertain a suit pertaining to the question of title even independently of sub-sec. (4) of S. 11 of that Act.

8. Sub-sec. (3) of S. 11 of the Ceiling Act provides a period of limitation for filing objections to the draft statement. Section 29 of the Limitation Act 1963 provides:

"29. (1) Nothing in this Act shall affect S. 25 of the Indian Contract Act, 1872.

(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of S. 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Ss. 4 to 24 (inclusive) shall apply only in so far as and to the extent to which, they are not expressly excluded by such special or local law.

(3) Save as otherwise provided in any law for the time being in force with respect to marriage and divorce, nothing in this Act shall apply to any suit or other proceeding under any such law.

(4) Ss. 25 and 26 and the definition of 'easement' in S. 2 shall not apply to cases arising in the territories to which the Indian Easements Act, 1882, may for the time being extend."

Sub-section (2) of this section provides that in such cases where a period of limitation different from the period which is prescribed under the Schedule is provided by any local law S. 3 shall be applicable as if the period has been prescribed under the Schedule itself. It further provides that for determining any period of limitation prescribed under the local or special law the provisions contained in Ss. 4 to 24 (both inclusive) will be applicable unless they are expressly excluded by such special or local law. Apparently, sub-sec. (2) of S. 29 as it stands today is different from how it stood before the Limitation Act of 1963. In the earlier provision, the provisions contain-

ed in S. 5 could be applied if they were so applied specifically in the local or special law whereas sub-sec. (2) of Section 29 as it stands enacted now makes the provisions contained in Ss. 4 to 24 of the Limitation Act applicable except when they are specifically excluded by the local or special law. The provisions contained in the Ceiling Act do not specifically exclude the application of S. 5 of the Limitation Act. Consequently, it cannot be doubted that to an objection application as provided for in sub-sec. (3) of S. 11 of the Ceiling Act, S. 5 of the Limitation Act will be applicable.

9. Therefore, our answer to the second question is that S. 5 of the Limitation Act 1963 will be applicable for considering the question of limitation in regard to an objection petition filed under sub-sec. (3) of S. 11 of the Madhya Pradesh Ceiling on Agricultural Holdings Act 1960.

10. In view of these answers to the questions referred to us the second appeal shall be placed before a single Judge hearing second appeals for decision in the light of the answers to the questions referred to us.

Answered accordingly.

AIR 1978 MADHYA PRADESH 76

G. P. SINGH AND J. S. VERMA, JJ.

Amritlal, Appellant v. Keshriprasad Bilaiya and another, Respondents.

First Appeal No. 144 of 1972, D/- 10-11-1976.*

Limitation Act (1963), Arts. 64 and 65 — Adverse possession — Plea of — Mere assertion of possession is not possession — The doctrine "possession follows title" — Applicability.

Where the plaintiff sought declaration of his title to the tank in dispute, on the basis that the tank belonged to his ancestors and in the alternative, on the basis of title acquired by adverse possession, relying on the entries in the remarks column in the annual village papers for 26 years (from 1937 to 1962-63).

Held that the entries only go to show that the plaintiff asserted possession over the tank. Mere assertion of possession is, however, not possession. The plaintiff has failed to prove any act done by him or by his father which may have had the effect of dispossessing the defendant. When the nature of the property is such that it cannot be put to any immediate use by the true owner, the doctrine that "possession follows title" holds the field. The tank was not meant for being used for raising any crop or for fishing and the village community had rights of Nistar in it. In the circumstances, the defendant and his predecessors could have hardly done any act for making the use of the tank in the exercise of their right of ownership and possession. As the defendant and his predecessors were the owners, they must, in the circumstances, be deemed to have continued in possession. Case law discussed.

(Paras 6, 7-A)

Anno: AIR Comm., 5 Lim. Act, Articles 64-65, N. 82.

Cases Referred: Chronological Paras

AIR 1956 Nag 38: 1956 Nag LJ 157 5
AIR 1937 Nag 407 5
AIR 1931 PC 162 6
AIR 1917 PC 18 6
(1902) ILR 29 Cal 518 6
(1879) 5 Ex D 264: 42 LT 463, Leigh v. Jack 6
(1878) 3 AC 641, Bristow v. Cormican 6
(1849) 2 Ex 803, Jones v. Chapman 6
(1845) 1 Ch 641: 72 LT 670, Marshall v. Taylor 6

S. K. Seth with K. N. Panday, for Appellant; T. C. Naik, for Respondent No. 1.

G. P. SINGH, J.:— This is an appeal by defendant No. 1 Amritlal against a declaratory decree that the plaintiff-respondent and the members of his family are the owners and Bhumiswami of a tank, khasra No. 1357, area 1.19 acres, of village Murwara. The declaration in favour of the plaintiff-respondent has been granted on the basis that the tank belonged to his ancestors and, in the alternative, on the basis of title acquired by adverse possession. The findings of the trial Court on both these points have been assailed by the defendant appellant.

2. We will first take up the point of initial title. The plaintiff's case is that the tank was originally known as 'Trisool Babaki Talaiya' and that along with some other land it was granted to his great grandfather Param Bilaiya and grand-uncle Gunthe Bilaiya by the then Malguzar Thakur Ramdutt in the year 1875. It is further alleged by the plaintiff that in course of time this tank came to be known as 'Bilaiya ki Talaiya', sug-

*(Against order of J. C. Gour, 2nd Addl. Dist. J., Jabalpur, D/- 23-12-1971.)

gesting the ownership of Bilaiya family. The defendant's case is that the land on which the tank exists was granted to his grandfather Karan Singh along with some other lands in 1884 by the Malguzar Ramdutt and thereafter his grandfather constructed the tank.

3. To prove his title, the plaintiff has produced the original grant Ex P-13 made by Thakur Ramdutt in favour of the plaintiff's ancestors. This document is dated 19th July 1875. It does appear that the plaintiff's ancestors got 800'× 360' of land including a tank known as 'Trisool Babaki Talaiya' under this document. The document, however, does not give the khasra numbers and, therefore, it cannot be said that the tank in dispute in this suit is the same which is described as Trisool Baba ki Talaiya in Ex. P-13. The trial Court has observed that the boundaries given in Ex. P-13 include the tank. In our opinion, this observation is incorrect. There is absolutely no description of any boundary towards north, south and west. The only description is about the eastern boundary which is referred to as the compound of Aftar Sahab. Towards the bottom of the document there appears to be signature of one Harchand Rai, which has been mistaken as a description of western boundary. It has further to be noticed that the land granted to the plaintiff's ancestors under Ex. P-13 was about 6½ acres and the tank with which we are concerned in this suit is only in 1.19 acres of land. The boundaries of the land existing in the year 1875 must have considerably changed by the time the suit came to be instituted. For these reasons, even if there had been more definite description of boundaries on all the sides, it would have been difficult to say only on the strength of boundaries that the tank in suit is the same 'Talaiya' which is referred to in Ex. P-13. The plaintiff has also produced Ex. P-4, a commendatory letter dated 1st Aug., 1877 issued by the Commissioner, Jabalpur. In this letter, the Commissioner has appreciated the act of Param Bilaiya in constructing a Chah. The plaintiff's contention is that the Chah referred to in this letter is the tank in suit which was constructed by Param Bilaiya. There are at least three reasons why this document is not of much help to the plaintiff. First, the case of the plaintiff is that when Param Bilaiya got the lands under Ex. P-13, the tank was already there and was then known as Trisool Baba ki Talaiya, which in course of time came to be known as Bilaiya ki Talaiya. It is not the plaintiff's case that the tank in suit was constructed by Param Bilaiya. Secondly, the word 'Chah' which is a Persian word primarily means a well; it does not ordinarily mean a tank. This is deposed to by Pannalal (D.W. 5) with reference to certain dictionaries which he brought in Court. Pannalal is a graduate in Urdu. Some of the dictionaries referred to by Pannalal in his evidence were also produced before us. We have no hesitation in accepting the statement of Pannalal (D.W. 5) that the primary meaning of Chah is a well, even if in some context it may refer to a tank. Thirdly, Ex. P-4 does not mention the land over which the Chah referred to therein was constructed by Param Bilaiya. It was not disputed before us that the plaintiff owns a well near the tank in suit. It appears to us that in 1877 Param Bilaiya constructed a well for public use and Ex. P-4 was written by the Commissioner, Jabalpur, in that context.

4. As against the documents produced by the plaintiff, the documents of title produced by the defendant are clear and specific. Ex. D-1 is a receipt executed by the Malguzar Thakur Ramdutt Deodutt in favour of Seth Karan Singh of Kathiawar, in respect of khasra Nos. 1231 to 1235 for a sum of Rs. 672. This document although not referred to in the written statement was produced at the earlier opportunity. Even the trial Court has not doubted its genuineness. It is not disputed before us that in 1884 the present khasra No. 1357 in which the tank exists was khasra No. 1235. The documents Ex. D-1, therefore, is specific on the point that the land in which the tank in suit exists was conveyed to the defendant's grand-father who hailed from Kathiawar and who was doing business at Murwara. Any doubt about Ex. D-1 is dispelled by the settlement entry. Ex. D-8 is the settlement khasra and Ex. D-9 is the Jamabandi of the settlement that took place in 1891-92. Khasra No. 1235 is recorded in the name of Karan Singh in Exs. D-8 and D-9. It is also recorded in Ex. D-8 that a tank had been constructed by Karan Singh in khasra No. 1235. The settlement entries in Ex. D-8 read along with Ex. D-1 would show that Karan Singh acquired khasra No. 1235 in 1884 from the Malguzar and sometime before 1891 he constructed a tank in this land. Ex. D-4 dated 13th

Sept. 1893 is a receipt issued by the Municipal Officer, Murwara, stating that Rs. 90/5/0 were received from Seth Meghaji, brother of Kanji, for cleaning the tank. It may here be mentioned that Kanji was defendant's father. Ex. D-3 is a document relating to the partition in the defendant's family which took place in 1902. This document also mentions the tank of Murwara as one of the properties which were subject-matter of partition. Ex. D-6 and Ex. D-7 are respectively settlement khasra and Jamabandi of the year 1906-07. In this settlement, khasra No. 1235 over which the tank was constructed by Karan Singh, the defendant's grand-father, was re-numbered as khasra No. 1357. This number in Exs. D-6 and D-7 is recorded in the name of Kanji, the defendant's father. In our opinion, the aforesaid documents conclusively establish that khasra No. 1357 in which the tank in suit exists was acquired by the defendant's grand-father Karan Singh and it was he who constructed the tank. In view of the defendant's documents referred to above, it cannot be held from the plaintiff's documents Exs. P-13 and P-4 that khasra No. 1357 was acquired by the plaintiff's ancestors, or that the tank in suit was constructed by them. It is true that in Ex. P-13 Trisool Baba ki Talaiya is referred to, but that tank must be different and may have been filled up in course of time. The plaintiff has led oral evidence that the tank in suit is known as Bilaiya ki Talaiya to show that it was constructed by one of his ancestors. No reliance can be placed upon this oral evidence in view of the clear and unequivocal documents produced by the defendant.

5. The settlement operations of 1891-92 and 1906-07 were undertaken under the Land Revenue Act of 1881. Under Ss. 78 and 83 of that Act which correspond to S. 80 of the Land Revenue Act of 1917, the entries made in settlement become binding if not set aside within one year; [Secy. of State v. Habibulla, AIR 1937 Nag 407 and Motishah v. Abdul Gaffar Khan, 1956 Nag LJ 157 at p. 164: (AIR 1956 Nag 38 at p. 41)]. Even if it be held that the settlement entries are not conclusive, they at least raise a very strong presumption in favour of the defendant's title and it was for the plaintiff to prove that these entries were wrong. In our opinion, the plaintiff has completely failed to discharge this burden. The plaintiff's name or the name of his ancestors does not appear even in the annual village papers till 1936-37. It is only from this year that the plaintiff's father is entered in wrongful possession in the remarks column. In the columns relating to title and possession, the names of the defendant and his ancestors are throughout entered. We will consider the value of entries in the remarks column relating to possession of plaintiff's father while taking up the case of adverse possession. At this stage, it is sufficient to say that these entries do not show that the title initially vested in the plaintiff or in his ancestors. We are clearly of opinion that the plaintiff has failed to prove that the land khasra No. 1357 belonged to his ancestors or that the tank in suit was constructed by his ancestors. On the other hand, as earlier stated, the defendant has been successful in proving that this land was acquired by his grand-father Seth Karan Singh and it was he who constructed the disputed tank.

6. We now take up the point of adverse possession. In appreciating the evidence led by the plaintiff to show his possession, certain principles have to be kept in mind. When any land or immovable property is not of any immediate use to the owner or when the possession is merely constructive, the doctrine that 'possession follows title' applies. There can be no dispossession or discontinuance of the possession of the owner by mere absence of use and enjoyment when the land or the property is not capable of any use and enjoyment. It is on these principles that it has been held that while lands are submerged constructive possession is with the true owner, and that it is so even though immediately prior to the diluviation physical possession had been with the adverse claimant. Reference in this connection may be made to Basant Kumar v. Secy. of State, AIR 1917 PC 18 where the following pertinent observations were made by Lord Sumner:

"A man may cease to use his land because he cannot use it, since it is under water. He does not thereby discontinue his possession; constructively it continues until he is dispossessed; and, upon the cessation of the dispossession before the lapse of the statutory period constructively it revives. "There can be no discontinuance by absence of use and enjoyment. when the land is not capable of use and enjoyment," per Cotton, L. J. in Leigh v. Jack, (1879) 5 Ex D 264. It

seems to follow that there can be no continuance of adverse possession, when the land is not capable of use and enjoyment; so long as such adverse possession must rest on de facto use and occupation."

....

"Again, to apply the test suggested by Bramwell, L. J. in Leigh v. Jack at p. 273, "to defeat a title by dispossessing the former owner, acts must be done, which are inconsistent with his enjoyment of the soil for the purposes for which he intended to use it", and therefore it is necessary to look at the position in which the former owner stands towards the land, as well as to the acts done by the alleged dispossessor."

"'It is impossible' says Lord Halsbury in Marshall v. Taylor, (1845) 1 Ch 641, 'to speak with exact precision about the degree of possession or dispossession that will do', unless you have regard, as Lord Justice Cotton said in Leigh v. Jack, to the nature of the property."

Mention may also be made of another Privy Council case, Bhupendra v. Rajeswar, AIR 1931 PC 162, where their Lordships expressed themselves as under:

"But the doctrine that 'possession follows title' is well established: see per Maule, J., in Jones v. Chapman, (1849) 2 Ex 803 at p. 821 and the remarks of Lord Blackburn in Bristow v. Cormican, (1878) 3 AC 641 at p. 661. So while lands are submerged, constructive possession is with the true owner, and that, though immediately prior to the diluviation physical possession had been with the adverse claimant: Secy. of State v. Krishnamoni Gupta, (1902) ILR 29 Cal 518 and Kumar Basanta Roy v. Secy. of State, AIR 1917 PC 18.

7. It is not disputed that the tank in suit is neither used for growing Singhara nor for growing any other crop. It is also not used for fishing or pisciculture. The plaintiff's case is that he was in possession in the sense that no one was allowed to use the water of the tank unless permitted to do so by him or his servants. In our opinion, the oral evidence of this nature produced by the plaintiff appears to be false. Ex. D-5 is Kistbandi Khataunl for the year 1954-55. This document refers to the Wajib-ul-arz and states that villagers have Nistar rights of bathing etc. in the tank, Khasra No. 1357. It is further recorded that the villagers also use the water of the tank as drinking water for their cattle, and that the cattle are also taken to the tank for purposes of bathing and cleaning. The entry of Nistar rights in Wajib-ul-arz and Kistbandi Khataunl for the year 1954-55 goes to show that the Nistar rights of the villagers did not depend upon grant of any permission and the acts of user of the tank for Nistar purposes were done by the village community as of right. Had the plaintiff's case been true that no one was allowed to use the water of the tank without his permission, there would have been no entry of Nistar rights in the Wajib-ul-arz. Ex. P-1 dated 22nd January 1958 is a document which has been produced to prove that contract for cleaning the tank was given by the plaintiff to certain persons. However, the signature of Nanhu (P.W. 1), who has been produced to prove this document, does not appear on it. Such a document could have been prepared at any time. We do not think that any reliance can be placed on Nanhu's evidence. Ex. P-2 is another document dated 8th May 1961. This is a letter purporting to authorise Babadeen (P. W. 2) to construct a hut on the consideration that he would look after the well and the tank belonging to the plaintiff. No reliance can be placed on this document also, because Babadeen (P. W. 2) has deposed that the permission referred to in the said document was granted to him by Baboolal, plaintiff's father, and it was much later after Baboolal's death that the plaintiff obtained the said document. It appears that this document was prepared to bolster up a case that the plaintiff was engaging servants or Chowkidars for looking after the tank. It may here be mentioned that even the trial Court has not given any importance to the documents Exs. P-1 and P-2. Ex. P-5 is a notice said to have been issued by the Secretary, Municipal Committee, Murwara, on 22nd March 1952, to the plaintiff to clean the tank. This document, however, does not show that the plaintiff did actually clean the tank and is, therefore, of not much use. Ex. P-8A dated 1st June 1952 is an advertisement in a newspaper 'Bharti' by the plaintiff through which he wanted to contact some person who could plant water-lilies in the tank. There is, however, no evidence that water-lilies were actually planted by the plaintiff. Ex. P-1 dated 7th June 1953 is a letter from one V. P. Nigam (P. W. 1) for permission to take the water. Although Nigam (P. W. 1) does say that nobody could take water

without the permission of the plaintiff, we are unable to accept his evidence. We have already observed that had the plaintiff's case been true that no one was allowed to use the water of the tank without his permission, there would have been no entry of Nistar rights in the Kistabandi Khatauni for the year 1954-55 (Ex. D-5) which also refers to the Wajib-ul-arz. Considering the evidence produced by the plaintiff, we are not satisfied that the plaintiff did any act which could amount to dispossession of the true owner.

7-A. Strong reliance has been placed by the learned counsel for the plaintiff-respondent on the entries in the remarks column in the annual village papers from 1937 to 1962-63. It is true that in the remarks column of the said annual village papers possession of the plaintiff or his father has been entered, but at best it only goes to show that the plaintiff asserted possession over the tank. Mere assertion of possession is, however, not possession. The plaintiff has failed to prove any act done by him or by his father which may have had the effect of dispossessing the defendant. As earlier stated, when the nature of the property is such that it cannot be put to any immediate use by the true owner, the doctrine that 'possession follows title' holds the field. The tank was not meant for being used for raising any crop or for fishing and the village community had rights of Nistar in it. In the circumstances, the defendant and his predecessors could have hardly done any act for making the use of the tank in the exercise of their right of ownership and possession. As the defendant and his predecessors were the owners, they must, in the circumstances, be deemed to have continued in possession. It may here be mentioned that it is not the case of the plaintiff that he ever paid any land revenue in respect of the tank in suit. On the other hand, it has been stated on behalf of the defendant that the land revenue was all along paid by him. The revenue papers which have earlier been referred to go to show that the tank was assessed to the land revenue of 0-14-0 annas. We have no hesitation in believing the evidence that the land revenue was all along paid by the defendant.

8. On a consideration of the entire evidence and the nature of the property involved, we are clearly of opinion that no case of adverse possession has been made out by the plaintiff. The plaintiff has thus failed to establish his title.

9. The appeal is allowed. The judgment and decree passed by the trial Court are set aside and the plaintiff's suit is dismissed with costs throughout.

Appeal allowed.

AIR 1978 MADHYA PRADESH 80
FULL BENCH

J. S. VERMA, S. S. SHARMA AND J. P. BAJPAI, JJ.

The Commissioner of Income-tax, M. P. Nagpur and Bhandara, Applicant v. Parmanandbhai Patel and another, Opposite Party.

Misc. Civil Case No. 261 of 1969, D/- 1-12-1977.

Finance Act (13 of 1960), S. 2 (6); Income-tax Act (11 of 1922), Ss. 2 (6AA), 14 (2) (aa), 16 (1) (a) — Special surcharge — Levy of — Income of partner exempt under S. 14 (2) (aa) — Though a part of 'total income', it is not 'earned income' within S. 2 (6AA) — It is liable to special surchage.

Income of a partner exempt under S. 14 (2) (aa) though a part of his 'total income' as defined in S. 16 (1) (a) is not an 'earned income' within S. 2 (6AA) and, hence, is liable to special surcharge under the Finance Act. In such a case, it could not be said that cl. (aa) of S. 14 (2) could not be in contemplation when the term 'earned income' was defined because the meaning of 'earned income' was to be understood with reference to the Finance Act 1960 which adopted the definition of the term given in the Income-tax Act much after clause (aa) was inserted in the Income-tax Act. Further, the item of income having been included in the 'total income' of the partner, it could not also be said that the income did not even have the character of 'income'. M. C. C. No. 80 of 1969, D/- 5-11-1970 (Madh Pra), Approved; AIR 1949 Bom 176, Foll.

(Paras 11, 12, 13, 16)

Anno: AIR Manual (2nd Edn.), Income-tax Act (11 of 1922) S. 2 (6AA), N. 1; S. 14 (2) (aa), N. 7; S. 16 (1) (a), N. 2.

Cases Referred: Chronological Paras

(1970) M. C. C. No. 80 of 1969, D/- 5-11-1970 (Madh Pra) 1, 4, 7, 9, 10, 11, 17

AIR 1949 Bom 176 : 17 ITR 180 15

BV/BV/A466/78/SNV

P. S. Khirwadkar, for Applicant; K. A. Chitale with B. V. Shukla, for Opposite Party.

J. S. VERMA, J.:— This reference made under S. 66 (1) of the Income-tax Act, 1922, is to answer the following question:—

"Whether, on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal rightly held that no special surcharge could be levied on the assessee's share of tax paid by the registered firm?"

In view of the decision of a Division Bench (Naik and Tare, JJ.) in Commissioner of Income-tax, Madhya Pradesh v. Kalekhan Jumman Khan by legal representative Mohammad Hanif, M.C.C. No. 80 of 1969 decided on 5-11-1970 (Madh Pra), the question had to be answered in the negative when it came up for hearing before a Division Bench (Tare, C. J. and Sharma, J.). However, learned counsel for the assessee contended that the earlier Division Bench decision required reconsideration. For this reason, the Division Bench referred this matter to a Full Bench and this is how it has come before us. It is stated at the bar that with reference to the relevant period the only decision on the point is that of the Division Bench in Mohammad Hanif's case (supra) the correctness of which has been challenged on behalf of the assessee.

2. The relevant facts are these: The assessment year is 1960-61. A registered partnership firm M/s. Mohanlal Hargovinddas of Jabalpur had only two partners, namely, Smt. Jadaobai and Smt. Ujjambai, during the relevant period. The Income-tax Officer while assessing the income of Smt. Jadaobai and Smt. Ujjambai for the assessment year 1960-61 had not charged special surcharge amounting to Rs. 32,400 in each case on the share of income-tax paid by the registered firm falling to the share of the assessee. The Commissioner of Income-tax treating it as an omission prejudicial to the interest of revenue initiated action under S. 33-B of the Income-tax Act, 1922, and ultimately directed the Income-tax Officer to revise the order of assessment in the case of each partner by including the special surcharge of Rs. 32,400 in accordance with the Finance Act, 1960 (Act No. 13 of 1960). On behalf of the assessee it had been contended that the exemption granted to a partner under S. 14 (2) (aa) of the Income-tax Act, 1922, could not be treated as unearned income, the same being earned income of the partner, as a result of which no special surcharge was leviable according to the Finance Act, 1960. The Commissioner rejected the objection taking the view that the definition of 'earned income' contained in S. 2 (6AA) of the Act read along with the other relevant provisions including sub-sec. (6) of S. 2 of the Finance Act, 1960, clearly excluded from within the ambit of earned income, such income as is exempted from tax under sub-sec. (2) of S. 14. It was held that the amount was an item of unearned income in the hands of each partner, the same being obviously included within the "total income" as defined in the Income-tax Act, 1922.

The assessee appealed to the Income Tax Appellate Tribunal against the Commissioner's decision. The Tribunal upheld the assessee's contention taking the view that this amount was "earned income" of the partner; that no income tax being payable by the partner in respect of the same by virtue of the exemption granted under S. 14(2) (aa), there was no question of any surcharge being leviable under the Finance Act, 1960, in respect of that income. The Commissioner's view was, therefore, reversed by the Tribunal.

3. The Commissioner of Income Tax then applied to the Tribunal for referring the above question to this Court under S. 66 (1) of the Income-tax Act, 1922. The Tribunal accepted the contention that a question of law arose requiring such a reference to be made. Accordingly, this reference has been made.

4. When the matter first came up for hearing in this Court before a Division Bench, as aforesaid, the correctness of the earlier Division Bench decision in Mohammad Hanif's case M. C. C. No. 80 of 1969, D/- 5-11-1970 (Madh Pra) (supra) was assailed by learned counsel for the assessee. Admittedly, in accordance with that decision the question has to be answered in the negative against the assessee. It is for this reason obviously that its correctness was assailed on behalf of the assessee. The Division Bench thought that it would be better for a Full Bench to consider the correctness of that Division Bench decision. It also appears that an argument was advanced before the Division Bench that no clear finding had been given by the Tribunal on the nature of this income in the hands of the partner, i. e., whether it was

"earned income" as contended by the assessee or "unearned income" as contended by the revenue, which obviously was the only controversy between the parties throughout from its very inception. The Division Bench thought that no specific finding had been given by the Tribunal on this question even though this income of the partner had been assumed to be the "earned income" and not "unearned income". For this reason, the Division Bench also called upon the Tribual to give its specific finding on the question, i. e., whether this income of the partner was "earned income" or "unearned income". It was directed that the case was to be listed before a Full Bench after the additional statement of case on this point had been submitted by the Tribunal. This was the order passed by the Division Bench on 13-8-1975. Thereafter an additional statement of case dated 31-1-1976 has been submitted by the Tribunal. It has been stated therein that the department has treated this amount in the hands of the two partners as their "earned income" and there had never been any dispute on this point so that it constituted a part of the "earned income" of each partner. This is all that has been said in this additional statement of the case.

5. It is obvious that in making the additional statement of case, the Tribunal has totally missed the point. From the above facts stated in the initial statement of case itself, it is obvious that the real controversy between the parties throughout has been whether this amount in the hands of each partner was the partner's "earned income" as contended by the assessee or "unearned income" as contended by the revenue. This being the only real controversy, it is difficult to appreciate the additional statement of case saying that there was no dispute between the parties on this point. Shri K. A. Chitale, learned counsel for the assessee, stated before us that it was for us to decide the nature and character of the amount since the High Court's opinion was sought on that point and what was stated in the statement of case could be taken only as the Tribunal's opinion about its nature. This was his stand particularly in view of the arguments advanced by him which are mentioned hereafter since the consideration of those arguments itself requires a decision about the nature of this amount. The stand taken by Shri P. S. Khirwadkar, counsel for the revenue, was the same. The additional statement of case is, therefore, of no further assistance except to the extent of showing that in the Tribunal's view this amount was "earned income" in the hands of each partner. It may be mentioned that both the original partners Smt. Jadaobai and Smt. Ujjambai having died, they are now represented by their legal representatives.

6. For the decision of this question, we are concerned only with the provisions of the Income-tax Act, 1922 and the Finance Act, 1960. We shall now notice the relevant provisions therein. There is no dispute before us that the only provisions relevant for our purpose are S. 2 (6AA); S. 14(2)(aa); and S. 16(1)(a) of the Income-tax Act, 1922, in addition to the provisions of the Finance Act, 1960. The dispute really is about their meaning. The relevant portions of these provisions of the Income-tax Act, 1922 are as follows :—

"2. Definitions— In this Act, unless there is anything repugnant in the subject or context,—

* * * *

(6AA) "earned income" means any income of an assessee who is an individual, Hindu undivided family, unregistered firm or other association of persons not being a company, a local authority, a registered firm or a firm assessed under clause (b) of sub-sec. (5) of S. 23—

* * * *

and includes any such income which, though it is the income of another person, is included in the assessee's income under the provisions of this Act, but does not include any such income which is exempt from tax under sub-sec. (2) of S. 14 or under a notification issued under S. 60."

* * * *

"14. Exemptions of a general nature,—

* * * *

(2) The tax shall not be payable by an assessee—

* * * *

(aa) if a partner of a registered firm, in respect of that portion of his share in the profits or gains of the firm as is equal to the difference between his share in the total income of the firm and his share in such total income excluding the income-tax, if any, payable by the firm, the share in either case being computed in the manner laid down in clause (b) of sub-sec. (1) of S. 16:"

* * * *

"16. Exemptions and exclusions in determining the total income:— (1) In computing the total income of an assessee—

(a) any sums exempted under the first proviso to sub-sec. (1) of S. 7. the second and third provisos to S. 8, sub-sections (2), (3), (4) and (5) of S. 14, S. 15, S. 15B, S. 15C and S. 58F shall be included, and any sum exempted under S. 15A shall also be included except for the purpose of determining the rates at which income-tax (but not super-tax) is payable by the assessee to whom the exemption is given;"

* * * *

The relevant provisions of the Finance Act, 1960, are as follows:—

"2. Income-tax and Super-tax—(1) Subject to the provisions of sub-sections (2), (3) and (4), for the year beginning on the 1st day of April, 1960,—

(a) income-tax shall be charged at the rates specified in Part I of the First Schedule, and, in the cases to which paragraphs A, B and C of that Part apply, shall be increased by a surcharge for purposes of the Union and a special surcharge, calculated in either case in the manner provided therein; and

* * * *

(6) For the purposes of this section, and of the rates of tax imposed thereby, the expression "total income" means total income as determined for the purposes of Income-tax or Super-tax, as the case may be, in accordance with the provisions of the Income-tax Act, and the expression "earned income" has the meaning assigned to it in clause (6AA) of S. 2 of that Act.

The First Schedule

* *

Surcharges on Income-tax

The amount of income-tax computed at the rates hereinbefore specified shall be increased by the aggregate of the surcharges calculated as under:—

* * * *

(b) A special surcharge at fifteen per cent of the difference between the amount of income-tax on the total income and the amount of income-tax on the whole of the earned income, if any, included in the total income if such earned income had been the total income."

* * * *

7. The Division Bench deciding Mohammad Hanif's case M. C. C. No. 80 of 1969, D/- 5-11-1970 (Madh Pra) (supra) took the view that any income exempt from tax under sub-sec. (2) of S. 14 of the Income-tax Act, 1922 being expressly excluded from the purview of "earned income" defined in S. 2(6AA) of the Act, it necessarily followed that the amount in question could not be treated as the earned income of the assessee partner. Consequently, it was held that the very foundation of the assessee's contention vanished and the Commissioner of Income-tax was right in holding that this amount in the hands of the assessee partner was liable to the special surcharge under the Finance Act, 1960.

8. Shri K. A. Chitale, learned counsel for the assessee, contends that the Division Bench in the above case over-simplified the problem to reach that conclusion and according to him that decision is incorrect. While inviting us to take the contrary view, he has advanced the following arguments, namely,—

(1) For the purpose of S. 14(2)(aa) of the Act, it is a case of tax paid by the firm, i. e., an expenditure incurred by the firm on account of which it cannot be treated as any kind of income of the partner for the obvious reason that the firm's expenditure cannot be the partner's income.

(2) Both the partners of the firm being active partners thereof, the total income in their hands must be treated as entirely "earned income" so that no part of it could be "unearned income."

(3) Special surcharge can be levied only when there is income-tax payable by the assessee and since this amount being exempt from payment of tax under S. 14 (2)(aa) of the Act, no tax was payable thereon, the question of levying any special surcharge on it was obviously excluded.

9. In reply Shri P. S. Khirwadkar, learned counsel for the revenue, contends that Mohammad Hanif's case M. C. C. 80 of 1969, D/- 5-11-1970 (Madh Pra) (supra) is correctly decided. He also contends that an item of income exempted from payment of tax under S. 14(2)(aa) was admittedly to be included while computing the "total income" of the assessee as is laid down in S. 16 (1) (a) so that it was undoubtedly a part of the assessee's "total income"; and the definition of "earned income" in S. 2 (6AA) expressly excluded that item from within its ambit. The result, according to him, therefore, is that the item in question was part of the assessee partner's "total income" but not a part of her "earned income" and consequently it was the "unearned income" of

the assessee partner. If that conclusion be right, then there is no dispute that the reference has to be answered against the assessee and the correctness of the Division Bench decision in Mohammad Hanif's case (supra) cannot be doubted.

10. On a plain reading of the relevant provisions, there can be no doubt that the argument of Shri Khirwadkar must be accepted and it ought to be held that the aforesaid Division Bench decision in Mohammad Hanif's case M. C. C. No. 80 of 1969, D/- 5-11-1970 (Madh Pra) (supra) is correct. There is no dispute that the amount in question falls within the ambit of S. 14(2) (aa) and on that basis it is exempt from payment of tax in the hands of the assessee partner. There is also no dispute that the exemptions of a general nature provided in S. 14 relate not only to items of earned income but also to those falling in the category of unearned income. There is similarly no dispute that in computing the "total income" of the assessee partner, the sum so exempted under S. 14(2) (aa) from payment of tax has to be included as provided in S. 16(1)(a). Thus far there being no controversy, it logically follows therefrom that this item is undoubtedly a part of the "total income" of the assessee partner, computed in the manner laid down in the Act.

11. We now come to section 2 (6AA) which defines "earned income." The express exclusion therefrom of 'any such income which is exempt from tax under sub-section (2) of section 14' in clear and unambiguous language leaves no room for doubt that according to the definition of "earned income" given in the Act this item constituting a part of the total income of the assessee partner cannot be included within the assessee's "earned income" for purposes of the Act. The Tribunal has taken the view that clause (aa) was inserted in 1956 in sub-section (2) of S. 14 of the Act but was not there when this definition in S. 2 (6AA) had been inserted so that the definition of "earned income" was not intended to exclude from within its ambit an item exempted from payment of tax later by insertion of clause (aa). Incidentally this difficulty was also felt by the Division Bench deciding Mohammed Hanif's case M. C. C. No. 80 of 1969, D/- 5-11-1970 (Madh Pra) (supra) even though the Division Bench ultimately said that the legislature's omission did not alter the result. In our opinion, such a difficulty, if any, is also not real. We are actually concerned with the meaning of "earned income" with reference to the Finance Act, 1960 which in S. 2 (6) expressly provides that the expression "total income" means total income as determined for the purpose of income tax etc. in accordance with the I.-T. Act, 1922, and the expression "earned income" has the same meaning assigned to it in S. 2 (6AA) of that Act. Thus, the expression "earned income" occurring in the Finance Act, 1960 was defined with reference to S. 2 (6AA) in the I.-T. Act 1922, in this manner. This was done much after clause (aa) was inserted in 1956 in sub-section (2) of S. 14 of the Income-tax Act, 1922. For the purpose of levy of such surcharge under the Finance Act, 1960 the meaning of the expressions "total income" and "earned income", occurring therein are of significance and the legislature left no doubt as to the meaning of both these expressions by making such a clear provision in sub-section (6) of S. 2 of the Finance Act, 1960. The argument that while defining "earned income" in S. 2 (6AA), S. 14 (2) (aa) could not be in contemplation for the above reason, is obviously not available in this context.

12. It is, therefore obvious that the item in question forms a part of the "total income" of the assessee partner but is not included in her "earned income" for the purpose of the Finance Act, 1960.

13. The first argument of Shri Chitale has obviously been advanced for the first time before us. In substance, the argument is that this item is not even a part of the income of the assessee partner so that the question of its being "earned income" or "unearned income" does not arise. Ordinarily, there would be no occasion to permit such an argument for the first time at this stage since the substance of the question referred to us is only whether the item constitutes "earned income" or "unearned income" in the hands of the assessee. However, this argument has also no merit. Undoubtedly, the item being included in the "total income" of the assessee in accordance with S. 16(1)(a) of the Act, there is no basis to contend that it does not even have the character of "income" which is the substance of the first argument of Shri Chitale. This argument apart from being raised for the first time before us, has also no merit.

14. In our opinion, the second argument also of Shri Chitale is incorrect. He contends that both the partners of the firm being active partners, the entire

amount constituting the total income of each of them must be treated as "earned income." In other words, he wants to equate 'earned income' with 'total income' in the case of the assessee. That it is not so is obvious from the above discussion which shows that "earned income" is not necessarily the "total income" of an assessee since in computation of the "total income", S. 16 permits addition of certain items which are admittedly not included within the ambit of earned income as defined in S. 2(6AA). In view of these express provisions in the Act, the argument must be rejected.

15. The last argument is an attempt to knock out the very foundation to levy the special surcharge. If that were correct, nothing more would require consideration. In this context it would be profitable to quote from the opinion of Chagla, C. J., in Commr. of Income-Tax, Central, Bombay v. N. M. Raiji 17 ITR 180 : (AIR 1949 Bom 176) wherein the scheme of the Income-tax Act, 1922 was indicated. Admittedly, that view continues to hold the field. The relevant extracts are as follows:—

"Now, the scheme of the Indian Income-tax Act is that income, profits and gains of an assessee are liable to tax subject to certain exemptions and exceptions. Although certain sums may be exempted from taxation, still they may form part of the total income of an assessee in order to determine the rate at which income-tax is payable. Therefore, it follows that the total income of an assessee is not necessarily wholly subject to tax. Portions of it may be exempt from taxation and yet may be computed for the purpose of determining the rate at which tax is payable." (Page 184)

* * * *

"The scheme is that wherever one finds an exemption or exclusion from payment of tax, the exemption or exclusion also operates for the purpose of computing the total income. Not only is the sum not liable to tax, but it is also not to form part of the total income for the purpose of determining the rate. When the Legislature intends that certain sums, although not liable to tax, should be included in the total income, it expressly so provides, as it is done in S. 16."

(Page 185)

16. The special surcharge under the Finance Act, 1960, was levied on the difference between the amount of income tax on the "total income" and that on whole of the "earned income". The definitions of "total income" and "earned income" by virtue of S. 2(6) of the Finance Act, 1960, as earlier indicated, were the same as in the Income-tax Act, 1922. That in computation of the "total income", in accordance with S. 16 (1) (a) of the Act, an item which was exempt from payment of tax under S. 14 (2) (aa) was included has already been shown. The intention to recover special surcharge on items included in the "total income" of the assessee while falling outside the ambit of his "earned income" is manifest from the plain language of the provision. This special surcharge, as is clear from the opening words of this provision, is to be added to the amount of income tax computed at the rates specified and is an addition to the amount of income tax payable by the assessee. That such an amount is to be added for the purpose of determining the rate at which income tax is to be paid even though it is exempt from payment of tax by virtue of S. 14 (2) (aa) is common ground before us. Just as it is to be taken into account for determining the rate of income tax even though the amount itself is exempt from payment of income tax, it is undoubtedly to be taken into account as part of the "total income" of the assessee for the purpose of calculating the special surcharge required to be paid under the Finance Act, 1960. In our opinion, there is no merit even in this contention advanced on behalf of the assessee.

17. As a result of the aforesaid discussion, we find that the conclusion reached by the Division Bench in Commr. of Income-tax, Madhya Pradesh v. Kalekhan Jumman Khan by Legal representative Mohammad Hanif M. C. C. No. 80 of 1969 decided on 5-11-1970 (Madh Pra) was correct. We have supplied additional reasons to support that conclusion in view of the correctness of the Division Bench decision being assailed on the above grounds.

18. We, therefore, answer the reference in the negative, i. e., the Income Tax Appellate Tribunal was wrong in holding that no special surcharge under the Finance Act, 1960, could be levied on the assessee's share of tax paid by the registered firm.

19. The costs of the reference shall be paid by the non-applicant assessee. Counsel's fee Rs. 300/-, if certified.

Reference answered in the negative.

AIR 1978 MADHYA PRADESH 86
FULL BENCH

SHIV DAYAL, C. J., M. L. MALIK AND C. P. SEN, JJ.

Bal Krishna Tiwari, Petitioner v. Registrar of Awadhesh Pratap Singh, University, Rewa and others, Respondents.

Misc. Petn. No. 877 of 1976, D/- 16-12-1977.

(A) Evidence Act (1 of 1872), S. 115 — Constitution of India, Arts. 226 and 227 — Cancellation of examination — Validity — Applicability of principles of estoppel — Case of promissory estoppel and violation of principles of natural justice.

Cases where occasion arises for refusal to permit a candidate to appear in an examination or cancel his examination may broadly be categorised thus :—

(i) Where the candidate practised fraud on the authorities, or was guilty of misstatement or suppression of facts in his application form on the basis of which admission to examination was granted.

(ii) Where there is some technical defect in the filling of the form or where there was any deficiency, such as shortage in attendance, which defect or deficiency could be condoned by the authorities in exercise of discretion vested in them under the statute, Rules or Regulations;

(iii) Where the candidate was patently ineligible on the particulars supplied by him; and

(iv) Where the question of eligibility depends upon interpretation of any provision of law, or rules or regulations having the force of law, and two interpretations are reasonably possible.

In the first category of cases no question of estoppel arises. The authorities will be within their rights to cancel the admission card or the examination on the discovery of fraud. This is because a person, who practises fraud or makes a misstatement or suppresses material facts cannot claim estoppel. Fraud vitiates everything. (ii) In the second case, if admission card has been issued to the candidate and he has appeared even in one paper of the examination, estoppel will operate against the authorities. The reason is that the authorities will be deemed to have represented to the candidate that the defect has been cured or the deficiency has been condoned. Where the examination has not yet begun, whether the authorities will be estopped from cancelling the admission card will depend upon the facts of each case. (iii) In the third category of cases, there will be no estoppel, the principle being that there can be no estoppel against the statute. For instance, if a candidate has not passed the B.A. examination and has applied for appearing in LL.B. examination, even if an admission card has been issued and even if the candidate had stated the facts truthfully, the authorities will be entitled to cancel the admission card and the examination. (iv) It will depend upon the peculiar facts of each case falling under the fourth category whether or not estoppel will operate against the authorities to cancel the examination once a candidate has appeared in a single paper. In such a case, the authorities may be deemed to have accepted the other possible interpretation, which is in favour of the candidate. (Para 17)

In the instant case the petitioner was a regular student of LL.B. (Part-I) in 1967 in the teaching department of the Saugor University. He did not succeed in the examination. In October 1975, he applied to the Registrar for permission to appear in LL.B. (Part I) examination of the Rewa University and on the recommendation of the Dean, the Registrar issued a letter dated December 17, 1975, according him permission to appear in the examination. He submitted a regular application form. The University admittedly issued an admission card permitting the petitioner to appear in that examination. The petitioner received the admission card and he appeared in all the papers from first to last without anybody objecting to his appearance. It was only subsequently that he got an intimation by post directly from the University that his admission card was cancelled. He got the intimation of cancellation of his admission card in his village after he had taken the whole of the examination. According to the University he was not eligible to appear as an ex-student candidate and, therefore, the admission card, which was issued to him, was by mistake and consequently it was cancelled.

Held that (1) the petitioner's case fell under the fourth of the categories enumerated above; (2) that in the facts and circumstances of the case, the University was estopped from cancelling the examination and (3) that there was violation of natural justice when no notice was given

to the petitioner before cancelling the admission card and the examination. Case law discussed. (Para 28)

The interpretation of the expression "ex-student candidate" in the relevant ordinance admitted of two reasonable interpretations, when examined in the light of all the relevant definitions. The petitioner first received permission from the Registrar as back as in December 1975. Secondly, admission card was issued by the University and delivered to the petitioner through proper authority. The petitioner appeared in and took the entire examination. In these circumstances, the University could not turn round and say that there was a mistake in issuing the admission card on the other possible interpretation of the definitions. This was a case of promissory estoppel. (Para 18)

As soon as the University realised what it called a "mistake", it was obligatory for the University to have called upon him to explain why his admission card be not cancelled. He could have placed before the University the other interpretation which was in his favour. It was not impossible that the University would have accepted the interpretation in favour of the petitioner. Thus there being also violation of natural justice, the petitioner was entitled to a suitable writ. (Para 26)

Anno: (1) AIR Manual (3rd Edn), Evidence Act, S. 115, N. 83-A; (2) AIR Comm,. Constitution of India (2nd Edn), Arts. 226 and 32, N. 59 (O).

(B) Awadhesh Pratap Singh Vishwavidyalaya Adhiniyam (22 of 1968), S. 5 — Scope and applicability.

S. 5 merely provides that for the candidates who come within category (i) or (ii), the course of studies of the University of Saugor will apply, although the examination will be held by the Awadhesh Pratap Singh Vishwavidyalaya. The provision is not meant for application to students as ex-student candidates, but it provides an exception that although such students would take an examination to be given by the Awadhesh Pratap Singh University, it will be in accordance with the course of studies of the University of Saugor. (Para 12)

Cases Referred: Chronological Paras

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(1937) 4 All E R 396 In re Parent Trust and Finance Co. Ltd. 22
(1929) 1 Ch 602 : 141 L T 83 Maclean v. Workers' Union 7
(1883) 8 A C 467 : 49 L T 303 Maddison v. Alderson 23

R. K. Samaiya with B. K. Jain, for Petitioner; Rampalsingh with R. N. Singh, for Respondents.

SHIV DAYAL, C. J.:— The petitioner appeared in the LL.B. (Part-I) examination of the Awadhesh Pratap Singh Vishwavidyalaya, Rewa (hereinafter called the 'Rewa University') held in the month of April 1976. The University has not declared his result but has withheld it on the ground that he was not eligible to appear in the examination and his admission card was cancelled and consequently his examination has been cancelled. The petitioner seeks a writ of mandamus directing the University to declare his result.

2. The petitioner appeared in the examination as an ex-student candidate. According to the University he was not eligible to appear as an ex-student candidate and, therefore, the admission card, which was issued to him was by mistake and consequently it was cancelled.

3. The petitioner was a regular student of LL.B. (Part-I) in 1967 in the teaching department of the Saugor University. He did not succeed in the examination. In October 1975, he applied to the Registrar for permission to appear in LL.B. (Part-I) examination of the Rewa University and on the recommendation of the Dean, the Registrar issued a letter dated December 17, 1975, according him

permission to appear in the examination. He submitted a regular application form. On April 24, 1976, he got an admission card from the Superintendent of the Examination. On April 26, 1976, the examination commenced. The petitioner appeared in all the papers. Then he went away to his village in the interior. There, on May 14, 1976, he got an envelope from the University conveying to him that his admission card had been cancelled.

4. The case for the University is that the petitioner was an ex-student of the Saugor University but he was not an "ex-student candidate of the Rewa University". That being so, he could not appear as an ex-student candidate in the LL.B (Part-I) examination of Rewa University. The Registrar was persuaded by the recommendations of the Professor of Law and it was by mistake that the Registrar granted him permission. That permission was erroneous and contrary to the provisions of the rules. The petitioner was not eligible to appear in the LL.B. (Part-I) examination as an ex-student candidate. It was on April 22, 1976, that the University cancelled the admission card and conveyed this both to the Superintendent of the Examinations and the candidate. Learned counsel for the University placed before us the Despatch Register for our inspection. It is clear that the envelope addressed to the petitioner was sent by post to his village address. Perhaps that was the only address with the University. However, the fact remains that the envelope was never delivered to the petitioner until he reached his village after taking the whole of the examination.

5. The petitioner's contentions are that since the letter of permission was issued to him as back as on December 17, 1975, and, that apart, an admission card was issued to him, and further he actually appeared in the examination without any objection, the University is estopped from withholding his result. To consider the petitioner's case of eligibility was a quasi-judicial act. The petitioner was entitled to a notice. Rules of natural justice were violated when his examination and the admission card were cancelled without giving him an opportunity of being heard. The petitioner has relied on Krishan v. Kurukshetra University AIR 1976 SC 376.

6. Rules of natural justice are not codified. Principles of natural justice are not statutory. They are fundamental rights of judicial procedure which have been evolved to ensure fair adjudication wherever rights of an individual are affected. Their aim is to prevent miscarriage of justice. Where there is violation of principles of natural justice, proceedings can be quashed by certiorari. Acts of public authorities, judicial, quasi-judicial or administrative, can be challenged when the rules of natural justice have been contravened.

7. However, the rules of natural justice are not capable of definition. They vary according to the constitution of the statutory body and the statute under which they function. But they depend to a great extent on the facts and circumstances of the case and the framework of the law applicable to it. "Eminent Judges have at times used the phrase 'the principles of natural justice'. The phrase is, of course, used only in a popular sense and must not be taken to mean that there is any justice natural among men. Among most savages there is no such thing as justice in the modern sense. In ancient days, a person wronged executed his own justice. Amongst our own ancestors, down to the thirteenth century, manifest felony, such as that of a manslayer taken with his weapon, or a thief with the stolen goods, might be punished by summary execution without any form of trial. Again every student has heard of compurgation and of ordeal and it is hardly necessary to observe that (for example) a system of ordeal by water in which sinking was the sign of guilt and floating the sign of innocence, a system which lasted in this country for hundreds of years, has little to do with modern ideas of justice. It is unnecessary to give further illustrations. The truth is that justice is a very elaborate conception, the growth of many centuries of civilization; and even now the conception differs widely in countries usually described as civilised." This is what Maugham, J. said in Maclean v. The Workers' Union (1929) 1 Ch 602 at p. 624. It is always in the light of the statutory rules and provisions that the question whether or not rules of natural justice have been contravened is to be decided. Said Raman Nayar, J. in P. N. Kurien v. P. S. Raghavan AIR 1970 Ker 142 at p. 150 :—

"Although the requirements of natural justice must necessarily vary according to the circumstances of each case, the test as to whether there has been a violation is simple, disarmingly simple

although, perhaps for that very reason, difficult of application in practice.....It is essentially whether there has been such a manifest failure of justice as to shock the conscience.....what would be the reaction of a fair-minded person of ordinary sense and ordinary sensibility who has been informed of all that has happened."

8. In the present case, the facts are peculiar. The Registrar of the University intimated to the petitioner as back as in December 1975, that he was eligible to appear in the LL.B. (Part-I) examination. This was even before his application on the prescribed pro forma was filed. Further, the University admittedly issued an admission card permitting the petitioner to appear in that examination. Above all, the petitioner received the admission card and he appeared in all the papers from first to last without anybody objecting to his appearance. It was only subsequently that he got an intimation by post directly from the University that his admission card was cancelled. He got the intimation of cancellation of his admission card in his village after he had taken the whole of the examination.

9. This was not a case of any fraud practised by the petitioner upon the University or College authorities. It is not as if he had misstated any facts or had suppressed any facts. It also does not appear that there was any collusion between the petitioner and any of the University authorities. Even before us the learned counsel for the University contends that this was a case of mistake.

10. At this stage, we shall recall the relevant provisions. Ordinance No. 6, Clause 1(ii) defines 'ex-student candidate' thus :—

" 'Ex-student candidate' means a person who was admitted to an examination as a regular candidate and was not declared successful thereat or was not able to appear in the examination though admission card was correctly issued to him by the University and seeks admission again to the said examination."

The expression 'regular candidate' is also defined in the same Ordinance as follows :—

"1(i) 'Regular candidate' means a person who has prosecuted a regular course of study in a University Teaching Department, School of Studies or College and seeks admission to an examination of the University as such."

The word 'University' is defined in section 4 (xvii) of the Act thus:—

" 'University' means the University deemed to be established under this Act and specified in the Second Schedule."

(Underlined by us)

Now, by virtue of S. 2(ii) of the Act, "the Universities established under the repealed enactments shall be deemed to be the Universities established under this Act and shall be known by the names of the respective Universities with headquarters at place and territorial jurisdiction over the areas as specified in the Second Schedule".

11. Section 2 of the Act must now be adverted to. The relevant portion of that repealed and saving section may be reproduced here :—

"S. 2. As from the date appointed under sub-sec. (3) of S. 1 (hereinafter in this section and S. 3 referred to as the appointed date), the following consequences shall ensue, namely :—

(i) the enactments mentioned in the First Schedule shall stand repealed (hereinafter in this section and S. 3 referred to as the repealed enactment);

(ii) the Universities established under the repealed enactments shall be deemed to be the Universities established under this Act and shall be known by the name of the respective Universities with headquarters at places and territorial jurisdiction over the areas as specified in the Second Schedule;....."

(underlined by us)

In the First Schedule the enactments repealed are :—

(1) The University of Saugar Act, 1946 (No. 16 of 1946);
(2) The Madhya Bharat Vikram University Act, 1955;
(3) The Jabalpur University Act, 1956;
(4) The Ravi Shankar University Act, 1963;
(5) The Indore University Act, 1963;
(6) The Jiwaji University Act, 1963;
(7) The Awadhesh Pratap Singh Vishwavidyalaya Adhiniyam, 1968;
(8) The Bhopal Vishwavidyalaya Adhiniyam, 1970.

In the Second Schedule are enumerated the above Universities in the first column, their headquarters in the second column and their territorial judisdiction in the third column.

12. Learned counsel for the University relied on S. 5 of the Awadhesh Pratap Singh Vishwavidyalaya Adhiniyam 1968, (No. 22 of 1968) and contended that the

petitioner was entitled to appear as an ex-student candidate only within three years from the commencement of that Act. In other words, he could be treated as an ex-student candidate up to the first day of July 1971, but not thereafter. The petitioner applied for appearing in the examination of 1976. He was, therefore, not eligible. Section 5 of that Act runs thus :—

"5. Notwithstanding anything contained in this Act or the Statutes, Ordinances and Regulations made thereunder.

(i) any student of a college situate within the territorial limits of the University and affiliated to the University of Saugor, or

(ii) any other student;

who immediately prior to the 1st day of July 1968 was studying or was eligible as the case may be, for any examination of the University of Saugor, shall be permitted to complete his course in preparation therefor and the University shall provide for such period not exceeding three years, and in such manner as may be prescribed by the Statutes for the instruction, teaching, training and examination of such students in accordance with the course of studies of the University of Saugor."

This section merely provides that a candidate who comes within clause (i) or (ii) shall be permitted to complete his course in the manner prescribed by the Statutes for the instruction, teaching, training and examination in accordance with the course of studies of the University of Saugor. To put it differently, for the candidates who come within category (i) or (ii) the course of studies of the University of Saugor will apply, although the examination will be held by the Awadhesh Pratap Singh Vishwavidyalaya. The provision is not meant for application to students as ex-student candidates, but it provides an exception that although such student would take an examination to be given by the Awadhesh Pratap Singh University, it will be in accordance with the course of studies of the University of Saugor. Thus, this section is not relevant at all to the point before us.

13. Shri Ram Pal Singh then argued that in order to entitle a candidate to appear as an ex-student candidate, he must have had prosecuted a regular course of studies in a College, which is maintained by or admitted to the privileges of the "University concerned"; but not otherwise. The argument is that if the candidate had, for instance, prosecuted his studies in a College, which is now within the jurisdiction of the Awadhesh Pratap Singh Vishwavidyalaya, although at the time that he so prosecuted his studies, that College was not within its territorial limits, he would still be an ex-student candidate within the definition.

14. The argument, on the other side, is that since the University of Saugor is, within the meaning of S. 2(i) and (ii), also a University established under the Act, the petitioner would be an ex-student candidate if he had prosecuted his studies in any College maintained by or admitted to the privileges of the Saugor University. And, this was so inasmuch as the petitioner had prosecuted his studies in the University 'Teaching Department' of the Saugor University.

15. The argument would not be wholly without force that immediately before the commencement of the Madhya Pradesh Vishwavidyalaya Adhiniyam, 1973, all the Universities enumerated in Sch. I and Sch. II had been functioning within the same State of Madhya Pradesh so that a College for the purposes of the Act would be any College within the territorial limits of any of the Universities described in the Second Schedule. It can reasonably be argued in favour of the petitioner that since the University of Saugor (Second Schedule) was established under the University of Saugor Act, 1946 (First Schedule), it is, by statutory fiction, a University "deemed to be a University under this Act" [section 2(ii)]. Therefore, the Saugor University is a "University" within the meaning of the definition contained in S. 4 (xvii) of the M. P. Vishwavidyalaya Adhiniyam, 1973. That being so, the petitioner was a "regular candidate" within the definition of that term in Ordinance 6, clause 1 (i) inasmuch as the petitioner had prosecuted a regular course of studies in the Saugor University teaching department. It then follows as a necessary consequence that under Ordinance No. 6, clause 1(ii) he is an ex-student candidate. It has not been disputed by the University that the petitioner was admitted to an examination as a regular candidate and was not declared successful. This view of the matter is not only plausible and arguable but prima facie it has force.

16. However, it is not necessary to finally resolve the above debate for the purposes of the present case and the point which is before us. It is sufficient

to say that the petitioner could have profitably placed that interpretaion before the University authorities if he had been given an opportunity to do so; that is where natural justice was attracted. No such opportunity was given to the petitioner; that is where there is violation of natural justice.

17. Cases where occasion arises for refusal to permit a candidate to appear in an examination or cancel his examination may broadly be categorised thus:

(i) Where the candidate practised fraud on the authorities, or was guilty of misstatement or suppression of facts in his application form on the basis of which admission to examination was granted;

(ii) where there is some technical defect in the filling of the form or where there was any deficiency, such as shortage in attendance, which defect or deficiency could be condoned by the authorities in exercise of discretion vested in them under the statute, Rules or Regulations;

(iii) where the candidate was patently ineligible on the particulars supplied by him; and

(iv) where the question of eligibility depends upon interpretation of any provision of law, or rules or regulations having the force of law, and two interpretations are reasonably possible.

In our opinion (i) in the first category of cases no question of estoppel arises. The authorities will be within their rights to cancel the admission card or the examination on the discovery of fraud. This is because a person, who practices fraud or makes a mis-statement or suppresses material facts cannot claim estoppel. Fraud vitiates everything. (ii) In the second case, if admission card has been issued to the candidate and he has appeared even in one paper of the examination, estoppel will operate against the authorities. The reason is that the authorities will be deemed to have represented to the candidate that the defect has been cured or the deficiency has been condoned. Where the examination has not yet begun, whether the authorities will be estopped from cancelling the admission card will depend upon the facts of each case. (iii) In the third category of cases, there will be no estoppel, the principle being that there can be no estoppel against the statute. For instance, if a candidate has not passed the B.A. examination and has applied for appearing in LL.B. examination, even if an admission card has been issued and even if the candidate had stated the facts truthfully, the authorities will be entitled to cancel the admission card and the examination. (iv) It will depend upon the peculiar facts of each case falling under the fourth category whether or not estoppel will operate against the authorities to cancel the examination once a candidate has appeared in a single paper. In such a case, the authorities may be deemed to have accepted the other possible interpretation, which is in favour of the candidate.

18. The present case falls under the fourth category. We have pointed out above that the interpretation of the expression "ex-student candidate" admits of two reasonable interpretations, when examined in the light of all the relevant definitions. The petitioner first received permission from the Registrar as back as in December 1975. Secondly, admission card was issued by the University and delivered to the petitioner through proper authority. The petitioner appeared in and took the entire examination. In these circumstances, the University could not turn round and say that there was a mistake in issuing the admission card on the other possible interpretation of the definitions. This is a case of promissory estoppel.

19. In Union of India v. Anglo Afghan Agencies, AIR 1968 SC 718 their Lordships observed (at p. 727):

"Even though the case does not fall within the terms of S. 115 of the Evidence Act, it is still open to a party who has acted on a representation made by the Government to claim that the Government shall be bound to carry out the promise made by it, even though the promise is not recorded in the form of a formal contract as required by the Constitution."

20. It was strenuously contended for the University that the admission card was issued under a mistake and the University was, therefore, within its power under clause 21 (3) (a) of Ordinance No. 6 to cancel the admission card. In this context, it must be recalled that the Registrar of the University had issued a letter to the petitioner informing him that he was eligible to appear in the examination. That was as back as in December 1975. But that apart, the University was well aware on April 22, 1976, that it had issued an admission card for the petitioner, and that the examination was go-

ing to commence on the 26th April. What the University did was merely to send the cancellation order to the Superintendent of the examination. Firstly, the University did not take care to see that the order of cancellation was served on the petitioner. It was a very important decision taken by the University so far as the candidate was concerned, and that decision was taken only four days before the commencement of the examination and that too behind his back. That being so, it was the duty of the University to ascertain that the cancellation order was served on the candidate before the examination began. This it did not do. On the contrary, the admission card was handed over to the petitioner by proper authority on the 24th April and he appeared in the first paper on the 26th April and also in all the subsequent papers to the last, without any one objecting. Secondly, although the University issued the cancellation order directly to the candidate, what it did was to send it on the 22nd April by post at the petitioner's village address which is in the interior. The University could not rest assured that the cancellation order would be received by the petitioner before the 26th April in his village. It was bound to presume that the candidate would have started for Rewa to appear in the examination. If the University did not act with care and caution, which was reasonably expected, the candidate cannot be made to suffer. It was held in Geeta Mishra v. Utkal University, AIR 1971 Orissa 276, that the principle of estoppel applies also to a representation made under mistake, and a fraudulent intention is not necessary to create a estoppel. See also Registrar v. Sundara, AIR 1956 Mad 309, and Delhi University v. Ashok Kumar, AIR 1968 Delhi 131. In the Delhi case, it was, however, made clear that their decision had no application to a case where a student is guilty of fraud, deception or concealment of material particulars, while seeking and obtaining admission. Although these are cases relating to admission, we think the principle applies to the present case as well.

21. The case of R. K. Saha v. Medical College, AIR 1976 Cal 347 was different. There, admission had been sought to pre-medical course on wrong basis that the petitioner belonged to Scheduled Caste. To such a case, the principle of estoppel would not apply. So also the case of S. A. Manjunath v. University of Bangalore, AIR 1967 Mys 119, is distinguishable. There it was held on the facts of that case that absence of notice had not resulted in any injustice to party. It was observed that the principle followed by a quasi-judicial tribunal is not absolute and rigid and an obligation to observe it depends upon the facts and circumstances of each case.

22. Shri Rampal Singh relied on the following decisions in support of the proposition that there can be no estoppel against statute. Maritime Electric Co. Ltd. v. General Dairies Ltd. (1937) 1 All ER 748; Re Parent Trust & Finance Co. Ltd. (1937) 4 All ER 396; Southend-on-Sea Corp. v. Hodgson (Wickford) Ltd. (1961) 2 All ER 46; Kok Hoong v. Leong Cheong Kweng Mines Ltd. (1964) 1 All ER 300; N. Setharamaiha v. Kotaiah, AIR 1970 SC 1354; Amar Singhji v. State of Rajasthan, AIR 1955 SC 504; Bihar E. G. F. Co-op. Society v. Sipahi Singh, AIR 1977 SC 2149; Mathura Parshad & Sons v. State of Punjab, AIR 1962 SC 745; Excise Commr. v. Ram Kumar, AIR 1976 SC 2237 and Gappulal v. State of M. P., 1971 MPLJ 547 : (1971 Tax LR 285). As we have said above. that proposition is well established, but on the facts and circumstances of the present case, these cases are clearly distinguishable.

23. In K. R. Shenoy v. Udipi Municipality, AIR 1974 SC 2177, it was held that an excess of statutory power cannot be validated by acquiescence in or by the operation of an estoppel. The Court declines to interfere for the assistance of persons who seek its aid to relieve them against express statutory provision. Lord Selborne in Maddison v. Alderson, (1883) 8 AC 467, said:

"Courts of equity would not permit the statute to be made an instrument of fraud."

The view that we take does not run counter to the above observations. Those observations would apply to cases falling under the first and third categories (supra), but not to the second or fourth.

24. In Board of High School v. Ghanshyam, AIR 1962 SC 1110, their Lordships referred to the principles enunciated in Province of Bombay v. Khushaldas 1950 SCR 621 : AIR 1950 SC 222.

"The principles, as I apprehend them are:

(i) that if a statute empowers an authority, not being a court in the ordinary sense, to decide dispute arising out of a claim made by one party under the sta-

tute which claim is opposed by another party and to determine the respective rights of the contesting parties who are opposed to each other, there is a lis and prima facie in the absence of anything in the statute to the contrary it is the duty of the authority to act judicially and the decision of the authority is a quasi-judicial act and

(ii) that if a statutory authority has power to do any act which will prejudicially affect the subject, then, although there are not two parties, apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially.

In other words, while the presence of two parties besides the deciding authority will prima facie and in the absence of any other factor impose upon the authority the duty to act judicially, the absence of two such parties is not decisive in taking the act of the authority out of the category of quasi-judicial act if the authority is nevertheless required by the statute to act judicially."

Then, their Lordships observed as follows (at pp. 1113-14):

"Now it may be mentioned that the statute is not likely to provide in so many words that the authority passing the order is required to act judicially, that can only be inferred from the express provisions of the statute in the first instance in each case and no one circumstance alone will be determinative of the question whether the authority set up by the statute has the duty to act judicially or not. The inference whether the authority acting under a statute where it is silent has the duty to act judicially will depend on the express provisions of the statute read along with the nature of the rights affected, the manner of the disposal provided the objective criterion if any to be adopted, the effect of the decision on the person affected and other indicia afforded by the statute. A duty to act judicially may arise in widely different circumstances which it will be impossible and indeed inadvisable to attempt to define exhaustively."

It is stated in 11 Halsbury (Simonds) 66:

"When the statute under which a tribunal is set up permits it to reach its decision on its own knowledge and without any evidence, then if it has observed the formalities prescribed by the statute and has not excluded any evidence tendered to it, its decision cannot be impugned. Where, however, a tribunal, which has power to make such inquiry as it thinks fit, decides a case on a matter of fact discovered by the tribunal itself on inspecting the premises in question, it will be a breach of natural justice if it does not inform the parties and give them a chance of dealing with it." The present case falls under the latter class of cases.

25. In Board of High School and Intermediate Education U. P. v. Kumari Chittra, AIR 1970 SC 1039 their Lordships made weighty observations as follows (at p. 1040):

"Whether a duty arises in a particular case to issue a show cause notice before inflicting a penalty does not depend on the authority's satisfaction that the person to be penalised has no defence but on the nature of the order proposed to be passed.

"We agree with the High Court that the impugned order imposed a penalty. The petitioner had appeared in the examination and answered all the question papers. According to her she had passed. To deny her the fruits of her labour cannot but be called a penalty. We are unable to appreciate the contention that the Board in 'cancelling her examination' was not exercising quasi-judicial functions. The learned counsel urges that this would be casting a heavy burden on the Board. Principles of natural justice are to some minds burdensome but this price—a small price indeed—has to be pail if we desire a society governed by the rule of law. We should not be taken to have decided that this rule will also apply when a candidate is refused admission to an examination. We are not concerned with this question and say nothing about it."

In State of Mysore v. Shivabasappa, AIR 1963 SC 373 their Lordships observed:

"Tribunals exercising quasi-judicial functions are not Courts and that therefore they are not bound to follow the procedure prescribed for trial of actions in Courts nor are they bound by the strict rules of evidence. They can, unlike Courts, obtain all information material for the points under enquiry from all sources, and through all channels, without being fettered by rules and procedure which govern proceedings in Court. The only obligation, which the law

casts on them is that they should not act on any information which they may receive unless they put it to the party against whom it is to be used and give him a fair opportunity to explain it. What is fair opportunity must depend on the facts and circumstances of each case but where such an opportunity had been given, the proceedings are not open to attack on the ground that the enquiry was not conducted in accordance with the procedure followed in Courts."

26. In the present case, we have no hesitation in holding that there was a breach of natural justice, when the University did not issue a show cause notice to the petitioner but cancelled his examination taking him unawares. The only reason which has been placed before us at the hearing of this petition is that the petitioner could not be considered as an ex-student candidate on the true construction of the provisions which we have referred to above. Now, as soon as the University realised what it calls a "mistake," it was obligatory for the University to have called upon him to explain why his admission card be not cancelled. He could have placed before the University the other interpretation which was in his favour. It cannot be assumed that the University could not possibly accept that interpretation. It is not necessary for us to finally express our opinion on the two rival interpretations suggested above. It is sufficient to say that it was not impossible that the University would have accepted the interpretation in favour of the petitioner particularly in respect of the meaning of the expression "University established under this Act." Thus, there being also violation of natural justice, the petitioner is entitled to a suitable writ.

27. In Shri Krishan v. Kurukshetra University, AIR 1976 SC 376 their Lordships observed in paragraph 7:

"It is obvious that during this period of four to five months it was the duty of the University authorities to scrutinise the form in order to find out whether it was in order. Equally it was the duty of the Head of the Department of Law, before submitting the form to the University to see that the form complied with all the requirements of law. If neither the Head of the Department nor the University authorities took care to scrutinise the admission form, then the question of the appellant committing a fraud did not arise. It is well settled that where a person on whom fraud is committed is in a position to discover the truth by due diligence, fraud is not proved. It was neither a case of suggestio falsi, or suppressio veri. The appellant never wrote to the University authorities that he had attended the prescribed number of lectures."

28. On the above discussion, it must be held that (1) the petitioner's case falls under the fourth of the categories we have enumerated above; (2) that in the facts and circumstances of the case, the University was estopped from cancelling the examination; and (3) that there was violation of natural justice when no notice was given to the petitioner before cancelling the admission card and the examination.

29. In the result, the order passed by the University cancelling the petitioner's examination is quashed. Further, a mandamus shall issue to the respondent-University to declare the petitioner's result within two weeks from today. The University shall pay to the petitioner Rupees 100/- as costs. The amount of security deposit shall be refunded to the petitioner.

Order accordingly.

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(GWALIOR BENCH)

U. N. BHACHAWAT, J.

Kailash Narayan, Applicant v. Bundi Bai and others, Opposite Parties.

Civil Revn. No. 321 of 1973, D/- 14-10-1977.*

(A) Civil P. C. (5 of 1908), S. 11 — Decision on merits — Revision against order rejected at motion hearing with certain observations — Opposite party had no opportunity of being heard — Trial Court passing impugned order in view of these observations — Revision against that order — Petitioner not barred from reagitating the question.

(Para 7)

Anno: AIR Comm. Civil P. C. (9th Edn.), S. 11 N. 104.

(B) Suits Valuation Act (7 of 1887), S. 9 — Rules framed by Judicial Commissioner, C. P. and Berar under, R. 1 (3) Proviso — Suit for declaration that alleged adoption was invalid affects title of adopted son to property — Value of

*(Against order of Brij Mohan Gupta, Civil Judge 2nd Class, Gohad D/- 24-4-1973.)

LU/AV/E756/77/JDD/VSS

property exceeding Rs. 400 — Value of property is subject-matter of suit — Ad valorem Court fee on same is to be paid. AIR 1949 Nag 263, AIR 1930 Nag 73, Followed. (Paras 10, 11, 12)

Anno: 3 AIR Manual, Suits Valuation Act, S. 9, N. 1.

Cases Referred: Chronological Paras

(1971) Civil Revn No. 64 of 1971 D/- 25-3-1971 (Madh Pra) 6
AIR 1949 Nag 263 11
AIR 1930 Nag 73 11

R. D. Jain, for Applicant; G. G. Mangal, for Opposite Parties.

ORDER:—This is a revision by the defendant against the order of the Civil Judge, Class II, Gohad, dated 24-4-1973 in Civil Suit No. 41-A/68 regarding the valuation of the suit and payment of court-fees.

2. The short facts leading to this revision are these:
The plaintiff-non-applicant No. 1 herein has filed a suit against the applicant and non-applicants Nos. 2 and 3 in their capacity as the wife of non-applicant No. 3 (sic) for a declaration that the adoption of the applicant by non-applicant No. 3 is void and ineffective. The suit was valued initially at Rs. 100/- and fixed court-fee of Rs. 30/- was paid. On an objection having been raised by the applicant that the suit was under-valued and the court-fees paid were insufficient, ad valorem court-fee was required to be paid. On this objection, two preliminary issues were framed by the trial Court which were issues Nos. 4 and 5 reading as under:

"Issue No. 4:

क्या वादी ने उचित कोर्ट फीस दिया है ।

"Issue No. 5:

क्या इस न्यायालय को वाद सुनने का अधिकार नहीं है ?

3. The trial court decided these issues vide its order dated 6-11-1970, the operative part whereof, relevant for consideration is thus:

"Para 10— In view of the above rulings it is held that the plaintiff should value the suit for the purposes of jurisdiction and court-fees at the market value of the property affected by the adoption. The arbitrary valuation put by the plaintiff at Rs. 100/- and the fixed court-fees Rs. 30/- paid by her is wrong."

4. Being aggrieved by the aforesaid order of the trial Court, the plaintiff filed a revision before this Court which was registered at No. 64 of 1971. This revision was rejected at motion hearing with the following observations:

"On the merits, there can be no doubt that the plaintiff's suit falls within R. 3 and for purpose of the Court-fees Act, has to be treated as if the subject-matter of the suit was of the value of Rs. 400/-. The suit does not fall within the Proviso because neither the plaintiff nor the adopted son has any present right or title to the property which admittedly belongs to the plaintiff's husband, being his self-acquired property. That being so, the suit does not affect a title to property within the meaning of the Proviso."

5. In view of the aforesaid observations of this Court, the trial Court vide the impugned order, held that the valuation for court fees fixed at Rs. 400/- by the plaintiff and the court-fees paid thereon was proper. In other words, the trial Court rejected the defendant's objection that the suit ought to have been valued for the purposes of court-fee and jurisdiction at the market value of the property in respect of which the rights, title and interest of the parties were involved in the suit. The Trial Court has, in the impugned order, not given its own independent reasoning, but has in view of the fore-quoted order of this court, passed the impugned order.

6. The first question, therefore, for consideration and more particularly in view of the arguments in counter of the learned counsel for the non-applicant is whether the fore-quoted order passed by this Court in Civil Revision No. 64 of 1971 (Bundi Bai v. Kailash Narayan) decided on 25-3-1971 (Madh Pra), was binding on the parties and the question could not be re-agitated. It may be mentioned that this court, while observing that R. 3 of the Rules framed under Section 9 of the Suits Valuation Act, 1887, by the erstwhile State of Judicial Commissioner, C. P. and Berar, which are admittedly adopted and extended by this Court to the area within the jurisdiction of this Court, (hereinafter referred to as the Rules) applies to the instant case, further observed that in view of that Rule, the valuation of the suit at Rupees 400/- was proper as the Proviso to that Rule was not attracted on account of the admitted position that the property belonged to the plaintiff's husband being his self-acquired property.

7. In my opinion, as the observations were made while rejecting the revision

at motion hearing, the defendant had no opportunity to be heard; the defendant had, therefore, the right to re-agitate this question and this court is competent to re-examine the question on merits after hearing both the parties; more particularly when it is contended that the correct position as to the nature of the property involved in the suit was not stated before this Court during the hearing on admission.

8. At this stage, it would be pertinent to set out certain averments from the plaint to indicate the nature of the property in respect whereof defendant No. 1's right, title and interest is involved:

("वादिया के खानदान की पुश्तैनी जायदाद पुख्ता मकान वा दुकान चौखट्टा करबा गौहद पर स्थित है। वादिया के खानदान में लेन देन आदि का कारोबार है। यह कि वादिया के खानदान का समस्त कारोबार वादिया के पति प्रतिवादी नम्बर ३ ही करते हैं। व सब जायदाद पुश्तैनी उन्हीं के नाम कागजात नगरपालिका गोहद आदि में दर्ज है।)

The aforesaid averments in the plaint clearly indicate that there was a joint ancestral property of the husband of the plaintiff, namely, Jagannath Prasad, defendant No. 3, since dead, whose, the defendant No. 1 applicant herein, claims to be the adopted son.

9. I would now advert to the following provisions of the Rules which read as under:

"1. Suits of the following classes shall for the purposes of the Court-fees Act, 1870, the Suits Valuation Act, 1887, the Central Provinces Courts Fees Act, 1917, be treated as if the subject-matter of such suits were of the value of Rs. 400/-;

(1) Suits for the restitution of conjugal rights, for declaration of the validity of marriage, or for a divorce.

(2) Suits for the custody or guardianship of minor.

(3) Suits for a declaration that an adoption is valid or invalid:

Provided that if a suit for declaration that an adoption is valid or invalid affects a title to property, then the value of that property, if it exceeds Rs. 400, shall be deemed to be the value of the subject-matter of the suit."

10. On a plain reading of his fore-quoted Rule, especially the Proviso, it is transparently clear that a suit for declaration that an adoption is invalid when it affects a title to property and the value of the property, if exceeds Rs. 400/-, the value of the property shall be deemed to be the value of the subject-matter of the suit.

11. Bearing the fore-quoted Rule and its interpretation in mind, the present suit has to be valued. From the relevant averments of the plaint quoted hereinabove, in paragraph 8 of this order, it is apparent that there is a joint ancestral property of the husband of the plaintiff. It is not disputed that if the adoption in question of the defendant, applicant is valid, he has a right, title and interest in the joint family property of the adoptive father like that of a natural son who, by birth, has right, title and interest in the joint ancestral property. Thus a decision in the present suit which is for a declaration that the alleged adoption of the defendant-applicant is invalid is bound to affect his title to the joint ancestral property. The defendant-applicant has, in the written statement, contended that the value of such property is more than Rs. 25,000/-. If this contention is found correct, then in view of the aforesaid Rule, the suit has to be valued accordingly. This will have a bearing on the jurisdiction of the trial Court and also on the quantum of court-fees. I am supported in my view from a decision of this Court in Apparao v. Bhagubai, (AIR 1949 Nag 263) wherein a decision in Noksingh v. Bholu Singh, (AIR 1930 Nag 73) has been relied on. The relevant facts and observations of the fore-quoted decision are quoted herein below:

"The plaintiff-appellant Apparao filed a suit in the Court of the Additional Subordinate Judge, Second Class, Pusad, against the widows of one Yeshwantrao and one Gunwantrao for a declaration that Gunwantrao was not the adopted son of Yeshwantrao and in the alternative for a declaration that the adoption of Gunwantrao by the widows or anyone else was null and void. The plaintiff, who claims to be one of the next reversioners of Yeshwantrao valued the suit for the purposes of jurisdiction at Rs. 400/- and paid a fixed court-fee of Rs. 15/-, as the court apparently took the view that he was claiming two separate declarations. The defendants contended that the claim was undervalued and understamped, and on 20th Feb. 1941 the Court held that as Yeshwantrao's estate was admittedly worth more than Rs. 5,000/- the value of the claim for the purposes of jurisdiction exceeded Rs. 5,000/- and the plaintiff must pay ad valorem court-

fees in accordance with the decision in (AIR 1930 Nag 73)."

"The Rules under S. 9, Suits Valuation Act, provide that if a suit for a declaration that an adoption is valid or invalid affects a title to property then the value of that property, if it exceeds Rs. 400/-, shall be deemed to be the value of the subject-matter of the suit. The point was considered in (AIR 1930 Nag 73) and so far as I am aware that decision has never been dissented from since. It has been suggested that these rules, which were made by the Judicial Commissioner, are no longer valid; but the establishment of a High Court in this Province did not alter the law previously in force, and this particular rule has been included in the Rules and Orders (Civil) issued by this High Court."

12. In this view of the matter, the market value of the property to which the title of the defendant-applicant by virtue of the declaration that his adoption is invalid would be affected should be determined and the suit should be valued for the purpose of court-fee and jurisdiction accordingly.

13. As a result of the foregoing discussion the revision deserves to be allowed which is accordingly allowed with costs.

The impugned order of the trial Court is set aside and the case is sent back to the trial Court to determine the market value of the property as indicated hereinabove for the purposes of its jurisdiction and court-fees.

Revision allowed.

AIR 1978 MADHYA PRADESH 97

= 1978 TAX. L. R. 1773

FULL BENCH

SHIV DAYAL, C. J., R. K. TANKHA AND J. P. BAJPAI, JJ.

M/s. Sukhu Ram Tamrakar, Petitioner v. State of Madhya Pradesh and others, Respondents.

Misc. Petn. No. 144 of 1977, D/- 3-12-1977.*

(A) M. P. General Sales Tax Act (12 of 1959) Sch. II Part II Entry 25 and Part VI Residuary entry — Interpretation of — Colour powders fall within the term 'dyes' in Item 25 of Sch. II Part II and are taxable under that entry.

A Kirana-shopkeeper who deals in the sale and purchase of colour-powders which are ordinarily used for dyeing cloth or other articles is liable to pay tax at the rate prescribed in entry 25 of Part II Sch. II M. P. General Sales Tax Act 1958, as colour powders fall within the term 'dyes' in item 25. 1976 Tax LR 1249 (Madh Pra) Explained and Distinguished. (Para 17)

According to the common parlance, a 'dye' is that article which can be used to impregnate tissues with colour or is able to fix itself or is being capable to fix on fibre. Merely because the colour powder is to be diluted with water or any other chemical is added for preparing an effective solution for dying a piece of cloth, it cannot be taken out of the category of "dyes" on the ground that it was not sold in the form of a ready made solution. (Para 9)

(B) Interpretation of Statutes — Taxing Statutes — Interpretation of various items in entries in Sales Tax Act.

While interpreting various items contained in the entries made in the Statutes like Sales Tax Act, resort should be had not to the scientific or technical meaning of such terms, but to their popular meaning or the meaning attributed to them by those dealing in the said commodities. AIR 1967 SC 1454 Rel. on. (Paras 10, 11)

Anno: AIR Comm. Civil P. C. (9th 1976 Edn.), Pre. N. 7.

(C) Interpretation of Statutes — Ejusdem Generis rule — Scope of.

The doctrine of ejusdem generis is not an inviolable rule of law. You can be permitted to infer by applying it only in the absence of an indication to the contrary. You cannot apply the rule when the preceding words and the general words constitute description of two categories or the general words in question themselves constitute description of a distinct category. (Para 13)

The rule of ejusdem generis is to be applied with caution and should not be pushed too far unless we find a category covering the various items. The inclusion of several articles under the same heading does not mean that they all constitute one commodity when it is apparent that a particular article belongs to a distinct category. AIR 1964 SC 1729 Rel. on. (Para 14)

Anno: AIR Comm. Civil P.C. (9th 1976 Edn.) Pre. N. 7

Cases Referred: Chronological Paras 1976 Tax LR 1249 ; 1975 MPLJ 673 2, 16

*(Decided by Full Bench on order of reference made by Shiv Dayal C. J. and R. K. Tankha J. D/- 4-4-1977.)

AIR 1967 SC 1454 11
AIR 1964 SC 1729 : (1964) 15 STC 719 15

S. N. Agrawal with A. K. Khaskalam for Petitioner; S. L. Garg, Advocate General with M. V. Tamaskar, Govt. Advocate, for the State.

J. P. BAJPAI, J.:— The question referred to this Bench for answer is as below:

"Whether colour-powders fall within Entry No. 25 of Sch II, Part II of the M. P. General Sales Tax Act, 1958?"

2. The occasion for the reference arose, because of certain observations made by a Division Bench of this Court in paragraph 15 of its decision in the case of N. Ganubhai v. Commissioner of Sales Tax, M. P. 1975 MPLJ 673 : (1976 Tax LR 1249), wherein it was observed that the word "dyes" should be understood as denoting that type of materials which are more or less similar to the other goods described in the said entry.

3. The facts relevant for the purpose of properly appreciating the respective contentions raised on behalf of the assessee and the department are that the petitioner is a kirana shop-keeper (grocer). He deals in the sale and purchase of colour-powders also. It was not disputed that the various powdered colours sold by the petitioner were used ordinarily for dyeing cloth or other articles and are quite distinct from the colour material used by textile mills for dyeing their products.

4. The petitioner contended before the assessing authorities and also before this Court that the colour-powders sold by him are not covered by the term "dyes" as used in Entry No. 25 of the Schedule referred above and since the colour-powders have not been specifically mentioned in any other entry, the turnover in respect of the sale of such powders could be taxed under the residuary entry in part VI Sch II of the Act. Entry No. 25 and the residuary entry read as below:

* * * * * *

Entry 25.	**Dyes, paints, varnishes, lacquers, enamels, glue, paints brush, sand paper, turpentine oil, bale oil and polish other than boot polish.**	**12 per cent**
(Note : — In the relevant period, it was 11 per cent in column 3)		
*	* *	*
Residuary Entry:	**All other goods not included in Schedule I or any other part of this Schedule.**	**8 per cent**
(Note : — In the relevant year, it was 7 per cent in column 3).		

5. Before proceeding to deal with the respective contentions, it would be significant to note that earlier "dyes" were not included in Entry No. 25 prior to 15-11-1966. The entry prior to amendment was as follows:—

"Paints and varnishes including glue, polish brush, sand paper, turpentine oil, enamels, bale oil."

By amendment, "dyes" have been added and put at the beginning of the aforesaid entry. The rate of tax over the goods mentioned in Entry No. 25 is, however, higher than that applicable to the articles covered by the residuary entry.

6. The contention raised on behalf of the assessee is based on the following two grounds:

(i) That since the legislature has not used the words "colour-powder" and instead preferred to use the word "dyes", the colour-powder sold by grocers was not intended to be taxed as "dyes". According to the petitioner, the term "dyes" denotes only such colouring material which is in liquid form prepared after adding certain chemicals etc. for dyeing cloth or any other articles and would not include the bare dry colour-powder;

(ii) That since "dyes" have been included in Entry No. 25, which relates to paints, varnish, enamel, brush, sand paper etc., it should be interpreted and understood as denoting that type of material which is more or less similar to these goods like paints, varnishes etc. directly and readily usable for painting or colouring. In substance, the petitioner seeks to rely on the principles of "ejusdem generis."

7. On behalf of the department, the learned Advocate General contended that the principle of ejusdem generis is not of universal application. While interpreting the entries in a schedule for the purpose of ascertaining whether a particular item is covered by the same or not the meaning ascribed to a word in common parlance should be adopted and the technical meaning given to a particular word is not always material and relevant. He further contended that the colour-powders sold by the assessee, who is a kirana shop-keeper, are sold and purchased as dyes in the market and are also used as the same. According to him, the word "dyes" is a term of common use denoting colour-powders used for the purpose of colouring clothes or other material in day-to-day use and not confined to dyeing material used by textile mills etc.

8. Shri Agrawal, learned counsel appearing for the petitioner, quoted the meaning given to the term "dyes" in the book of Organic Chemistry and wanted to contend that only such solution, which is made by adding water and other chemicals etc. to the colour powder, can be termed as "dyes" and not the bare powder.

9. We are not impressed by the aforesaid argument. In our opinion, it is not possible to accept the contention raised on behalf of the petitioner. According to the common parlance, a 'dye' is that article which can be used to impregnate tissues with colour or is able to fix itself or is being capable to fix on fibre. Merely because the colour powder is to be diluted with water or any other chemical is added for preparing an effective solution for dyeing a piece of cloth, it cannot be taken out of the category of "dyes". on the ground that it was not sold in the form of a ready-made solution. The words "dyeing", "dyer" and "dyes" are commonly understood as denoting the ordinary process of colouring clothes and such other articles by using a colour powder.

10. The purpose of M. P. General Sales Tax Act is to raise revenue and for this purpose various articles have been classified according to the general usage and common commercial terms denoting particular articles. Therefore, the concept of Organic Chemistry would not be conclusive for interpretation of the entries. The words and expressions in the entries contained in the schedule referred above are to be construed in the context of the meaning as understood in popular commercial sense and it would not be possible to either curtail or widen the scope either by relying on the meaning technically given to the word "dyes" in the books of Organic Chemistry or by rigidly following the dictionary meaning. Even according to the meaning given in various dictionaries, the word "dyes" includes a colouring material basically used for dyeing.

11. As observed in Commissioner of Sales Tax, Indore v. M/s. Jaswantsingh Charansingh (AIR 1967 SC 1454), it is now well settled that while interpreting various items contained in the entries made in the statutes like Sales tax Act, resort should be had not to the scientific or technical meaning of such terms, but to their popular meaning or the meaning attributed to them by those dealing in the said commodities.

12. As regards the second contention, it would suffice to observe that in the context, the entries have been made and various commodities classified, there is no scope for construing the term "dyes" so as to mean and include only such articles which are similar to paint, varnish or sand-paper etc. and thereby to exclude colour-powder.

13. The doctrine of ejusdem generis is not an inviolable rule of law. You can be permitted to infer by applying it only in the absence of an indication to the contrary. You cannot apply the rule when the preceding words and the general words constitute description of two categories or the general words in question themselves constitute description of a distinct category.

14. The rule of ejusdem generis is to be applied with caution and should not be pushed too far unless we find a category covering the various items. Where the specific items mentioned in any entry contained in a schedule appended to a tax statute prescribing rates and impost of taxation on various items are clearly distinct and wide in their meaning vis-a-vis the other items, though contained in the same entry, but belonging to an altogether different category, one ought not to qualify their meaning merely on the ground that the word "dyes" has been mentioned under the entry relating to varnishes and paints. The inclusion of several articles under the same heading does not mean that they all constitute one commodity when it is apparent that a particular article belongs to a distinct category.

15. The aforesaid view, which we are inclined to take, finds support from the observations made by their Lordships of the Supreme Court in Haji Abdul Shakoor v. State of Madras (1964) 15 STC 719 : (AIR 1964 SC 1729). In the last para at page 728 of the aforesaid case, while construing the entries relating to hides and skins, their Lordships observed as below:

"The fact that certain articles are mentioned under the same heading in a statute or the Constitution does not mean that they all constitute one commodity. The inclusion of several articles under the same heading may be for a reason other than that the articles constitute one and the same thing."

16. In view of the aforesaid observations of the Supreme Court and in the context that the Entry No. 25, as it originally stood, was confined to varnishes and paints and the item "dyes" has been added later on and apparently belongs to a category quite distinct and different from the category covering sand paper, paint brush, enamel-paint etc., the observations made by the Division Bench of this Court in N. Ganubhai's case (1976 Tax LR 1249) (Madh Pra) in a different context cannot be relied on for narrowing down the meaning of the word "dyes". In N. Ganu Bhai's case (1976 Tax LR 1249 (Madh Pra)), the controversy before the Court was whether Neel, a material used for brightening clothes, could be included in the term "dyes". In that context, it was observed that neither according to the common meaning attributed to the word "dyes", nor according to the dictionary meaning or the meaning given in the Organic Chemistry, it was possible to hold that the Neel is a "dye" and should be taxed accordingly. The Division Bench referred to the various meanings given for the word 'dye' and ultimately was of the opinion that the brightening object like Neel could not be treated as an article used for impregnating tissues with any colour and therefore, cannot be regarded as colouring material. The observations made in paragraph 15 of the aforesaid judgment can, therefore, not be construed de hors of the context in which they were made and are therefore, distinguishable.

17. For the reasons stated above, we answer the question referred to us in affirmative and hold that colour-powders fall within the term "dyes" as contained in Entry No. 25 of Schedule II, Part II of the M. P. General Sales Tax Act and are liable to tax at the rate prescribed against the said entry.

18. The petition shall now be placed before the Division Bench for disposal according to law.

Answered in the affirmative.

AIR 1978 MADHYA PRADESH 100
= 1978 CRI. L. J. 585

FULL BENCH

SHIV DAYAL C. J., J. S. VERMA AND C. P. SEN, JJ.*

Devisingh and others, Appellants v. The State of Madhya Pradesh, Respondent.

Criminal Appeal No 806 of 1976, D/- 19-11-1977†.

M. P. Bal Adhiniyam (15 of 1970), Ss. 6, 19 and 39 — Criminal P. C. (1974), Ss. 4, 5 and 27 — Constitution of India, Art. 254 — Exclusive jurisdiction of Juvenile Courts to try a child (person under 16 years) for all offences except those punishable with death or imprisonment for life continues after enforcement of new Cr. P. C., (1974) (Criminal P. C. (1898), Ss. 5, 1 (2) and 29-B).

Per Majority (Verma J. dissenting):

(1) The exclusive jurisdiction conferred by the provisions of the M. P. Bal Adhiniyam, 1970 on Juvenile Courts to deal with a child (a person under 16 years of age) for all offences, except those punishable with death or imprisonment for life, continues after the enforcement of the new Cr. P. C., (1974).

(2) Any provision of the Bal Adhiniyam, 1970, which is repugnant to any provision contained in the Cr. P. C., (1974), in relation to a subject-matter pertaining to the Concurrent List in the 7th Schedule to the Constitution, to the extent of repugnancy, being void, a child must be tried, for the offences punishable with death or imprisonment for life, by a Court of Session under the provisions of the Cr. P. C. (1974). (Para 36)

According to Ss. 6, 19, 39 and 67 of M. P. Bal Adhiniyam, a child who is charged with any offence, irrespective of whether it is punishable with death or imprisonment of life, is required to be dealt with by the Juvenile Court in accordance with the provisions of the Adhiniyam. The rules deducible from S. 5 of the Cr. P. C., (1974), are:

(1) Where special jurisdiction or special power is conferred or any special form of

*(Note: In this case, the Judges of the Full Bench differ in their views. The majority view is taken by Shiv Dayal C. J. and C. P. Sen J. and the minority, by J. S. Verma J. The judgments in the case are, however, printed in the order in which they are given in the certified copy — Ed).

†(Decided by Full Bench on order of reference made by J. S. Verma and C. P. Sen JJ. on 24-8-1977.)

procedure is prescribed by any other law for the time being in force, that jurisdiction, power and procedure will prevail over those contained in the Cr. P. C.

(2) However, if there is a specific provision to the contrary, it will override such special jurisdiction, power or procedure. In S. 27 of the Code there is a specific provision to the contrary, within meaning of Section 5 of the Code. S. 27 completely covers the field of operation of the provisions contained in the Bal Adhiniyam and lays down a contrary rule as to the trial of offences committed by a child under the age of 16 years, which offence is punishable with death or imprisonment for life. That being so, S. 5 of the Code does not save the provisions contained in the Bal Adhiniyam in respect of special jurisdiction conferred by it for the trial of an offence punishable with death or imprisonment for life committed by a child. To put it differently, the combined effect of Ss. 4, 5 and 27 of the Cr. P. C. is that an offence punishable with death or imprisonment for life, committed by a child, must be tried by a Court of Session. Thus an offence punishable with death or imprisonment for life, committed by a child (i. e. person under 16 years of age), must be dealt with:

(i) on the one hand, under the provisions of the Bal Adhiniyam to the exclusion of any other enactment; and

(ii) on the other hand, by the Court of Session under the Cr. P. C.

Thus, there is a repugnancy between the State law and the law made by Parliament. Art. 254 of the Constitution must then resolve the repugnancy Cl. (2) comes into play only when (i) the two laws in question deal with a matter in Concurrent List; (ii) the State law has been made with the consent of the President; and (iii) the provisions of the law made by Parliament were earlier. When all these three conditions are satisfied, the law made by the State Legislature will prevail. If any of these three conditions is not satisfied, cl. (2) of Art. 254 is out of the way. In the present case, Cl. (2) clearly does not apply, because the third condition is absent, The Cr. P. C. (1974), was not made earlier than the Bal Adhiniyam. Cl. (1) of that Article applies and the law made by Parliament i.e., the Cr. P. C. (1974), must prevail and the provisions of the Bal Adhiniyam, to the extent of the repugnancy, must be held to be void. 1975 Cri LJ 713 (M P) (FB), Approved; 1975 Cri LJ 500 (M. P.) held to be correctly decided.

(Paras 5, 7, 8, 11, 12, 30. 31, 34)

Per Verma J. : There can be no doubt that if there is an irreconcilable conflict between the provisions of the New Code and those of the Bal Adhiniyam, then the New Code being the later Central enactment it will supersede Bal Adhiniyam, the earlier State enactment to the extent of repugnancy by virtue of Cl. (1) of Art. 254 of the Constitution. It is equally clear that in case there is no such repugnancy and the relevant provisions of the two enactments are capable of co-existence, then Art. 254 would not be attracted, and the provisions of the Bal Adhiniyam conferring exclusive jurisdiction on the Juvenile Courts to try all offences including those punishable with life imprisonment or death would continue to operate. Such a conclusion is supported also by the fact that the Bal Adhiniyam is a special local Act while the New Code is a general enactment applicable throughout the country on account of which the special local Act would apply within this State in preference to the general law on the subject. The relevant provisions of the New Code are Ss. 4, 5 and 27 which correspond to Ss. 5, 1 (2) and 29-B of the Old Code. From the Statement of Objects and Reasons together with the Notes of clauses of the Bill relating to the New Code, it is clear that these provisions of the New Code which alone are relevant for the present purpose operate in the same field as the corresponding provisions of the Old Code and by these provisions in the New Code the Parliament did not intend to create a new jurisdiction or enlarge the existing ones of the general Courts specified in the Code which had not existed under the Old Code. In other words, if the corresponding provisions of the Old Code were capable of co-existence with the provisions of the Bal Adhiniyam and there was no irreconcilable difference between the provisions of the two enactments, then there is no occasion to hold that the provisions of the New Code have altered this position and taken away the exclusive jurisdiction of the Juvenile Courts constituted under the Bal Adhiniyam which undoubtedly was not affected by the corresponding provisions of the old Code even without the aid of Art. 254. S. 27 of the New Code is couched in affirmative terms and uses the word "may" which in its ordinary usage is permissive and not imperative. Unless there is any cogent reason to depart from the ordinary meaning of the word "may", it is obvious that it cannot be read as imperative. S. 27 being an enabling provision cannot be read as a specific prevision

containing a contrary intention to supersede the saving of a special or local law provided in S. 5 of the New Code, Sections 4, 5 and 27 of the New Code read together indicate that Parliament did not intend its legislation to be a complete and exhaustive Code on this subject; and that the Union law itself permits or recognises other laws restricting or qualifying the general provision made in it. In such a situation, the special provisions of a State local law cannot be said to be repugnant to the Union Law. There is no real conflict between the provisions of the New Code, particularly S. 27 thereof, and the provisions of the Bal Adhiniyam. In short, the provisions of the New Code clearly save any special or local law like the Bal Adhiniyam and S. 27 of the New Code is merely an enabling provision which does not express any contrary intention to undo the saving provided in S. 5 of the New Code. There being thus no conflict or repugnancy, these provisions of Bal Adhiniyam can co-exist with the relevant provisions of the New Code, so that Art. 254 of the Constitution is not attracted. The modern trend to treat youthful offenders not as criminals but as delinquents and to resort to correctinoal methods for rehabilitating them is too widely accepted to require any further emphasis. If the Parliament intended while enacting the New Code, to reverse the trend in case of the more serious offences, it is reasonable to assume that the step in the opposite direction would have been taken in clear and unambiguous language. Re-enacting the relevant provisions in the New Code in substantially the same old language and treating them merely as corresponding provisions cannot be construed as indicating a reversal of the existing modern trend. (Paras 19, 21, 22, 23, 26, 28)

Cases Referred: Chronological Paras

1977 Cri LJ 225 : AIR 1977 SC 366 27
1977 Cri LJ 1921 : (1977) 4 SCC 44 : AIR 1977 SC 2236 28
AIR 1977 Madh Pra 243 : 1977 Jab LJ 292 : 1977 Lab IC 1266 (FB) 10
AIR 1976 SC 1654 23
1975 Cri LJ 500 : 1974 MPLJ 341 3, 14, 17, 18, 25, 26
1975 Cri LJ 713 : 1975 MPLJ 1 (FB) 2, 13, 17, 18
1974 Cri LJ 261 (FB) (Mad) 24, 34
1963 (2) Cri LJ 418 : AIR 1963 SC 1531 9
(1961) 2 Cri LJ 227 (Guj) 25
1960 Cri LJ 927 : 1960 Mad WN Cri 59 24
1960 Cri LJ 927 : AIR 1960 Mad 308 24
AIR 1959 SC 648 9, 33
AIR 1959 SC 749 9
AIR 1956 SC 676 33
1954 Cri LJ 1822 : 1955 1 SCR 799 : AIR 1954 SC 752 9, 33

S. C. Dutt with Surendrasingh, for Appellants; M. V. Tamaskar, Govt. Advocate, for the State.

SHIV DAYAL, C. J. (Majority view):— Devisingh the first appellant, had admittedly not attained the age of 16 years on the date of the offence. He was then a 'child' within the meaning of the definition contained in S. 2 (c) of the M. P. Bal Adhiniyam, 1970 (No. 15 of 1970) (hereinafter called the 'Bal Adhiniyam'). He was tried for the offence of murder punishable under S. 302, Penal Code. He was, along with three other accused, tried by the Sessions Judge, Seoni, who found him guilty of that offence. However, he was dealt with under S. 6 of the Bal Adhiniyam.

2. He preferred this appeal for his acquittal. When the appeal went before a Division Bench, the following question arose, which has been referred to us for opinion:—

"Whether the exclusive jurisdiction conferred by the provisions of the Bal Adhiniyam, 1970, on Juvenile Courts to try a 'child' within the meaning of the definition contained in S. 2 (c) of the Adhiniyam for all offences, including those punishable with life imprisonment or death, continues after the enforcement of the new Cr. P. C. (1974)."

In the order of reference, there is a mention of State of M. P. v. Ramesh Nai, 1975 MPLJ 1 : (1975 Cri LJ 713) (FB) where it was held that the exclusive jurisdiction of the Juvenile Courts had been taken away after the enforcement of the new Cr. P. C. with effect from April 1, 1974. Relying on that decision, the learned Sessions Judge tried Devisingh.

3. Formerly, i. e. under the Cr. P. C. 1898 it had been held by a Division Bench of this Court in Rupsingh v. State, 1974 MPLJ 341 : (1975 Cri LJ 500), that the Juvenile Court had exclusive jurisdiction to try a child as defined in the Adhiniyam, in respect of all offences, including those punishable with life imprisonment or death.

4. Section 2 (c) of the Bal Adhiniyam defines a 'child' thus:—

"'Child' means a boy or a girl who has not attained the age of 16 years."

Clause (f) of that section defines 'delinquent child' as follows:—

"'Delinquent child' means a child who has been found to have committed an offence."

5. Under S. 4 of the Adhiniyam, a Juvenile Court is established and as soon as such Court is established, it has to deal with a delinquent child, by virtue of S. 6. The jurisdiction was exclusive as declared by the non obstante clause. It is subject to the provisions expressly made in the Adhiniyam itself. Section 19 of the Adhiniyam provides for an enquiry to be made in accordance with S. 39 of the Adhiniyam, in respect of a child who is charged with an offence and who appears or is produced before a Juvenile Court. Section 24 prohibits joint trial of a child with adult. Section 39 enacts that save as otherwise provided by the Adhiniyam, a Juvenile Court, by holding an enquiry under any of the provisions of the Adhiniyam, shall follow such procedure as may be prescribed and subject thereto the procedure laid down in the Cr. P. C. 1898, for trial in summons cases, would be followed. S. 67 excludes the application of S. 29-B of the old Code. Thus, a child who is charged with any offence, irrespective of whether it is punishable with death or imprisonment of life, is required to be dealt with by the Juvenile Court in accordance with the provisions of the Adhiniyam.

6. Adverting now to the Cr. P. C. (1974), S. 4 enacts that "(1) all offences under the Indian Penal Code shall be investigated, enquired into, tried and otherwise dealt with according to the provisions herein contained; (2) all offences under any other law shall be investigated, enquired into....."

Now, the offence of murder, which is punishable under S. 302, Penal Code, falls within sub-sec. (1) of S. 4 and has, therefore, to be tried according to the provisions of the Cr. P. C.

7. However, S. 5 of the Code saves from the operation of the Code "any special or local law for the time being in force, or any special jurisdiction or power conferred or any special form of procedure prescribed by any other law for the time being in force". But, this saving provision contained in S. 5 of the Code is itself subject to the exception "in the absence of specific provision to the contrary". Thus, the rules deducible from S. 5 of the Code are:—

(1) Where special jurisdiction or special power is conferred or any special form of procedure is prescribed by any other law for the time being in force, that jurisdiction, power and procedure will prevail over those contained in the Cr. P. C.

(2) However, if there is a specific provision to the contrary, it will override such special jurisdiction, power or procedure.

Applying these tests here, under the provisions of the Bal Adhiniyam, special jurisdiction and powers are conferred and special form of procedure is prescribed to deal with offences committed by a child. It has then to be seen whether there is any specific provision to the contrary. That provision we find in S. 27 of the Cr. P. C. which enacts that an offence not punishable with death or imprinsonment for life, committed by a person under the age of 16 years, may be tried by a Chief Judicial Magistrate or by any Court specially empowered under the Children's Act, 1960, or any other law for the time being in force, providing for the treatment, training and rehabilitation of youthful offenders. The Bal Adhiniyam is such other law. Under S. 27 of the Code, an offence committed by a juvenile offender is made triable by a Court specified in the Bal Adhiniyam, unless it is one which is punishable with death or imprisonment for life. This is a specific provision realting to a person under 16 years of age, i. e. a child within the meaning of the Bal Adhiniyam. This section is specifically made to govern offences committed by persons under 16 years of age. It is thus a specific provision within the meaning of S. 5. It completely covers the field of operation of the provisions contained in the Bal Adhiniyam and lays down a contrary rule as to the trial of offences committed by a child under the age of 16 years, which offence is punishable with death or imprisonment for life. That being so, S. 5 of the Code does not save the provisions contained in the Bal Adhiniyam in respect of special jurisdiction conferred by it for the trial of an offence punishable with death or imprisonment for life committed by a child. To put it differently, the combined effect of Sections 4, 5 and 27 of the Cr. P. C., is that an offence punishable with death or imprisonment for life, committed by a child, must be tried by a Court of Session. Under the schedule to the Code of Criminal Procedure, an offence under S. 302, Penal Code, is triable by a Court of Session.

8. What emerges from the above narration is that an offence punishable with death or imprisonment for life, committed by a child (i.e. person under 16 years of age), must be dealt with:

(i) on the one hand, under the provisions of the Bal Adhiniyam to the

exclusion of any other enactment; and

(ii) on the other hand, by the Court of Session under the Cr. P. C.

Thus, there is a repugnancy between the two. The subject-matter falls within Entry 2 of List III (Concurrent List) in the 7th Schedule to the Constitution: "Criminal Procedure, including all matters included in the Cri. P. C. at the commencement of this Constitution", as also within Entries 1 and 5 of the same list.

9. Bal Adhimiyam is a law made by the legislature of the State of Madhya Pradesh. The Cr. P. C. (1974), is a law made by Parliament. The State law is repugnant to the law made by Parliament, inasmuch as there is a direct conflict between the provisions contained in the two enactments and one cannot be obeyed without disobeying the other. See Deepchand v. State of U. P. AIR 1959 SC 648; Premnath v. State of J. and K, AIR 1959 SC 749; Zaverbhai v. State of Bombay, (1955) SCR 799: (1974 Cri LJ 1822 (SC)) and Ukha v. State of Maharashtra, AIR 1963 SC 1531 (1541) : ((1963) 2 Cri LJ 418).

10. Art. 254 of the Constitution must then resolve the repugnancy. When a question arises as to repugnancy between any provision contained in a law made by the legislature of a State and any provision contained in any law made by Parliament, Cl. (2) of Art. 254 has first to be considered, because if a case falls under Cl (2), then clause (1) becomes inapplicable. (M. P. S.R.T.C. v. Ramchandra) 1977 Jab. L. J. 292: (AIR 1977 Madh. Pra. 243) (F.B.).

11. Cl. (2) of Art. 254 of the Constitution reads thus:—

"Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislative of the State".

This clause comes into play only when (i) the two laws in question deal with a matter in Concurrent List; (ii) the State law has been made with the consent of the President; and (iii) the provisions of the law made by Parliament were earlier. When all these three conditions are satisfied, the law made by the State Legislature will prevail. If any of these three conditions is not satisfied. Cl. (2) of Art. 254 is out of the way. In the present case, Cl. (2) clearly does not apply, because the third condition is absent. The Cr. P. C. (1974), was not made earlier than the Bal Adhiniyam.

12. Having reached the conclusion that Clause (2) of Art. 254 is out of the way, Cl. (1) of that Article applies and the law made by Parliament, i.e. the Cr. P. C. (1974), must prevail and the provisions of the Bal Adhiniyam, to the extent of the repugnancy, must be held to be void. Cl. (1) of Art. 254 may be reproduced here:—

"If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact or to any provision of any existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of Cl. (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void".

13. As a result of the above discussion, it must be held that for the offence punishable with death or imprisonment for life, a child must be tried by a Court of Session under the provisions of the Code of Criminal Procedure and not under the provisions of the Bal Adhiniyam. With respect we concur with the majority view in State of M. P. v. Ramesh Nai, 1975 MPLJ 1 : (1975 Cri LJ 713) (FB).

14. We must, however, mention that Rupsingh v. State 1974 MPLJ 341 : (1975 Cri LJ 500), was also correctly decided inasmuch as in that case, the provisions applicable were those of the Cr, P. C., 1898. Repugnancy in that case was between the provisions of the Bal Adhiniyam 1970, on the one hand, and the Cr. P. C., 1898 on the other hand. In that case, all the three requisites of Cl. (2) of Art. 254 of the Constitution were satisfied, and, consequently, the law made by the State Legislature, i.e. Bal Adhiniyam, prevailed. The position became reverse on the enactment of the Cr.

P. C., (1974), because then Cl. (2) of Art. 254 became inapplicable and the provisions of the Cr. P. C., (1974), override those of the Bal Adhiniyam, by virtue of Cl. (1) of Art. 254.

15. In the result, we would answer the reference thus:

(1) The exclusive jurisdiction conferred by the provisions of the Bal Adhiniyam, 1970, on Juvenile Courts to deal with a child (a person under 16 years of age) for all offences, except those punishable with death or imprisonment for life, continues after the enforcement of the new Cr. P, C. (1974).

(2) Any provision of the Bal Adhiniyam, 1970, which is repugnant to any provision contained in the Cr. P, C. (1974), in relation to a subject-matter pertaining to the Concurrent List in the 7th Schedule to the Constitution, to the extent of repugnancy, being void, a child must be tried, for the offences punishable with death or imprisonment for life, by a Court of Session under the provisions of the Cr. P. C. (1974).

(3) The appeal shall now be laid before the Division Bench.

VERMA, J. (Minority view):— 16. The circumstances which have given rise to this reference are stated in the order of reference and the opinion of the learned Chief Justice. They need not, therefore, be reiterated here. I regret my inability to agree with the view taken by my lord the Chief Justice.

17. The question for decision is: Whether the exclusive jurisdiction conferred by the Madhya Pradesh Bal Adhiniyam, 1970 (No. 15 of 1970) on the Juvenile Courts constituted under it to try juveniles for all offences including those punishable with life imprisonment or death continues even after the enforcement of the new Cri. P.C. 1973 (Act No. II of 1974), (hereinafter called the new Code)? Rupsingh Devlia v. State 1974 MPLJ 341 : (1975 Cri LJ 500), a Division Bench held with reference to the old Cr. P. C., 1898 (hereinafter called the old Code) that the Juvenile Courts constituted under the Bal Adhiniyam had exclusive jurisdiction to try juveniles for all offences including those punishable with life imprisonment or death. That view with reference to the old Code was affirmed by a Full Bench in State of Madhya Pradesh v. Ramesh Nai, 1975 MPLJ 1 : (1975 Cri LJ 713).

18. The provisions of the Bal Adhiniyam conferring exclusive jurisdiction on the Juvenile Courts to try all offences including those punishable with life imprisonment or death were considered at length in Rupsingh's case (1975 Cri LJ 500) (MP) (supra) and approved by the Full Bench in Ramesh Nai's case, (1975 Cri LJ 713) (MP) (supra). That position is not in dispute and does not require a fresh consideration.

19. The only question before us is whether the provisions of the New Code have brought about any change in this position. There can be no doubt that if there is an irreconcilable conflict between the provisions of the New Code and those of the Bal Adhiniyam, then the New Code being the later Central enactment it will supersede Bal Adhiniyam, the earlier State enactment to the extent of repugnancy by virtue of Cl. (1) of Art. 254 of the Constitution. The real question, therefore, is whether there is any such repugnancy between the two enactments so as to attract Art. 254. It is equally clear that in case there is no such repugnancy and the relevant provisions of the two enactments are capable of co-existence, then Art. 254 would not be attracted, and the provisions of the Bal Adhiniyam conferring exclusive jurisdiction on the Juvenile Courts to try all offences including those punishable with life imprisonment or death would continue to operate. Such a conclusion is supported also by the fact that the Bal Adhiniyam is a special local Act while the New Code is a general enactment applicable throughout the country on account of which the special local Act would apply within this State in preference to the general law on the subject. It is in this light that the question has to be examined with a view to determine whether there is any such irreconcilable conflict so as to attract Art. 254 of the Constitution. This is the real question for decision.

20. Before embarking on this enquiry, it would be proper to briefly state the settled rules of construction applicable to such an enquiry. It is settled that the principle of implied repeal may be applied to determine repugnancy for the purposes of Art. 254 of the Constitution. In Maxwell on the Interpretation of Statutes, Twelfth Edition, the relevant extracts are as follows:—

"The fact that jurisdiction is conferred on one authority does not necessarily take away jurisdiction which another already possesses in the same matter". (Page 155).

"It is also presumed that a statute does not create new jurisdictions or enlarge existing ones, and express language is required

if an Act is to be interpreted as having this effect". (Page 159).

"A later statute may repeal an earlier one either expressly or by implication. But repeal by implication is not favoured by the courts.....If, therefore, earlier and later statutes can reasonably be construed in such a way that both can be given effect to, this must be done.....And when the later Act is worded in purely affirmative language, without any negative expressed or implied, it becomes even less likely that it was intended to repeal the earlier law". (Page 191).

"If, however, the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together, the earlier is abrogated by the later." (Page 193).

"Now, if anything be certain it is this," said the Earl of Selborne L.C. in The Vera Cruz, "that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so". In a later case, Viscount Haldane said: "We are bound.....to apply a rule of construction which has been repeatedly laid down and is firmly established. It is that wherever Parliament in an earlier statute has directed its attention to an individual case and has made provision for it unambiguously, there arises a presumption that if in a subsequent statute the Legislature lays down a general principle, that general principle is not to be taken as meant to rip up what the Legislature had before provided for individually, unless an intention to do so is specially declared. A merely general rule is not enough, even though by its terms it is stated so widely that it would, taken by itself, cover special cases of the kind I have referred to". (Page 198).

In Justice G. P. Singh's Principles of Statutory Interpretation, Second Edition, these principles have been summarised taking into account also our Supreme Court decisions on the point. As such, reference to the same is sufficient to indicate the up-to-date law as settled by the Supreme Court. The relevant portions are as follows:—

"The continuance of existing legislation, in the absence of an express provision of repeal, being presumed, the burden to show that there has been a repeal by implication lies on the party asserting the same. The presumption is, however, rebutted and a repeal is inferred by necessary implication when the provisions of the later Act are so inconsistent with or repugnant to the provitions of the earlier Act 'that the two cannot stand together'. But, if the two may be read together and some application may be made of the words in the earlier Act, a repeal will not be inferred. The Supreme Court has indicated that the test applied for determining repugnancy under Article 254 of the Constitution, may be applied for solving a question of implied repeal and that it should be seen: '(1) Whether there is direct conflict between the two provisions; (2) Whether the legislature intended to lay down an exhaustive Code in respect of the subject-matter replacing the earlier law; (3) Whether the two laws occupy the same field.' The doctrine of implied repeal is based on the theory that the legislature, which is presumed to know the existing law, did not intend to create any confusion by retaining conflicting provisions and, therefore, when the court applies the doctrine, it does no more than give effect to the intention of the legislature by examining the scope and the object of the two enactments and by a comparison of their provisions, The matter in each case is one of construction and comparison of the two Acts". (Pages 354-355).

"As an application of the above principles a prior particular or special law is not readily held to be impliedly repealed by later general enactment. The particular or special law deals only with a particular phase of the subject covered by the general law and, therefore, a reconciliation is normally possible between a prior particular Act and a later general Act, and so the particular Act is construed as an exception or qualification of the general Act. To quote the words of Lord Phillimore: 'It is a sound principle of all jurisprudence that a prior particular law is not easily to be held to be abrogated by a posterior law, expressed in general terms and by the apparent generality of its language applicable to and covering a number of cases, of which the particular law is but one. This, as a matter of jurisprudence, as understood in England, has been laid down in a great number of cases, whether the prior law be an express statute, or be the underlying common or customary law of the country. Whether general words in a later Act are capable of

reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, that earlier and special legislation is not to be held indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so'. The principle has been accepted by the Supreme Court and has been expressed by Mudholkar J. as follows: 'A general statute applies to all persons and localities within its jurisdiction and scope as distinguished from a special one which in its operation is confined to a particular locality and, therefore, where it is doubtful whether the special statute was intended to be repealed by the general statute the court should try to give effect to both the enactments as far as possible.

The provisions of a Municipal Act which empowered a Municipal authority to provide for bus stands, were not held to be repealed by a subsequent Motor Vehicles Act, which empowered the Government or its delegate to do the same. The reasons for this conclusion were mainly twofold: (1) that the Municipal Act was a special law applying to Municipal areas, and the Motor Vehicles Act was a general law applying to all areas in general and (2) that both the provisions were enabling ones and there could be no question of conflict till the authority in the later Act also provided for bus stands for the same areas for which bus stands had already been provided under the earlier Municipal Act". (Page 356-357).

"On the same principle it was held that a provision in the Bengal Ghatwali Lands Act, 1859, enabling the Court of Wards to grant leases of Ghatwali Lands in perpetuity for erection of dwelling houses and certain other purposes was not affected by the Court of Wards Act, 1870, which enacted that no lease in respect of land under the management of the Court of Wards shall, except under the sanction of the Board of Revenue, be given for a term exceeding 10 years nor beyond the expiration of the Ward's minority". (Pages 357-358)

"So, if the later affirmative enactment does not imply a negative, it will not be construed as impliedly repealing an earlier affirmative enactment". (Page 361).

21. It is in this back ground that the question should be considered. The relevant provisions of the new Code are Ss. 4, 5 and 27 which correspond to Ss. 5, 1 (2) and 29-B of the Old Code. A comparison of the corresponding provisions of the two Codes shows that they are substantially the same and are in effect a reproduction in the new Code of their corresponding provisions in the Old Code. The statement of Objects and Reasons together with Notes of Clauses of the Bill relating to the New Code (The Gazette of India, Extraordinary, dated 10-12-1970, Part II, at Pages 1309, 1312 and 1314) shows that the Clauses which have finally become Sections 4, 5 and 27 of the new Code were treated as corresponding to the sections of the old Code already referred and incorporated without any material changes. It is, therefore, clear that these provisions of the new Code which alone are relevant for our purpose operate in the same field as the corresponding provisions of the old Code and by these provisions in the New Code the Parliament did not intend to create a new jurisdiction or enlarge the existing ones of the general Courts specified in the Code which had not existed under the old Code. In other words, if the corresponding provisions of the Old Code were capable of co-existence with the provisions of the Bal Adhiniyam and there was no irreconcilable difference between the provisions of the two enactments, then there is no occasion to hold that the provisions of the new Code have altered this position and taken away the exclusive jurisdiction of the Juvenile Courts constituted under the Bal Adhiniyam which undoubtedly was not affected by the corresponding provisions of the old Code even without the aid of Article 254 as I will presently show.

22. I would now briefly state the substance of the relevant provisions of the new Code. Section 4 deals with the general jurisdiction for the trial of offences under the Penal Code or other laws and provides that the same shall be in accordance with the provisions of the Code contained thereafter. Same was S. 5 of the old Code. Section 5 of the New Code corresponds to S. 1 (2) of the old Code and there is no material difference between the two. The saving contained in this provision provides that the provisions of the Code, in the absence of any specific provision to the contrary, shall not affect any existing special or local law or special jurisdiction or special procedure provided by any other existing law. This section clearly saves all existing special or local laws dealing with the procedure and jurisdiction etc. for trial of such offences unless a contrary intention has been expressed. It is in this context that S. 27 of the New Code which

corresponds to S. 29-B of the Old Code has to be examined. Section 27 reads as under:—

"27. Jurisdiction in the case of Juveniles.— Any offence not punishable with death or imprisonment for life. committed by any person who at the date when he appears or is brought before the Court is under the age of sixteen years, may be tried by the Court of a Chief Judicial Magistrate, or by any Court specially empowered under the Children Act, 1960 (60 of 1960) or any other law for the time being in force providing for the treatment, training and rehabilitation of youthful offenders."

There can be no doubt that for purpose of the question before us, this section is substantially the same as S. 29-B of the Old Code. As I read it, the plain words of the provision indicate that it is merely an enabling provision permitting the trial of Juveniles for offences not punishable with death or imprisonmnt for life in the manner provided in the section. The provision is couched in affirmative terms and uses the word "may" which in its ordinary usage is permissive and not imperative. Unless there is any cogent reason to depart from the ordinary meaning of the word "may", it is obvious that it cannot be read as imperative. This also indicates that this provision is only enabling and not mandatory. In other words, S. 27 is only an enabling provision permitting the trial of Juveniles for offences not punishable with death or imprisonment for life in the manner indicated therein which itself provides more than one alternative and there is nothing in the provision to make it imperative and to read therein a prohibition that a juvenile charged with an offence punishable with death or life imprisonment cannot be tried according to the special law applicable within a locality conferring exclusive jurisdiction on Juvenile Courts constituted under that special law. This also appears logical in view of the saving of special or local laws provided in S. 5 of the New Code. Section 27 being an enabling provision cannot be read as a specific provision containing a contrary intention to supersede the saving of a special or local law provided in S. 5 of the New Code.

23. Sections 4, 5 and 27 of the new Code read together indicate that Parliament did not intend its legislation to be a complete and exhaustive Code on this subject; and that the Union law itself permits or recognises other laws restricting or qualifying the general provision made in it. In such a situation, the special provisions of a State local law cannot be said to be repugnant to the Union Law: State of Haryana v. Chanan Mal AIR 1976 SC 1654.

24. If I am right in my view that S. 27 of the New Code corresponds to S. 29-B of the Old Code and so also Ss. 4 and 5 of the New Code correspond to Ss. 5 and 1 (2) of the Old Code, then the above conclusion is supported by decisions wherein these provisions of the Old Code were construed similarly. I shall now refer to those decisions. A similar question arose for decision by the Madras High Court with reference to provisions of the Madras Children Act (4 of 1920), The question was whether the provisions of the Madras Children Act conferring jurisdiction on the Juvenile Courts constituted thereunder, to try juveniles for all offences including those punishable with death or imprisonment for life, were superseded by S. 29-B of the Old Code which was inserted by amendment in 1923 subsequent to the enactment of the Madras Children Act. In In re Authony alias Bakthawatsalu AIR 1960 Mad 308 : (1960 Cri LJ 927) it was held as follows (at p. 310 of AIR):—

"This juxtaposition of S. 1 (2) Cr. P. C. and S. 6, Criminal Procedure Code, taken along with the Government of India Act, 1919 and the schedules thereto clearly imply that the State Legislature had power to make a law for establishing juvenile Courts to try all juveniles, accused of any offence whatsoever. Hence, S. 29-B does not take away the power of the State Legislature to enact a measure like the Madras Children Act (Act IV of 1920). The power of the Juvenile Court to try all juvenile offenders for any offence, including murder, is therefore incontrovertible..... We accept the argument of the learned Advocate General that, upon the grounds set forth already, it was competent for the State Legislature to enact the provisions of the Madras Children Act (Act IV of 1920) and that, having regard to the juxtaposition of S. 1 (2), Cr. P. C. and S. 6, Cr. P. C. S. 29-B, Cr. P. C. does not, by any necessary implication, take away the power of juvenile Court established by law to try a juvenile offender even for an offence punishable with death or imprisonment for life".

(Emphasis supplied).

This decision has been recently approved by Full Bench of the Madras High Court in Sessions Judge, Tirunelveli v. Perumal 1974 Cri LJ 261 and the relevant extracts from

the Full Bench decision are as follows:— (at p. 271).

"Construed this way, S. 29-B of the Cr. P. C. would not in any way conflict with the provisions of the Madras Children Act, 1920, but would enlarge the powers of the courts other than the Courts of Session mentioned in S. 4 of the Madras Children Act, 1920, if the accused was under the age of fifteen years. In concrete terms, as a result of S. 29-B of the Cr. P. C., a District Magistrate, a Sub-Divisional Magistrate, a salaried Presidency Magistrate and any Magistrate of the first class or second class specially empowered by the Local Government (now State Government) to exercise all or any of the powers conferred by the Madras Children Act, 1920, might try any offence other than one punishable with death or transportation for life, if the accused was under fifteen. This meant that those courts could try for instance, an offence under S. 312 I. P. C. which otherwise would have been triable only by the Court of Session under Schedule II of the Cr. P. C. So far the Juvenile Court constituted under S. 36 (1) of the Madras Children Act is concerned, it was not necessary to invoke S. 29-B of the Cr. P. C. because, as we have seen, the Juvenile Court could try any offence whatsoever, including one punishable with death or transportation for life. The question, however, is whether Section 29-B of the Cr. P. C. should be construed not merely as an enabling provision, but also as a provision which by necessary implication meant that in respect of an offence punishable with death or transportation for life, it repealed the provisions of the earlier Act, the Madras Children Act, 1920; in other words whether it means that in respect of an offence punishable with death or transportation for life even the Juvenile Court constituted under S. 36 (1) of the Act could no longer try such offences even though prior to the enactment of S. 29-B of the Cr. P. C. the Juvenile Court could have tried any offence whatsoever. Stated this way it seems to me that there could be only one answer, that S. 29-B of the Cr. P. C. could not possibly be construed in any such manner. If it was meant to have any such repealing effect, it should have been specially stated. Certainly the law does not favour an implied repeal. (Emphasis supplied).

x x x x

It follows that (Sivaguru v. Saroja 1960 Mad WN Cri 59 : 1960 Cri LJ 927), in so far as it laid down that a Juvenile Court established under S. 36 of the Madras Children Act, 1920 could try any offence, whatsoever, including an offence punishable with death or imprisonment for life and that that position was not in any way affected by S. 29-B of the Cr. P. C. is good law.

x x x x

The result of my discussion so far may be summed up thus. Where a juvenile alone is accused of an offence, the case against him will, as hitherto, be tried by the Juvenile Court established under S. 36 (1) of the Act even if the offence is one punishable with death or imprisonment for life".

The Madras High Court took the view that the subsequently enacted S. 29-B of the Old Code was merely an enabling provision and on a harmonious construction it was capable of co-existence with the provisions of the earlier enacted State Act. In short, it was held that S. 29-B of the Old Code was not inconsistent with the provisions of the Madras Children Act conferring jurisdiction upon juvenile Courts to try a juvenile for any offence including those punishable with death or life imprisonment so as to result in any repugnancy between them.

25. Similar provisions of the Bombay Children Act, 1948, were similarly construed by P. N. Bhagwati, J. (as he then was) in State v. Madhubharti (1961) 2 Cri LJ 227 (Guj). One of the rules of construction adopted by Bhagwati, J., was that the Cr. P. C. being a general law and the State Children Act, the special law, the settled rule required that when they operate in the same field, it is the special law which must prevail as against the general law. In the Division Bench decision in Rupsingh's case (1975 Cri LJ 500) (Madh Pra) (supra) these cases are referred and relied on in Paras. 11 to 16 of that judgment. I rely on that reasoning being available even now because that was to show that S. 29-B of the Old Code was merely an enabling provision and was not in conflict.

26. Applying the tests indicated by the settled principles, I have no hesitation in holding that there is no real conflict between the provisions of the New Code, particularly S. 27 thereof, and the provisions of the Bal Adhiniyam. In short, the provisions of the New Code clearly save any special or local

law like the Bal Adhiniyam and S. 27 of the New Code is merely an enabling provision which does not express any contrary intention to undo the saving provided in S. 5 of the New Code. There being thus no conflict or repugnancy, the question of Art. 254 of the Constitution being attracted does not arise. In Rupsingh's case (1975 Cri LJ 500 (Madh Pra) (supra) the reliance on Art, 254 was merely an additional reason to support the conclusion reached therein because in that case even in case of repugnancy the Bal Adhiniyam being the later enactment which had received the assent of the President would have the superseding effect, However, the reliance on the Madras, Bombay and Gujarat view as mentioned in Paras 11 to 16 of that decision, clearly shows that the Division Bench was of the view that there was no repugnancy between the provisions of the Old Code and that of the Bal Adhiniyam. I have not been able to find any good reason to depart from that view. In my opinion, there is no conflict and these provisions of Bal Adhiniyam can co-exist with the relevant provisions of the New Code, so that Art. 254 of the Constitution is not attracted.

27. Balchand Jain v. State of Madhya Pradesh AIR 1977 SC 366 : (1977 Cri LJ 225) is a very recent decision reiterating the above principles of construction and indicating the extent to which Courts can go to avoid holding that provisions in two different statutes are conflicting. The question there was whether the provision of anticipatory bail contained in S. 438 of the New Code applied to offences falling under R. 184 of the Defence of India Rules, 1971. The point really was whether there was any inconsistency between the two provisions so that the provision for anticipatory bail contained in the New Code could not stand side by side with R. 184. These principles of construction to avoid inconsistency and attempt at a harmonious construction were followed and it was held that there was no direct conflict between R. 184 of the said Rules and S. 438 of the New Code. One of the main tests applied by the Supreme Court for reaching this conclusion was stated by Fazal Ali, J., as follows (at p. 376 of AIR):—

"Thus one of the main tests pointed out by the Court was that the Court, while interpreting the statutes concerned must infer repeal by the later statute only if it causes inconvenience of where it is couched in an affirmative or negative terms. Maxwell on Interpretation of Statutes, 11th Edn., page 162 observes: 'A sufficient Act ought not to be held to be repealed by implication without some strong reason.' We think it is reasonable to presume that the Legislature does not intend to keep contradictory enactments on the statute book and, therefore, a construction should be accepted which offers an escape from it." (Page 376).

This view was taken by the Supreme Court notwithstanding the fact that there was some difficulty in importing fully the requirements of R. 184 to a case of grant of anticipatory bail; R. 184, in some cases, places the burden on the accused to show the existence of reasonable grounds indicating that he is not guilty, and this is difficult to achieve at the stage when anticipatory bail is applied for. This decision clearly points out the extent to which the Courts must make an attempt to avoid any conflict between two enactments and it may safely be inferred from this decision that unless there be no possibility for the two provisions to co-exist, the conflict should be avoided by giving such a meaning to the provisions which would enable both of them to co-exist. In the case before us, we are not faced even with any such difficulty as a result of the view taken by me. This consequence also lends assurance to me for taking this view.

28. The modern trend to treat youthful offenders not as criminals but as delinquents and to resort to correctional methods for rehabilitating them is too widely accepted to require any further emphasis. A recent decision in Hiralal Mallick v. State of Bihar (1977) 4 SCC 44 : (1977 Cri LJ 1921), reemphasised this trend in our country in a case where a juvenile was tried for murder and regretted the absence of a State Children Act in Bihar to deal with that case in a children's Court. This trend does not differentiate in the mode of trial of the juvenile with reference to the offence. At least till the new Code came into force in 1974, no one disputes that the Juvenile Courts constituted under the Bal Adhiniyam in this State had exclusive jurisdiction to try juveniles for all offences. In this situation, if the Parliament intended while enacting the New Code, to reverse the trend in case of the more serious offences, it is reasonable to assume that the step in the opposite direction would have been taken in clear and unambiguous language. In my opinion, re-enacting the relevant provisions in the New Code in substantially the same old language and treating them merely as corresponding provisions cannot be construed as indicating a reversal of

the existing modern trend. I take this as an additional reason to support my view.

29. I would, therefore, answer the reference in the affirmative and hold that the exclusive jurisdiction conferred on the Juvenile Courts constituted under the Bal Adhiniyam to try juveniles for all offences including those punishable with life imprisonment or death continues even after the enforcement of the New Code of Criminal Procedure, 1973.

SEN, J. (Majority view):— 30. I had the privilege of going through the opinions expressed by Hon'ble the Chief Justice and brother Verma, J. I endorse the view of the learned Chief Justice that for offences punishable with death or imprsonment for life, a child must be tried by a Court of Session under the Cr. P. C. 1973 and not by a Juvenile Court under the M. P. Bal Adhiniyam, 1970, and the reference be answered in terms stated by him.

31. With respect I am unable to agree with the opinion expressed by my learned brother Verma, J. that there is no repugnancy between the Cr. P. C. 1973, and M. P. Bal Adhiniyam, 1970, regarding trial of juvenile children in respect of offences punishable with death or imprisonment for life and that both the enactments can co-exist side by side.

32. Clause (1) of Art. 254 of the Constitution gives a mandate that if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact or to any provision of any existing law with respect to one of the matters enumerated in the Concurrent List. then, subject to the provisions of Cl. (2), the law made by Parliament shall prevail. Cl. (2) provides that where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then the law made by Legislature of State shall prevail in such State if it has received the assent of the President. Cl. (2) saves only a State enactment in the Concurrent List which has received the consent of the President if it is later in point of time to the law made by the Parliament or an existing law on the subject, So if there is any repugnancy between the M. P. Bal Adhiniyam, 1970, made by the State Legislature and the Cr. P. C. 1973 enacted by the Parliament cl. (2) will not be available to save it because the State Act is an earlier enactment.

33. It will be useful to quote Durga Das Basu from his book on Constitutional Law, 1977 edition. He has the following comments to make in Art. 254 on Repugnancy—

"A State law may be 'repugnant' in any of the following ways:—

(i) Where there is direct conflict between the two provisions.

(a) Where one cannot be obeyed without disobeying the other.

(b) Two enactments may also be inconsistent although obedience to each of them may be possible without disobeying the other. It may arise where both the laws operate in the same field and the two cannot possibly stand together, e. g. where both prescribe punishment for the same offence but the punishment differs in degree or kind or in the procedure prescribed—Zaverbhai v. State of Bombay AIR 1954 SC 752 : (1954 Cri LJ 1822) and Deepchand v. State of U. P. AIR 1959 SC 648.

(ii) Though there may not be any direct conflict between the Union and State legislation, where it is evident that the Union Parliament intended its legislation to be complete and exhaustive code relating to the subject, it shall be taken that the Union law has replaced State legislation relating to the subject. But if the Union law itself permits or recognises other laws restricting or qualifying the general provisions made in it, the special provisions of such State local law cannot be said to be repugnant to the Union law.

(iii) Even where the Union Act is not exhaustive, repugnancy may arise if it occupies the same field as the State Act—Tika Ramji v. State of U. P. AIR 1956 SC 676 and Deepchand v. State of U. P. AIR 1959 SC 648.

(iv) When a question of repugnancy arises under Art. 254, every effort should be made to reconcile two enactments and to construe them so as to avoid them being repugnant to each other and care should be taken to see whether the two really operate in different fields without encroachment."

34. In the present case, the provisions M. P. Bal Adhiniyam provide that all offences committed by child delinquents are to be tried by Juvenile Court whereas S. 27 of the Cr. P. C. 1973, enacts that for offences punishable with death or imprisonment for

life, a child must be tried by a Court of Session and all other offences can be tried by a Juvenile Court. Therefore, there is direct conflict between the two enactments regarding trial of juvenile offenders in respect of offences punishable with death or imprisonment for life and one cannot be obeyed without disobeying the other. Cr. P. C. 1973, may be a general enactment and S. 5 of the Code saves all special or local laws in the absence of specific provision to the contrary in the Code. However, it excludes the provisions of the M. P. Bal Adhiniyam regarding trial of juvenile offenders in respect of offences punishable with death or imprisonment for life. The two enactments can be reconciled by stating that all offences other than those punishable with death or imprisonment for life are to be tried by Juvenile Courts under the M. P. Bal Adhiniyam, The Full Bench of the Madras High Court in Sessions Judge. Tirunelveli v. Perumal 1974 Cri LJ 261 was not required to consider the effect of Art. 254 on the enactments referred therein. They had no occasion to consider the effect of the Cr. P. C. 1973, on the Madras Children Act of 1920.

35. I, therefore, endorse the opinion of Hon'ble the Chief Justice.

OPINION

BY THE COURT:— 36. In accordance with the majority opinion the question referred by the Division Bench is answered as follows:

(1) The exclusive jurisdiction conferred by the provisions of the Bal Adhiniyam, 1970, on Juvenile Courts to deal with a child (a person under 16 years of age) for all offences, except those punishable with death or imprisonment for life, continues after the enforcement of the new Cr. P. C. 1973.

(2) Any provision of the Bal Adhiniyam, 1970, which is repugnant to any provision contained in the Cr. P. C. 1973, in relation to a subject-matter pertaining to the Concurrent List in the 7th Schedule to the Constitution, to the extent of repugnancy, being void, a child must be tried, for the offences punishable with death or imprisonment for life, by a Court of Session under the provisions of the Cr. P. C. 1973.

The appeal shall now be laid before the Division Bench.

Answered accordingly.

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J. P. BAJPAI, J.

Abhimanyu Rath, Petitioner v. Virendra Pandey, Respondent.

Election Petn. No. 30 of 1977, D/- 17-8-1977.

(A) Representation of the People Act (1951), Ss. 81 and 67-A — Limitation for filing election petition — Period of 45 days runs from date of election, that is, a date on which a candidate is declared as elected by the Returning Officer and not from the date of publication of the same in official Gazette. (Para 2)

(B) Representation of the People Act (1951), Ss. 81 and 86 (1) — Election petition filed beyond period prescribed by S. 81 — S. 86 (1) is mandatory and petition must be dismissed — S. 5 Limitation Act does not apply. (Limitation Act (1963), Ss. 5 and 29 (2)). AIR 1968 Cal 69, Diss.

The Representation of the People Act is a special Act which provides a different period of limitation for an election petition for which no period is prescribed by the Schedule to the Limitation Act. AIR 1964 SC 1099 Rel. on. (Para 6)

Even if it is assumed that by virtue of S. 29 of the Limitation Act, certain provisions of the Limitation Act can be made applicable to an election petition, there is no scope for applying the provisions of S. 5 of the Limitation Act. The exclusion of the same is clearly borne out from the language of Ss. 81 and 86(1) of the Act. S. 81 in an unqualified manner prescribes that an election petition shall be presented within 45 days from the date of election. The special Act thereafter makes a mandatory provisions in S. 86(1) that if an election petition has not been presented in compliance of S. 81, the same shall be dismissed by the High Court. Neither the restrictive words as "subject to the provisions of the Limitation Act" have been used by the Parliament, nor any power has been conferred on the Court by adding a proviso to the aforesaid sections or otherwise to extend the period or to condone the delay. Wherever legislature wanted to provide for condonation of delay for instituting proceedings contemplated by the Act, it made a special provision for the same, AIR 1968 Cal 69, Diss. (Paras 9 and 11)

(C) Limitation Act (1963), S. 5 — Sufficient cause — Mistake of Counsel —

Wrong advice about limitation given — If and when can be said to be ground for condonation of delay.

A mistake of the counsel no doubt may be a good ground in the facts and circumstances of a case for extension of the time under S. 5 of the Limitation Act, but the mistake must be such which is a bona fide one and not one which proceeds from misconduct, negligence or want of reasonable skill. (Para 13)

It is not a general rule that every case of wrong advice by a counsel will give a ground for condonation of delay under S. 5 of the Limitation Act. The application seeking condonation of delay on such ground must make out a case that the person approached by him for advice was skilled and competent. For claiming the benefit, it should also be further established that the opinion was given by the lawyer after exercising reasonable care and that the mistake was bona fide and not due to negligence or want of due skill. It would also be necessary to establish that the view taken by the lawyer though wrong was a subject matter of justifying doubt which would have been entertained by a competent person exercising reasonable care and skill. In the present case, these necessary requirements are not satisfied. (Para 14)

Cases Referred:	Chronological Paras
AIR 1973 SC 584	2
AIR 1969 SC 872	9
AIR 1968 Cal 69	7
AIR 1964 SC 1099	5, 6

R. K. Pandey, for Petitioner.

ORDER :— This is an election petition presented under S. 81 of the Representation of the People Act, 1951 (hereinafter referred to as 'the Act') calling in question the election of the respondent to the Legislative Assembly of Madhya Pradesh from Jagdalpur Legislative assembly constituency. The petitioner seeks to challenge the election of the respondent on the sole ground of improper rejection of his nomination paper.

2. Undisputedly, the respondent was declared elected by the returning officer on 14-6-1977. This petition was filed on 1-8-1977 and accordingly the office made a note indicating that the petition was barred by limitation as delayed by two days. According to the provisions of S. 81 of the Act, an election petition has to be filed within 45 days from the date of election. S. 67A of the Act as reproduced below defines the date of election to be the date on which a candidate in election is declared by the returning officer to be elected.

"67A.— Date of election of candidate.— For the purposes of this Act, the date on which a candidate is declared by the returning officer under the provisions of S. 53 * * * * or S. 66, to be elected to a House of Parliament or of the Legislature of a State * * * shall be the date of election of that candidate."

Similar was the view expressed by their Lordships of the Supreme Court in C. A. No. 1178 of 1971 decided on 3-1-1972 (reported in AIR 1973 SC 584). Thus, it is apparent that the limitation prescribed by S. 81 would run from the date of declaration by the returning officer and not from the date of publication of the same in the official gazette. It is true that in the present case. the publication was made in the official gazette on 21-6-1977, but according to the clear provisions of the Act, the same is irrelevant for the purposes of counting the period of limitation.

3. Shri R. K. Pandey, learned counsel for the petitioner, rightly and fairly did not dispute this position. It was however, contended that since the petitioner has moved an application for condonation of delay under S. 5 of the Limitation Act, 1963, the same is liable to be condoned and the petition deserves to be entertained.

4. Thus, in order to decide whether the petition is liable to be dismissed under S. 86(1) of the Act for want of compliance of the provisions of S. 81 on the point of limitation, it would be necessary to determine the following questions:

(a) Whether the provisions of the Indian Limitation Act, 1963 will apply to an election petition under the Representation of the People Act ?

(b) Even if so, whether the provisions of S. 5 of the Indian Limitation Act will not apply as having been excluded by the Special Act ?

(c) In case, it is found that the provisions of S. 5 of the Indian Limitation Act do apply, whether there is sufficient cause for condoning the delay ?

5. While making submissions on the first point, it was contended on behalf of the petitioner that by virtue of the provisions of S. 29 of the Indian Limitation Act, 1963, the provisions of Ss. 4 to 24 of the Limitation Act became applicable even to the election petitions. By placing reliance on the observations of their Lordships of the Supreme Court in

Vidyacharan Shukla v. Khubchand Baghel, AIR 1964 SC 1099 it was argued that the difference between the Special Act and the Limitation Act would arise even by omission to provide for limitation for presenting an election petition under the Limitation Act. The contention was that for election petition to the High Court, no period has been prescribed by the Limitation Act and thus the petition could be ordinarily presented at any time, but when S. 81 of the Special Act (Representation of the People Act) provided that the petition is to be presented within 45 days of the date of election, the period prescribed was different from that under the Limitation Act and, therefore, S. 29 of the Limitation Act became applicable extending the provision of Ss. 4 to 24 of the Limitation Act to an election petition.

6. In my opinion, it is not possible to accept the aforesaid contention. It is true that the requirement of there being an otherwise different period of limitation in the Special Act can be held to be satisfied even in cases where the Limitation Act omits to prescribe a period of limitation. This position is well settled by the decision of the Supreme Court in Vidyacharan Shukla's case (AIR 1964 SC 1099) (supra). But this fact alone will not be decisive for holding that all the provisions of the Indian Limitation Act will apply to an election petition. It will have to be seen whether the Special Act excludes the applicability of the same and if so, to what extent.

7. On behalf of the petitioner, reliance was placed on a decision of the Calcutta High Court reported in Bhakti Bh. Mondal v. Khagendra K. Bandhopadhya AIR 1968 Cal. 69 wherein it was held that by virtue of S. 29 the provisions of Ss. 4 to 24 of the said Act became applicable to the election petition also and as such S. 5 of the Indian Limitation Act was applicable and in appropriate cases, Court has power when sufficient cause is shown to admit an election petition presented even after the prescribed period, by condoning the delay. With due respect to the learned Judge of the Calcutta High Court, I find myself unable to agree with the proposition laid down in the said case.

8. For the sake of arguments, even if it is assumed that by virtue of S. 29 of the Limitation Act, certain provisions of the Limitation Act can be made applicable to an election petition, there is no scope for applying the provisions of S. 5 of the Limitation Act. The exclusion of the same is clearly borne out from the language of Ss. 81 and 86 (1) of the Act. S. 81 in an unqualified manner prescribes that an election petition shall be presented within 45 days from the date of election. The Special Act thereafter makes a mandatory provision in S. 86 (1) that if an election petition has not been presented in compliance of S. 81, the same shall be dismissed by the High Court. Neither the restrictive words as "subject to the provisions of the Limitation Act" have been used by the Parliament, nor any power has been conferred on the Court by adding a proviso to the aforesaid sections or otherwise to extend the period or to condone the delay. Wherever legislature wanted to provide for condonation of delay for instituting proceedings contemplated by the Act, it made a special provision for the same. For instance, the proviso added to sub-sec. (2) of S. 116-A enables the Court to entertain an appeal even if presented after the expiry of the prescribed period of 30 days on being satisfied that the appellant had sufficient cause for not preferring the appeal within the period prescribed.

9. In K. Venkateswara Rao v. Bekkam Narasimha Reddy AIR 1968 SC 872 their Lordships of the Supreme Court observed in para 14 that the Representation of the People Act is a complete and self contained Code. It does not admit of the introduction of the principles or the provisions of law contained in the Indian Limitation Act. In the same paragraph, their Lordships of the Supreme Court also referred to the provisions of S. 29 (2) of the Indian Limitation Act which makes certain provisions of the Limitation Act applicable to proceedings under a Special or Local Law unless the application thereof has been excluded by the Special or Local Act. In view of these observations of the Supreme Court, the view expressed in the Calcutta case cited above does not appear to be correct.

10. Various amendments have been made in the Representation of the People Act by the Parliament from time to time and the last amendment recently made was during the period 1976-77. Despite being aware of the strict interpretation given by the Supreme Court and the High Courts, the provisions with regard to the time within which the election petition must be filed and the absence of power to condone the delay even for a

day, no such provision was made at any time while amending the Act and the mandatory provisions of S. 86 (1) have been kept intact.

11. It is, therefore, held that S. 5 of the Limitation Act has no application to an election petition and the application moved by the petitioner seeking condonation of delay is liable to be dismissed on this ground alone.

12. Even if it is assumed for the sake of arguments, of course with a very big "if", that S. 5 of the Limitation Act is applicable, I do not find any sufficient cause for condoning the delay. The explanation given for the delay is that before filing the election petition, the petitioner happened to consult one Shri Acharya, Advocate at Jagdalpur (the Headquarter of Bastar District) about the period of limitation within which an election petition can be filed and Shri Acharya advised him that such a petition can be filed within 45 days from the date of publication of the notification in the official gazette. The argument was that being misled by the advice given by the counsel, the petitioner contacted his counsel at Jabalpur and filed the petition on 1st August, 1977. This story put up by the petitioner is not believable. It is nothing, but an afterthought plea cooked up for justifying the delay in an attempt to get rid of the bar of limitation. This is borne out from the following circumstances: Since it was not the case that the counsel at Jabalpur was not aware of the correct legal position, this explanation, if genuine, should have been mentioned in the petition itself while presenting the same on 1-8-1977. The election petition was prepared and verified at Jabalpur on 1-8-1977. According to the normal rules of pleadings, the plaintiff or the applicant is expected to make averment about the suit or the application being made within time. If it is being filed beyond the prescribed period of limitation and condonation of delay is sought, necessary averments seeking condonation of delay are made either in the main petition or in a separate application moved for that purpose as the case may be. In this petition, no such averment was made at all. The petitioner conveniently omitted to state anything in this respect. No application for condonation of delay was filed along with the petition. When the election petition was placed before the Court on 10-8-1977 with the office note disclosing that it was barred by limitation as being delayed by two days, the learned counsel for the petitioner sought an aljournment to make submission on the point of limitation and the case was fixed for 12-8-1977. On that date, the petitioner came with an application seeking condonation of delay under S. 5 of the Limitation Act. It is true that simply because an application for condonation of delay was not filed along with the main petition, the same cannot be rejected merely on that ground. But the significance of the circumstances stated above is in the context of finding out whether the explanation given is genuine and/or an afterthought one.

13. Even otherwise, despite, taking the facts and circumstances stated in the application and the affidavit of the counsel Shri Acharya into consideration, no case of sufficient cause is made out. A mistake of the counsel no doubt may be a good ground in the facts and circumstances of a case for extension of the time under S. 5 of the Limitation Act, but the mistake must be such which is a bona fide one and not one which proceeds from misconduct, negligence or want of reasonable skill.

14. Shri Acharya, the learned advocate, in his affidavit has stated that on being approached by the petitioner seeking advice on the question of limitation, he had after consulting the books advised him that a petition can be filed within 45 days to be counted from the date of notification in the Government gazette. Shri Acharya claims that this advice was given bona fide. It is difficult to believe this. It could not be maintained that the question of counting the period of limitation from the date of declaration by the returning officer, was a matter of justifying doubt so as to hold that the mistaken advice was bona fide. In view of the specific unambiguous language of S. 67A defining the term "Date of election" and the clear language used in S. 81(1) of the Act, it is not possible to accept that such a mistake could be committed by any lawyer of reasonable skill. It is not a general rule that every case of wrong advice by a counsel will give a ground for condonation of delay under S. 5 of the Limitation Act. The application seeking condonation of delay on such ground must make out a case that the person approached by him for advice was skilled and competent. For claiming the benefit, it should also be further established that the opinion was given by the

lawyer after exercising reasonable care and that the mistake was bona fide and not due to negligence or want of due skill. It would also be necessary to establish that the view taken by the lawyer though wrong was a subject matter of justifying doubt which would have been entertained by a competent person exercising reasonable care and skill. In the present case, these necessary requirements are not satisfied. Shri Acharya, claims to have given the advice after going through the statutory provisions and it is not possible to hold that there was a case of any justifiable doubt on the face of the clear unambiguous language used in S. 67A and S. 81 of the Act.

15. For the reasons stated above, it is held that the petitioner could not establish sufficient cause for condoning the delay and the application under S. 5 of the Limitation Act is accordingly dismissed not only on the ground of maintainability, but also on merits.

16. The result, therefore, is that the election petition is liable to be dismissed in accordance with the provisions of S. 86(1) of the Act due to non-compliance of the requirements of S. 81 of the Act on the point of limitation and is accordingly dismissed. The amount of security deposit be refunded to the petitioner in accordance with the provisions of S. 121(2) of the Act.

Petition dismissed.

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FULL BENCH

SHIV DAYAL, C. J., J. S. VERMA AND S. S. SHARMA, JJ.

Mohd. Hafeez Khan, Petitioner v. State Transport Appellate Tribunal, Gwalior and others, Respondents.

Misc. Petn. No. 439 of 1977, D/- 30-1-1978.*

(A) Motor Vehicles Act (4 of 1939), S. 47 — Application for grant of stage carriage permit — Matters to be considered — Bad operational record of partnership firm — Relevant in considering grant of permit to any of its partners. Misc. Petn. No. 436 of 1963 D/- 3-3-1964 (Madh Pra) Overruled.

*(Decided by Full Bench on order of reference made by Shiv Dayal C. J. and J. S. Verma J. D/- 29-9-1977.)

BV/CV/A833/78/KSB

The main consideration which has to be taken into account in granting permit under S. 47 of the Motor Vehicles Act is the interest of the public in general and the advantage to the public of the service to be provided. While determining this question the past performance, if any, besides other factors, has also to be considered. If as a fact it is known that the business was being carried on by one or more of the partners acting for all and the performance had been unsatisfactory, there is no reason as to why the bad operational record of that firm could not be taken into consideration if those or any of them who in fact had been carrying on the business acting for all apply for a permit. Such person or persons have no escape from the past bad operational record of the firm. No doubt, this will always be a question of fact. Whenever the past bad record of a partnership firm is placed before the Authority or Tribunal, it has to find out on the basis of the material before it whether the applicant or applicants for the permit was or were, in fact, acting for all in that partnership firm. Misc. Petn. No. 436 of 1963 D/- 3-3-1964 (Madh Pra) Overruled. (Para 11)

When questions of fact arise in cases of grant of permits and the parties put their rival contentions on those facts by way of affidavits and documents, those facts can be placed before the authorities in the manner in which other facts are being placed. (Para 12)

The bad operational record of a partnership firm is a relevant fact when any of the partners of that firm applies for a grant of permit. The weight, however, to be attached to that bad record would be a question of fact depending upon the circumstances of each case. (Para 14)

Anno: AIR Manual 3rd (1974) Edn., M. V. Act S. 47, N. 2 to 4.

(B) Partnership Act (9 of 1932), S. 4 — General nature and essential of partnership.

Partnership is merely an association of persons for carrying on the business of partnership and in law the firm name is a compendious method of describing the partners, while in the case of a company it stands as a separate juristic entity distinct from its share-holders. AIR 1955 SC 74 Rel. on. (Para 9)

A partnership contains three elements, viz. an agreement entered into by all the persons concerned; the agreement must be to share the profits of a business; and

the business must be carried on by all or any of the persons concerned acting for all. The last element shows that the persons of the group who conduct the business do so as agents for all the persons in the group and are, therefore, liable to account to all. (Para 10)

Anno: AIR Manual 3rd (1974) Edn., Partnership Act S. 4 N. 1 & 2.

Cases Referred: Chronological Paras

AIR 1965 SC 1718 : 1966 MPLJ 289 9

(1964) Misc. Petn. No. 436 of 1963 D/- 3-3-1964 2, 8, 11, 14

AIR 1955 SC 74 9

P. C. Pathak, for Petitioner; V. S. Dabir with A. G. Dhande and S. Q. Hasan, for Respondent No. 3.

S. S. SHARMA, J.:— This is a petition under Arts. 226 and 227 of the Constitution of India for issuance of a writ of certiorari quashing the order, dated 30-8-1977 (Annexure-E), passed by the State Transport Appellate Tribunal.

2. When this petition came up before a Division Bench of this Court for admission, a copy of the decision, dated 3-3-1964, in Dharam Singh v. R. T. A. Gwalior (Misc. Petn. No. 436 of 1963) was brought to the notice of the Bench. In the opinion of the Division Bench, the question that was raised was of general importance and of frequent occurrence and so it felt that the point deserved to be considered by a larger Bench. Accordingly, it has come up before us.

3. The R. T. A. Bilaspur vide notification published in the Madhya Pradesh Rajpatra, dated 9-4-1976, declared scope for grant of a stage carriage permit on route Ambikapur-Nandamali via Darima for one return-trip daily. Prior to this, the permit had been granted to Motor Transport Worker, Ambikapur, but it was cancelled by the R. T. A. vide order, dated 6-2-1976, on account of no-operation. In response to the aforesaid notification, the petitioner respondent No. 3 Shri Harbans Singh and the earlier permit-holder Motor Transport Worker applied for the grant.

4. The aforesaid applications were published in the Madhya Pradesh Rajpatra, dated 11-6-1976, inviting objections. In response to this, Messrs. Janta Transport Co-operative Society filed the objections against the applications of respondent No. 3 Harbans Singh and Motor Transport Worker. After hearing all the parties, the Regional Transport Authority granted permit to the petitioner for a period of three years on condition that he shall ply on the route a vehicle of the model of 1972 or of a later year which he shall put within one year.

5. Aggrieved by this grant in favour of the petitioner, respondent No. 3 Harbans Singh filed an appeal before the State Transport Appellate Tribunal. Before the Tribunal the petitioner filed certain documents to show that the Motor Transport Worker, whose permit on the route was cancelled earlier, was, in fact, a partnership firm, consisting of four partners, the petitioner being one of them, and that the partnership firm had been dissolved before the petitioner filed the application for the route in question. The documents and affidavits in this behalf that were filed have collectively been marked as Annexure-C. Besides these, the petitioner had also filed few other documents to show that respondent No. 3 was not a suitable person for the grant which have collectively been marked as Annexure-D.

6. The Tribunal, after hearing the parties, allowed the appeal, set aside the order of the Regional Transport Authority and granted the permit to respondent No. 3 on the condition that he shall ply a 1977-model bus on the route.

7. Respondent No. 3 in his return has alleged that the petitioner was the proprietor of the trading name "Motor Transport Worker" which held the stage carriage permit on the route in question. It also has been mentioned that from the records, both of the R. T. A. and the State Transport Appellate Tribunal, it is made out that the petitioner is the proprietor of the Motor Transport Worker. According to him, it were the lapses on the part of the petitioner in his individual capacity which had resulted in the cancellation of the permit. The respondent has averred that the documents marked by the petitioner as Annexures-C and D were not submitted to the Tribunal with notice to him and no such facts as are being put forth here were urged before the Tribunal.

8. The main grievance made by the learned counsel for the petitioner was about the following observation in para 7 of the impugned order, dated 30-8-1977, of the Tribunal:—

"No doubt, the respondent No. 2 had claimed the permit in question in his individual capacity but the fact has not to be ignored that he was the proprietor also of one Motor Transport works, who earlier had held the permit and whose

permit came to be cancelled because of considerable non-maintenance of the service."

According to him, the impugned order is vitiated because of the Tribunal having wrongly taken the petitioner to be the proprietor of the Motor Transport Worker which, in fact, was a partnership firm. He went on to say that the past bad record of that partnership could not be taken into consideration against the petitioner as he had applied for the permit in his individual capacity. In support of his contention, he relied on the following observations in Dharam Singh's Case (M. P. No. 436 of 1963 D/- 3-3-1964 (Madh Pra)) (supra).

"This application must be granted. It is plain enough that the firm M/s. Hassa Nand Dharamsingh of which the petitioner was a partner was altogether a different entity from the petitioner in his individual capacity. That being so, if the operational record of the firm was adverse, that could not on any principle be taken into consideration for determining the suitability of the petitioner in his individual capacity for the grant of a permit on the route in question. The transport authorities went altogether wrong in rejecting the petitioner's application for the grant of a permit to himself on the basis of the record of the firm of which the petitioner was a partner."

9. We have first to examine as to what is the legal connotation of 'partnership.' Their Lordships of the Supreme Court in Mrs. Bacha F. Guzdar v. Commr. of Income Tax, Bombay AIR 1955 SC 74 have observed that partnership is merely an association of persons for carrying on the business of partnership and in law the firm name is a compendious method of describing the partners, while in the case of a company it stands as a separate juristic entity distinct from its shareholders. In yet another decision in Her Highness Maharani Mandalsa Devi v. Ramnarain Private Ltd. 1966 M P L J 289 : (AIR 1965 SC 1718) their Lordships, while considering Order XXX of the Civil P. C., observed that the legal fiction must not be carried too far and it is for some purposes that the law has extended a limited personality to a firm which is not a legal entity. The persons who are individually called partners are collectively called a firm and the name under which their business is carried on is called the firm name.

10. A partnership contains three elements, viz., an agreement entered into by all the persons concerned; the agreement must be to share the profits of a business; and the business must be carried on by all or any of the persons concerned acting for all. The last element shows that the persons of the group who conduct the business do so as agents for all the persons in the group and are, therefore, liable to account to all. It is this last element which comes into play to find solution to the problem before us.

11. As has been laid down in numerous decisions, the main consideration which has to be taken into account in granting permit under S. 47 of the Motor Vehicles Act is the interest of the public in general and the advantages to the public of the service to be provided. While determining this question the past performance, if any, besides other factors, has also to be considered. If as a fact it is known that the business was being carried on by one or more of the partners acting for all and the performance had been unsatisfactory, we find no reason as to why the bad operational record of that firm could not be taken into consideration if those or any of them who in fact had been carrying on the business acting for all apply for a permit. Such person or persons have no escape from the past bad operational record of the firm. No doubt, this will always be a question of fact. Whenever the past bad record of a partnership firm is placed before the Authority or Tribunal, it has to find out on the basis of the material before it whether the applicant or applicants for the permit was or were, in fact, acting for all in that partnership firm. We are, therefore, of the opinion that Dharam Singh's Case (M. P. No. 436 of 1963 D/- 3-3-1964 (Madh Pra)) (supra) has not been correctly decided.

12. Learned counsel for the petitioner then urged that there is no procedure for recording of evidence or for proving facts before the Regional Transport Authority or the Tribunal. For this reason, according to him, it would not be possible for a party to prove or disprove the aforesaid fact. We are not at all impressed with this line of argument. It was not disputed that questions of fact do arise in cases of grant of permits and the parties put their rival contentions on those facts by way of affidavits and documents. That being so, we fail to understand why could not facts relating to the aforesaid question be also placed before the authorities in the manner in which other facts are being placed.

13. Learned counsel for the petitioner sought support to his contentions from the language of S. 127-A of the Motor Vehicles Act. This section deals with the offences by companies. According to this section, if the person contravening any provisions of the Act is a company, then every person who, at the time the offence was committed, was incharge of and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly. The proviso to this sub-sec. (1) of S. 127-A exonerates any such person from liability if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence. Sub-sec. (2) of this section further provides that notwithstanding anything contained in sub-sec. (1), if the offence is committed by a company and it is proved that the offence is committed with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly. In the Explanation—for the purposes of this section—"company" has been defined as "any body corporate and includes a firm or other association of individuals;" and "director" in relation to a firm, meaning as "a partner in the firm". In our opinion, the question before us cannot be solved by taking aid of this section. That apart, even assuming it to be applicable, it lends support to the reasoning which has been adopted by us and thus goes against the petitioner.

14. We are, therefore, of the opinion that the bad operational record of a partnership firm is a relevant fact when any of the partners of that firm applies for a grant of permit. The weight, however, to be attached to that bad record would be a question of fact depending upon the circumstances of each case. The decision in Dharam Singh's case, (M. P. No. 436 of 1963 D/- 3-3-1964 (Madh Pra)) in our opinion, does not lay down the correct law on the point.

The case be now placed before the Division Bench.

Order accordingly.

AIR 1978 MADHYA PRADESH 119

FULL BENCH

SHIV DAYAL C. J., K. K. DUBE, M. L. MALIK, C. P. SEN AND S. S. SHARMA JJ.

Dwarka Dhish Bhargava and others, Petitioners v. State of Madhya Pradesh and others, Respondents.

Misc. Petn. No. 291 of 1972, D/- 14-12-1977.*

(A) M. P. Veterinary (Gazetted) Recruitment Rules (1966) Rr. 6 and 8 — Constitutional validity — Rules 6 and 8 do not infringe in any way Arts. 14 and 16 of the Constitution. (Constitution of India, Arts. 14 and 16). (Para 9)

The Government was within its rights in laying down in R. 6 that class II gazetted posts in the Veterinary Department would be filled up by direct recruitment and also by promotion. The Government was also justified in reserving 50 per cent of posts for direct recruits and the remaining 50 per cent for promotees in the interest of public service. Direct recruits are being taken in order to infuse new blood and spirit in the services. The sources of selections of direct recruits and promotees are—different, one from the open market, including those in the department fulfilling the conditions of eligibility and the other from amongst the employees already working in the department. Those departmental or private candidates outside the upper age limit can make no grievance that they should also be considered for selection. There is no question of junior or senior in the selection of direct recruits, when the selection has to be on merit cum suitability. There has been no denial of equality of opportunity to candidates similarly placed either belonging to the services or coming from the open market. AIR 1967 SC 52 and AIR 1967 SC 1427 Rel. on. (Para 8)

Anno: AIR Comm. Const. of India, 2nd (1974) Edn. Art. 16 N. 2, 3.

(B) Constitution of India, Art. 16 — Equality of opportunity in matters of employment — Scope of guarantee.

Art. 16 (1) of the Constitution guarantees that there shall be equality of opportunity for all citizens in matters relating to employment or appointment

* (Decided by Full Bench on order of reference made by K. K. Dube and J. S. Verma, JJ. on 8-9-1977).

BV/CV/A831/77/KSB

to any office under the State. Matters relating to employment or appointment are wide enough to include the matter of promotion. This does not mean that the Government is not, like other employees, entitled to pick and choose from amongst a number of candidates offering themselves for employment under the Government. It does not prohibit the prescription of reasonable rules for selection to any employment or appointment to any office. It is open to the appointing authority to lay down such pre-requisite conditions for appointment as would be conducive to efficiency of or proper discipline amongst Government servants. The test or condition adopted by the Government will be violative of Art. 16 of the Constitution, if there is no relevant connection between the test prescribed and the interest of public service. The burden of showing that a classification rests upon an arbitrary and not reasonable basis is upon the person who impeaches the test or condition as violation of guarantee of equal protection. A person who complains of violation of Art. 16 (1) must show that he satisfies all tests and conditions validly prescribed by the authority and was yet denied equal opportunity. (Para 5)

The equality of opportunity guaranteed by Art. 16, however, means equality as between members of the same class of employees, and not equality between members of separate, independent classes. AIR 1961 SC 1245 Rel. on. (Para 6)

Where recruitment to certain posts is from different sources, e. g. direct recruitment and promotion from lower posts, it would be for the Government to determine, having regard to the recruitments and needs of a particular post, what ratio as between the two sources would be adequate and equitable. AIR 1967 SC 839 Rel. on. (Para 6)

Anno: AIR Comm. Constitution of India, 2nd (1974) Edn. Art. 16 N. 2, 3

Cases Referred: Chronological	**Paras**
1973 Lab IC 745 : 1972 M. P. LJ 834	3
AIR 1967 SC 52	6
AIR 1967 SC 839	6
AIR 1967 SC 1427	7
AIR 1961 SC 1245	6

P. C. Pathak for Petitioners; S. L. Garg Advocate General with S. L. Saxena Govt. Advocate, (for No. 1); D. M. Dharmadhikari, (for No. 18); Fakhruddin (for No. 14); Ravindra Kumar Verma, (for Nos. 4 and 8) and V. S. Dabir, (for Nos. 2 and 11) for Respondents.

C. P. SEN, J.:— The Division Bench has referred the question regarding the constitutional validity of Madhya Pradesh Veterinary (Gazetted) Recruitment Rules, 1966, to the larger Bench, as required under Art. 228-A of the Constitution of India.

2. The 4 petitioners and the respondents 2 to 20 were all recruited as Veterinary Assistant Surgeons (Class III non-gazetted posts) in the service of Agriculture and Veterinary Department of the State of Madhya Pradesh. In due course, the petitioners were confirmed in their posts. In this petition, the petitioners have challenged the selection of the respondents 2 to 11 as direct recruits to Class II Gazetted posts in the Veterinary Department in the year 1968-69 and also that of the respondents 12 to 20 as direct recruits in the same posts in the year 1970-71. The posts were duly advertised and selections were made through the Public Service Commission as per the Madhya Pradesh Veterinary (Gazetted) Recruitment Rules, 1966, (hereinafter referred to as 'the Recruitment Rules') framed under Art. 309 of the Constitution, by the Governor of Madhya Pradesh. The petitioners have contended that the rules 6 and 8 of the Recruitment Rules are ultra vires and repugnant to Arts. 14 and 16 of the Constitution because these 2 rules deny equality of opportunity in respect of promotions to Government servants similarly placed.

3. Rule 6 provides that the recruitment to the posts in Class II (Gazetted) Veterinary Service shall be (i) by direct recruitment and (ii) by promotion. Item No. 13 in Schedule II appended to this rule prescribes that 50 per cent of the posts will be filled up by direct recruitment and the remaining 50 per cent by promotion. R. 8 lays down the conditions of eligibility of direct recruits. Column 5 of Sch. III appended to this rule before its amendment prescribed minimum age limit of 21 years and upper age limit of 30 years. Cl. (c) of sub-rule (i) of this rule provided that upper age limit of State Government employees shall be relaxable (i) for permanent employees up to 30 years and (ii) for temporary employees up to 35 years. In R. C. Chaturvedi v. State of M. P. 1972 M P LJ 834 : (1973 Lab IC 745) sub-cl. (8) (i) (c) (i) was struck down by this Court on 3-12-1971 as repugnant to Art. 16 of the Constitution as it discriminated permanent employees in relation to the temporary employees. Thereafter

the Sch. No. III was amended prescribing upper age limit of 40 years as per Government notification dated 4-12-1971. In view of the extended upper age limit of 40 years, sub-cls. (i) and (ii) of cl. (c) of sub-rule (i) of R. 8 have become redundant and meaningless.

4. Vires of R. 6 is challenged on the ground that the reservation of 50 per cent of posts by direct recruitment is only a device to confer benefits on junior officers by deliberately ignoring the better claims of the more senior and experienced officers working in the same cadre. There was no point in making selection by direct recruitment when the source of selection is only, that is, the Government employees already working in the department, as there is no private practitioner in Madhya Pradesh. If at all there is to be selection to higher Class II posts, the same should be purely on the basis of merit cum seniority and on no other considerations, as provided in case of recruitment by promotion. R. 8 is said to be ultra vires because it denies equality of opportunity to more senior and experienced officers working in the same cadre by laying down the age limit for eligibility for selection as direct recruit. When there is no age limit prescribed for selection by promotion, there should be none for selection by direct recruitment also.

5. Art. 16 (1) of the Constitution guarantees that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Matters relating to employment or appointment are wide enough to include the matter of promotion. This does not mean that the Government are not, like other employees, entitled to pick and choose from amongst a number of candidates offering themselves for employment under the Government. It does not prohibit the prescription of reasonable rules for selection to any employment or appointment to any office. It is open to the appointing authority to lay down such pre-requisite conditions for appointment as would be conducive to efficiency of or proper discipline amongst Government servants. The test or condition adopted by the Government will be violative of Art. 16 of the Constitution, if there is no relevant connection between the test prescribed and the interest of public service. The burden of showing that a classification rests upon an arbitrary and not reasonable basis is upon the person who impeaches the test or condition as violation of guarantee of equal protection. A person who complains of violation of Art. 16 (1) must show that he satisfies all tests and conditions validly prescribed by the authority and was yet denied equal opportunity.

6. The equality of opportunity guaranteed by Art. 16, however, means equality as between members of the same class of employees, and not equality between members of separate, independent classes—Jagannath v. State of U. P. AIR 1961 SC 1245. Where recruitment to certain posts is from different sources, e. g. direct recruitment and promotion from lower posts, it would be for the Government to determine, having regard to the recruitments and needs of a particular post, what ratio as between the two sources would be adequate and equitable. (Govind v. Chief Controller, AIR 1967 SC 839). The Supreme Court upheld the reservation of 50 per cent of posts for direct recruits and the remaining 50 per cent for promotees and negatived the contention that this system has resulted in discriminatory treatment to promotees with the consequence that promotees of much larger service are put in the seniority list below direct recruits with shorter service—Mervyn Continho v. Collector of Customs, Bombay, AIR 1967 SC 52.

7. In Jaisinghani v. Union of India AIR 1967 SC 1427, the Supreme Court has held as under (at p. 1431):—

"The relevant law on the subject is well settled. Under Art. 16 of the Constitution, there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State or to promotion from one office to a higher office thereunder. Art. 16 of the Constitution is only an incident of the application of the concept of equality enshrined in Art. 14 thereof. It gives effect to the doctrine of equality in the matter of appointment and promotion. It follows that there can be a reasonable classification of the employees for the purpose of appointment or promotion. The concept of equality in the matter of promotion can be predicated only when the promotees are drawn from the same source. If the preferential treatment of one source in relation to the other is based on the differences between the said two sources, and the said differences have a reasonable relation to the nature of the office or offices to which recruitment is made, the said recruitment

can legitimately be sustained on the basis of a valid classification."

8. The Government was within its rights in laying down that class II Gazetted posts in the Veterinary Department would be filled up by direct recruitment and also by promotion. The Government was also justified in reserving 50 per cent of posts for direct recruits and the remaining 50 per cent for promotees in the interest of public service. Direct recruits are being taken in order to infuse new blood and spirit in the services. By getting direct recruits at an early ages, the Government gets longer service from them and their efficiency is improved. The sources of selections of direct recruits and promotees are—different, one from the open market, including those in the department fulfilling the conditions of eligibility and the other from amongst the employees already working in the department. The petitioners are, therefore, not right in comparing direct recruits with promotees. It is incorrect to say that the source of selection of the direct recruits is only from departmental candidates. It may be that in the selections of 1968-69 and 1970-71, no outsiders were selected, may be because none was found suitable or none fulfilled the conditions of eligibility. The assertion that no candidates are available in the open market in the State has not been substantiated. Even if private candidates were not available in the State, that does not mean that there are no candidates available outside the cadres of the M. P. State Goverment employees for filling up the posts of direct recruits, from open market. The selection of direct recruits is also thrown open to departmental candidates fulfilling the conditions of eligibility and they have no cause to complain. Those departmental or private candidates outside the upper age limit can make no grievance that they should also be considered for selection. There is no question of junior or senior in the selection of direct recruits, when the selection has to be on merit cum suitability. There has been no denial of equality of opportunity to candidates similarly placed either belonging to the services or coming from the open market.

9. It is, therefore, answered that the rules 6 and 8 of the Madhya Pradesh Veterinary (Gazetted) Recruitment Rules, 1966, do not, in any way, infringe Arts. 14 and 16 of the Constitution.

Answer accordingly.

AIR 1978 MADHYA PRADESH 122
FULL BENCH

SHIV DAYAL, C. J., G. P. SINGH, K. K. DUBE, M. L. MALIK AND J. P. BAJPAI, JJ.*

Brij Gopal Denga and others, Petitioners v. State of Madhya Pradesh and another, Respondents.

Misc. Petn. No. 342 of 1977, D/- 9-11-1977.**

Constitution of India, Art. 228-A — Writ petition challenging constitutionality of State law — Division Bench whether competent to admit or dismiss — Words "determination" and "any question" occurring in Art. 228-A — Interpretation of — AIR 1977 All 270 (FB) Dissented from.

Per Majority, (G. P. Singh, J. Dissenting)

Although a question of constitutional validity of a State law has been raised in a writ petition.

(1) the writ petition must, in the first instance, be placed before a Division Bench for admission. A Division Bench is competent to admit it and also to grant interim relief, such as, stay, injunction, etc.

(2) A Bench of less than five Judges cannot dismiss a petition even at the admission stage, where any question as to constitutional validity of a State law is to be determined, except in the following cases:—

(i) When the question is irrelevant and, therefore, does not arise for determination.

(ii) When the question has already been determined by the Supreme Court.

(iii) When the question has already been determined by a Bench of at least five Judges of the High Court, and the

*(Note:— In this case, the Judges of the Full Bench differ in their views. The majority view is taken by Shiv Dayal, C. J., J. P. Bajpai, K. K. Dube and M. L. Malik, JJ. and the minority, by G. P. Singh, J. The judgments in the case are, however, printed in the order in which they are given in the certified copy. The first judgment is not, therefore necessarily the judgment expressing the majority view—Ed.)

**(Decided by Full Bench on order of reference made by K. K. Dube and R. K. Tankha, JJ., D/- 10-8-1977.)

Division Bench does not feel reconsideration of the decision by a larger Bench to be necessary. AIR 1977 All 270 (FB), Dissented from. AIR 1977 SC 1686, AIR 1977 SC 1772 and AIR 1977 SC 2034 Explained. Case law discussed. (Paras 55, 56, 77)

When a Bench admits a petition under Art. 226 or any other case for that matter, it merely means that it has been entertained for hearing parties. It cannot be said that by admitting a case the Court has determined the question raised in it in favour of the first party. But the position is quite different when a case is dismissed at the admission stage. Dismissal at the admission stage has the same force and effect as dismissal after hearing parties. In either case, it is binding on the parties. It operates as res judicata. When a petition raises constitutional validity of a State law, its dismissal even at the admission stage amounts to "determination" of that question within the meaning of Art. 228-A of the Constitution. The word "determine" in Cl. (3) of Art. 228-A must be read in its usual connotation, which means an application of the mind and expression of the conclusion. It makes no difference whether the question is determined at the stage of admission or after hearing the parties, nor does the length of reasons given for rejecting the contention matter. (Paras 20 to 25, 55)

No limitation can be imposed on the word "question" occurring in Article 228-A so as to interpret it as meaning "real question" or "substantial question" and not any question of whatever weight or worth. The expression "any question", as employed in Article 228-A (3) is of widest connotation so as to embrace every question relating to constitutional validity, irrespective of its worth or weight. Further, there is nothing in the express language of that provision or to infer by necessary implication, that it comes into play only after a case is admitted but not at the admission stage, so as to make it permissible that a Bench of less than five Judges can determine the question of constitutional validity and dismiss a petition in limine. The words "any question" cannot be circumvented because, in the opinion of the Court, it will cause administrative inconvenience. (Paras 27, 39, 55)

Per J. P. Bajpai J. (concurring with Shiv Dayal, C. J.) — Certain observations of the Supreme Court in AIR 1977 SC 1686 and in AIR 1977 SC 2034 support the view taken by Hon'ble Chief Justice. (Para 64)

Per M. L. Malik J. (concurring with Shiv Dayal, C. J.) — A writ petition involving any question of constitutional validity of the State law must go before a Bench of not less than five Judges even at the admission stage since denial of admission on that question would be a "determination" of the question. It is settled practice, nay a requirement of law, that it is that Court alone, which can finally decide a matter on merits which can dismiss it in motion. However, having regard to administrative convenience, the writ petition may be placed before the Division Bench and it would not be violative of Art. 228-A (Paras 72, 73)

Per K. K. Dube, J. (concurring with Shiv Dayal, C. J.) — A writ petition requiring determination of any question of constitutional validity of a State law must go before a Bench of not less than 5 Judges even at the admission stage. In any case, the determination of the question as to the constitutional validity could not be done in motion hearing by the Division Bench. (Para 76)

Cases Referred: Chronological Paras

AIR 1977 SC 1615 : 1977 Cri LJ 1119 10
AIR 1977 SC 1666 : 1977 Lab IC 908 12
AIR 1977 SC 1686 : 1977 Tax LR 2219 10, 45, 50, 55, 59, 68, 71
AIR 1977 SC 1772 : 1977 Cri LJ 1164 9, 10, 47, 48, 50, 59. 63, 70, 71
AIR 1977 SC 2034 : (1977) 3 SCC 448 10, 46, 50, 55, 59, 62, 68, 76
AIR 1977 All 270 (FB) 11, 26, 60
AIR 1976 SC 2547 71, 76
AIR 1975 SC 43 35
AIR 1975 SC 1039 : 1975 Tax LR 1529 34
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AIR 1975 SC 2216 : 1975 Lab IC 1598 5, 24
AIR 1973 SC 927 37
AIR 1971 SC 530 10
AIR 1971 SC 786 : 1971 Cri LJ 662 48, 63
(1970) 2 All ER 871 (HL), Ballrooms v. Zenith Investments 8
AIR 1969 SC 1062 31
(1967) 66 ITR 619 (SC) 6
AIR 1966 SC 529 36
AIR 1966 SC 1490 : 60 ITR 188 6
AIR 1966 SC 1593 37
AIR 1966 SC 1987 8
(1966) 60 ITR 428 (SC) 6

AIR 1965 SC 1296 36
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AIR 1963 SC 550 33
AIR 1963 SC 677 23, 25
AIR 1963 SC 1128 37
AIR 1962 SC 113 37
AIR 1959 SC 459 30
AIR 1958 SC 107 : 1958 Cri LJ 254 48, 63
AIR 1955 SC 661 36
AIR 1954 SC 749 38
AIR 1953 SC 148 29
AIR 1950 SC 265 36
AIR 1938 PC 281 32
AIR 1933 PC 63 29
1897 AC 22, Solomon v. Solomon 35
(1891) AC 531 : 65 LT 621, Commr. for Special Purposes of Income-tax v. Pemsel 29
(1846) 6 Moo Ind App 1 : 13 ER 582, Crawford v. Spooner 29
(1840) 7 Cl & F 572, Gwynne v. Burnell 31

Y. S. Dharmadhikari with Gulab Gupta, for Petitioners; S. L. Garg, Advocate General, for the State.

G. P. SINGH, J. (Minority view):— In this petition under Art. 226 of the Constitution, one of the points raised is that S. 19 (c) (2) of the Madhya Pradesh Co-operative Societies Act, 1960, is ultra vires for two reasons: First, that it offends Art. 19 (1) (c) of the Constitution; and secondly, that it suffers from excessive delegation. When the petition came up for admission before a Division Bench (K. K. Dubey and R. K. Tankha, JJ.), the learned Judges referred the petition to a Bench of five Judges. It was also impliedly indicated that the Bench of five Judges would first consider the question whether, when in a petition the constitutional validity of a State law is raised, the petition can be placed before a Bench of two Judges for purposes of admission in view of Art. 228-A of the Constitution. It is on this question that we have heard arguments and it is this question which I proceed to decide by this order.

2. Under the rules of the High Court made in exercise of the powers conferred by Art. 225 of the Constitution and Cl. 27 of the Letters Patent, a petition under Art. 226 is laid before a Division Bench for motion hearing. At the time of motion hearing, the Court may either summarily dismiss the petition or order a rule nisi to be issued against the opposite party. The purpose of motion hearing is to find out whether the petition raises arguable points. If the Bench hearing the petition at the admission stage finds that no arguable points are raised, the petition is dismissed. But if the Bench finds that arguable points are made out, the petition is admitted and rule nisi is issued. Before Art. 228-A was inserted in the Constitution by the Constitution (Forty-second Amendment) Act, 1976, a petition challenging the validity of any State law could be admitted by a Division Bench and could also be rejected by it at the time of motion hearing. The question is as to how far this practice should stand modified in view of Art. 228-A which reads as follows:

"228-A. (1) No High Court shall have jurisdiction to declare any Central law to be constitutionally invalid.

(2) Subject to the provisions of Article 131-A, the High Court may determine questions as to the constitutional validity of any State law.

(3) The minimum number of Judges who shall sit for the purpose of determining any question as to the constitutional validity of any State law shall be five:

Provided that where the High Court consists of less than five Judges, all the Judges of the High Court may sit and determine such question.

(4) A State law shall not be declared to be constitutionally invalid by the High Court unless—

(a) where the High Court consists of five Judges or more, not less than two thirds of the Judges sitting for the purpose of determining the validity of such law, hold it to be constitutionally invalid; and

(b) where the High Court consists of less than five Judges, all the Judges of the High Court sitting for the purpose hold it to be constitutionally invalid.

(5) The provisions of this Article shall have effect notwithstanding anything contained in this part.

Explanation: In computing the number of Judges of a High Court for the purpose of this article, a Judge who is disqualified by reason of personal or pecuniary bias shall be excluded."

3. Article 228-A does not specifically provide that a petition under Art. 226 raising a point as to the constitutional validity of any State law cannot be heard by a Division Bench at the admission stage. The provision in Art. 228-A is that the minimum number of Judges who

shall sit for the purpose of determining any question as to the constitutional validity of any State law shall be five and that a State law shall not be declared to be constitutionally invalid unless two-thirds of the Judges sitting for the purpose of determining the validity of such law hold it to be constitutionally invalid. When a petition raising a point as to the constitutional validity of a State law comes up before a Division Bench for motion hearing, the Bench will naturally consider whether the point as to the constitutional validity is arguable or not. If the Bench comes to the conclusion that the point is arguable, the petition would be admitted. Up to this stage there is no difficulty, for it cannot be said that the Bench by admitting a petition determines any question as to the constitutional validity and thereby violates Art. 228-A. The real question is: whether, when the Division Bench hearing the petition at the admission stage comes to the conclusion that the point as to the constitutional validity is unarguable, can it summarily dismiss the petition?

4. Now the requirement in Cl. (3) of Art. 228-A that five Judges must sit is only for "the purpose of determining any question as to the constitutional validity of any State law". Cl. (3) comes into play only when there is a question as to the constitutional validity of any State law as it presupposes the existence of such a question. The enquiry whether there is any question as to the constitutional validity involved in a case is outside Cl. (3). Therefore, this enquiry can be undertaken by a Division Bench at the admission stage. What would be the ambit of this enquiry will depend upon the meaning of the word "question" in the context of Art. 228-A. The dictionary meaning of the word "question" is as follows:

"Interrogative statement of some point to be investigated or discussed; a problem; hence a matter forming, or capable of forming, the basis of a problem; a subject involving more or less difficulty or uncertainty (Shorter Oxford English Dictionary, Vol. 2, p. 1639)."

In the context of Art. 228-A, every point raised as to the constitutional validity of any State law cannot be understood to be a question. If the point raised requires investigation or discussion, if it presents a problem, if it involves difficulty or uncertainty, then and then alone the point raised can be described to be a question. If the point raised is wholly unarguable or unsubstantial, or when the answer is self-evident, it cannot be said that any question is raised requiring determination under Art. 228-A. The point raised must form or be capable of forming a problem or a subject needing investigation, or discussion at the High Court level. For example, if a petition says that the Madhya Pradesh State Legislature had no legislative competence to enact the Madhya Pradesh Land Revenue Code as a whole, the point so raised cannot be taken to be a question requiring any discussion and deliberation because it is known to everyone at the High Court level that the State Legislature has jurisdiction under Entries 18 and 45 of the State List to legislate on the topics of land and land revenue. Similarly, if a point as to the constitutional validity of a law is concluded by a Supreme Court decision or by an authoritative decision of the High Court, it would not be possible to say that the point is a question because in such a case the point would not need any further deliberation or discussion. The words "any question" as used in Cl. (3) of Art. 228-A, in my opinion, must mean any real question. A point as to the constitutional validity which cannot be supported by any reasonable argument or which is authoritatively concluded cannot be said to raise a question for determination under Cl. (3). When there is no room for dispute or doubt as to the constitutional validity of the relevant State law, or in other words, when its constitutional validity is beyond question, a case challenging the constitutional validity cannot be said to raise a real question and need not be heard by a Bench of five Judges.

5. The use of the word "determination" in Cl. (3) also points to the same conclusion. The word "determination" as explained by the Supreme Court in Divisional Personnel Officer, Southern Rly. v. T. R. Challapan, AIR 1975 SC 2216 is wider than the word "consider". The former, according to this decision, embraces a wider enquiry than what is contemplated by the word "consider" which connotes a summary enquiry. The question falling under Cl. (3) of Article 228-A must be such which requires a detailed treatment than a summary enquiry which is held at the admission stage in deciding whether a petition raises arguable points. When a point as

to the constitutional validity can be rejected summarily on the ground that there is no reasonable argument in its support, it cannot be said that the petition raises any question requiring determination within the meaning of Article 228-A (3).

6. In dealing with S. 66 of the Income-tax Act, 1922, it has been held that the Tribunal is not bound to refer a question of law to the High Court for decision if it is concluded by a judgment of the highest Court. The reason is obvious. When a question is concluded by the opinion of the highest Court, it ceases to be a question as it needs no deliberation or discussion and becomes purely academic: (Mathura Prasad v. Commr. of Income-tax, (1966) 60 ITR 428 at p. 433 (SC)). Similarly, when the question raised cannot be supported by reasonable arguments, or when it is not substantial, or when its answer is self-evident, the High Court does not require the Tribunal to refer the question: (Commr. of Income-tax, Ernakulam v. Managing Trustee, Jalkhabai Trust, (1967) 66 ITR 619 (SC); Commr. of Income-tax v. Chander Bhan Harbhajan, 60 ITR 188 at p. 195 : (AIR 1966 SC 1490 at pp. 1494-95)). The principle behind all these cases is the same that when the point raised is not a real question at all, it would be an exercise in futility to require a Tribunal to refer it for decision of the High Court.

7. So far I have considered the meaning of Cl. (3) of Art. 228-A from its language alone without reference to its object. The object behind the Article may now be seen to ascertain if the meaning arrived at above by me in any way goes counter to the object. The object behind Art. 228-A and the corresponding Art. 144-A, as stated in the object and reasons appended to the Bill, is as follows:

"It is proposed to strengthen the presumption in favour of the constitutionality of legislation enacted by Parliament and State Legislatures by providing for a requirement as to the minimum number of Judges for determining questions as to the constitutionality of laws and for special majority of not less than two-thirds for declaring any law to be constitutionally invalid."

The same point was stressed by Shri Swaran Singh in his speech in Parliament on 26th Oct. 1976 when the Bill was being considered. When a Legislature makes a law it is presumed to act within the framework of the Constitution and, therefore, the law enacted is presumed to be valid. Parliament by enacting Art. 228-A wanted to strengthen this presumption so that a State enactment may not be declared invalid by less than two-thirds majority of a Bench of five Judges of the High Court. The object behind Art. 228-A is not defeated or is in no way impaired if a Division Bench of the High Court at the motion hearing stage rejects a point as to the constitutional validity by holding that it is unarguable and that it raises no question for determination by a Bench of five Judges.

8. I have earlier stated that the word "question" as it occurs in Cl. (3) of Article 228-A can only mean a real question, i. e. an arguable question. But assuming that the word "question" is capable of embracing in some context even a point which is unarguable, I am of opinion that in the context of Art. 228-A the word "question" can only mean a real question. If the point as to the constitutional validity is unarguable, it would be an exercise in futility to constitute a Bench of five Judges for hearing such a point. If the word "question" is given a construction to embrace even such a point, it will lead to ridiculous and highly inconvenient results in the working of the High Court. The High Courts, it is well-known, are already flooded with cases and it is not possible to cope with the arrears even by sitting in Single Benches and Division Benches. The construction that all points as to the constitutional validity of a State law whether arguable or not must be heard even at the admission stage by a Bench of five Judges will put a heavy burden on the High Courts as a Bench of five Judges will always have to be in readiness for motion hearing of writ petitions involving such points, more so because the expression "State law" is defined to include not only Acts of the Legislature but also any notification, order, Scheme, rule, etc. having the force of law. Even a question which has already been determined by the Supreme Court or by an authoritative pronouncement of the High Court will have to be placed for hearing in motion before a Bench of five Judges. A perusal of the object and reasons of the Bill will show that the Parliament was alive to the accumulating arrears in the High Courts and it could not have intended to use the relevant words in Art. 228-A (3) in the sense

which leads to these results when it in no way promotes the object of strengthening the presumption of the constitutional validity. It is a well-settled principle of construction of the Constitution that when two constructions are possible, the Court must adopt that which will ensure smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well-established provisions of law nugatory: (Chandra Mohan v. State of U. P., AIR 1966 SC 1987 at p. 1993). It is no doubt true that when the language is express and no alternative construction is open, the Court must give effect to the language irrespective of its consequences. But as was well said by Lord Reid, "such cases are rare because the English language is a flexible instrument": (Ballrooms v. Zenith Investiments, (1970) 2 All ER 871 at p. 874 (HL)). The Courts are, therefore, not readily prepared to concede as plain language which involves absurdity or practical inconvenience: (Maxwell, 11th Edition, p. 6). The real role that is played by the consideration of consequences in the process of construction is correctly appreciated by Max Radin as follows:

"It is ... ... true that the consideration of the consequences of a decision has at all times been a controlling factor in the judicial process. Those Courts who declare vigorously that they are completely indifferent to the consequences of what they decide, and would decide as they do though the heaven fell, merely mean that they do not really believe that the consequences will be seriously harmful. If they meant what they said, and acted on it, they would be taking a long step towards the destruction of our judicial system." (33 Calif. L. Rev. 219, p. 228).

If Cl. (3) of Art. 228-A had used the words "any question, whether arguable or not" there would have been no room for construction. However, as the words used are only "any question", they have to be understood as meaning any real question or any arguable question to avoid the ridiculous result and practical inconvenience which would flow from holding that the expression is wide enough to include even questions which are unreal or unarguable.

9. The conclusion reached by me above is strongly supported by the Supreme Court ruling in State of W. B. v. Manmal, AIR 1977 SC 1772. The respondent in Manmal's case challenged before the Supreme Court the constitutional validity of the West Bengal Criminal Law Amendment (Special Courts) Act, 1949. It was submitted that the provisions of the Bengal Act, particularly the proviso to S. 4 (1) of the Act, offended Art. 14 (1) of the Constitution on the ground that a person who ceases to be a public servant could not be treated differently from a person who is a public servant in office. An application was made under Art. 144-A, as inserted by the Forty-second Amendment, that the appeal be heard by a Bench of seven Judges. A Division Bench consisting of Goswami and Fazal Ali, JJ. held that because a particular section is not applicable to a public servant after he ceased to be in office, the question of the Act being violative of Art. 14 of the Constitution will not arise. The Court further referred to the proviso to S. 4 (1) of the Bengal Act and said that it was difficult to imagine how such a provision could attract Art. 14 of the Constitution. Holding that there was no substance in the contention that the West Bengal Act offended Art. 14 of the Constitution and was, therefore, constitutionally invalid, the Court refused to refer the case to a larger Bench. The case is thus a clear authority for the proposition that if a question raised is not a real question and is not reasonably arguable it is not necessary that the same should be heard under Art. 144-A by a Bench of seven Judges of the Supreme Court. As Article 228-A, is in pari materia with Article 144-A, the aforesaid ruling of the Supreme Court in Manmal's case fully applies for its construction. On a parity of reasoning, if a point raised as to the constitutional validity of a State law is without any substance and is not reasonably arguable, the same will not attract the applicability of Cl. (3) of Art. 228-A and it need not be determined by a Bench of five Judges.

10. It was, however, argued on the authority of Misrilal Jain v. State of Orissa, AIR 1977 SC 1686 that even an unarguable point as to the constitutional validity of a law has to be determined by a Bench of seven Judges of the Supreme Court. Misrilal's case was a civil appeal on special leave involving the constitutional validity of Orissa Taxation (On Goods Carried by Roads or Inland Waterways) Act. The grant of special leave means that the point raised is arguable: (V. K. Kamble v. State of

Maharashtra, AIR 1977 SC 1615). After the grant of special leave, the civil appeal was bound to be heard by a Bench of seven Judges in view of Art. 144-A. No question arose in that case whether a case involving a point as to the constitutional validity of a law can be heard by a Bench consisting of less than seven Judges at the admission stage. In passing, however, their Lordships observed that Art. 144-A should engage the prompt attention of Parliament so that it may, by general consensus, be so amended as to leave to the Court itself the duty to decide how large a Bench should decide any particular case. In that context, the Court said "a Court which has large arrears to contend with has now to undertake an unnecesseary burden by seven of its members assembling to decide all sorts of constitutional questions, no matter what their weight or worth". In my opinion these observations do not form part of the ratio decidendi of the case. Art. 144-A did not come up for construction in Misrilal's case. All that these observations mean is that all cases involving a question as to the constitutionality of a law should not even at the final stage be heard by a Bench of seven Judges and, therefore, Article 144-A should be suitably amended leaving the Court itself the duty to decide how large a Bench should decide a particular case. It is interesting to notice that Manmal's case (AIR 1977 SC 1772) to which reference has already been made was decided only three days after the decision in Misrilal's case. Fazal Ali, J., is a party to both the cases. If Misrilal's case had really decided that even a question as to the constitutionality, which is unsubstantial or unarguable, should be heard at the preliminary stage by a Bench of seven Judges, Manmal's case would have been decided differently. From the very fact that a Bench of the Supreme Court three days later in Manmal's case, to which one of the Judges sitting in Misrilal's case was a party, decided otherwise, it follows that Misrilal's case is not an authority for a contrary proposition. It is well settled that a ruling of the Supreme Court is not to be construed as a statutory enactment: (Rajeswar Prasad v. State of W. B., AIR 1965 SC 1887 at p. 1891). It is difficult to regard every observation in a judgment of the Supreme Court, divorced from its context, as containing an exposition of the law on a point of law when the point did not even fall to be answered in that judgment. A decision is only an authority for what it actually decides, and generality of the expressions used must be read and qualified by the particular facts of the case found or assumed to exist: (Madhav Rao Scindia v. Union of India, AIR 1971 SC 530 at pp. 578 and 634). Assuming that even an obiter dictum of the Supreme Court is binding, every observation is not a dictum and cannot be held to be binding. As earlier pointed out, in the context of the facts of Misrilal's case, the observations relating to Art. 144-A cannot be held to be an authoritative statement as to its construction. Our attention was also drawn to the case of Trustees for the Improvement of Calcutta v. C. S. Mallick, (1977) 3 SCC 448: (AIR 1977 SC 2034)). In this case, observations similar to those made in Misrilal's case were made by the Supreme Court. The Court drew the attention of Parliament to the paralysing impact on the highest Court and the long term cause of justice flowing from the numerical rigidity prescribed by Article 144-A. This was an appeal on certificate from a judgment of the Calcutta High Court which struck down Ss. 78-B and 78-C of the Calcutta Improvement Act, 1911, as ultra vires and invalid. As the High Court had struck down the aforesaid sections of the Act, prima facie, the appeal involved a question as to the constitutionality of a State law and had to be heard by a Bench of seven Judges. The observations regarding Art. 144-A in this case stand on the same footing as made in Misrilal's case. In this case also, Fazal Ali, J., was a party. The case was decided a day after the decision in Manmal's case without any reference to it. It cannot be assumed that by drawing the attention of Parliament to the inconvenient plurality brought in by Art. 144-A, the Court overruled the decision in Manmal's case. This case also, therefore, cannot be taken to be decisive of the interpretation of Article 144-A. As earlier pointed out, the question as to construction of Art. 144-A directly arose in Manmal's case and it is the ruling in that case which holds the field.

11. The conclusion reached by me is also supported by a ruling of the Allahabad High Court in Chandra Kanta v. State, AIR 1977 All 270 (FB). In that case, a Bench of five Judges of the Allahabad High Court held that Arti-

cle 228-A was not a bar to a Division Bench hearing a writ petition at the admission stage even if the petition raised a point as to the constitutional validity of any State law. The Court observed that the purpose of an admission hearing is to screen cases in order to see whether triable or arguable points arise; and, if a Division Bench is of opinion that the question as to the constitutional validity of the State law has no prima facie substance, it can dismiss the petition. I am in respectful agreement with this view.

12. It was argued at the bar that if a Division Bench rejects a petition by observing that a point as to the constitutional validity of a State law is not reasonably arguable or that it has no substance, it would be determining the question as to the constitutional validity which Cl. (3) of Art. 228-A requires to be determined by a Bench of five Judges. In my opinion, as explained earlier, the Division Bench in holding that the point is not arguable or that it has no prima facie substance only comes to the conclusion that there is no real question which could attract the operation of Cl. (3). There is a distinction between determining a question and determining whether a question at all arises. Although the Division Bench cannot determine a question as to the constitutional validity of a State law, it can determine whether such a question really arises. As earlier stated, when a Division Bench rejects a petition holding that no arguable point is made out as to the constitutional validity of a State law, it only determines that no question as to the constitutional validity arises for determination under Cl. (3). By way of analogy, I may here refer to the decision of the Supreme Court in Cox & Kings (Agents Ltd.) v. Their Workmen, AIR 1977 SC 1666 at pp. 1670-1671 in which it was pointed out that the determination of the question, whether or not an industrial dispute exists, is not a determination of the industrial dispute or any question relating thereto within S. 2 (b) of the Industrial Disputes Act, 1947.

13. During the course of arguments at the bar, some reference was made by [redacted]ri Dharmadhikari to the propriety of [redacted]cting Art. 228-A. It was also said [redacted]the Forty-second Amendment was [redacted] passed by Parliament. Indeed, [redacted]rned Advocate-General, who ap[redacted]or the State, stated at the out[redacted]he Government is committed to see that the Forty-second Amendment is repealed. This is, however, only one side of the picture. In a so-called All India Judicial Officers' Conference, held in Jan. 1977 under the Presidentship of the Chief Justice of a State and inaugurated by the then Union Law Minister, the latter was acclaimed as a man of genius who gave the Constitution a proper shape. A Judge of a High Court is reported to have said at another occasion that "the original Constitution was a handiwork of cheap imitators of the West and the Forty-second Amendment, on the other hand, was a result of the deliberations of the Swaran Singh Committee composed of all illustrious men who have distinguished themselves and who held a public debate." In an article written by a High Court Judge the principle of plurality and the requirement of two-thirds majority enacted in Art. 228-A were commended as "just and proper". It is now a matter of history that the "man of genius" and the "illustrious men" and most of those who were concerned with the Forty-second Amendment were thrown out at the hustings. The party which in its manifesto promised to repeal the Forty-second Amendment was elected with thumping majority. If the philosophy which was advocated by the Government, after the Fundamental rights' case, is to guide me, I must notice the wind of change to "help the Government" and condemn the Forty-second Amendment as an entirely ill-advised legislation, or at least construe it in such a manner as to make its provisions look ridiculous or absurd. The present situation, which was not envisioned when the above philosophy of "the forward looking Judge" was advocated demonstrates its utter hollowness. The true principle is that "the Court has no reason for existence if it merely represents the pressures of the day". The question as to the utility of the Forty-second Amendment Act and whether the Act as a whole or certain of its provisions should be retained or repealed is one to be considered by the politicians and Parliament and not by the Court. Even assuming that certain of the provisions of the Forty-second Amendment were not well-conceived, the task of the Court still remains to construe the provisions of the Act according to normal canons of construction. In so far as the words of the Act are express they must be obeyed irrespective of consequences. For

example, whether we like it or not, a case involving the constitutional validity of even a Statutory order must be heard at the final hearing stage by a Bench of five Judges and the order cannot be struck down on the ground that it violates the Constitution except by a two-thirds majority. The words of Article 228-A are express and explicit in that matter and must be obeyed. But where the words are general or open to more than one meaning, they have to be reasonably and objectively construed and effort has to be made to avoid practical inconvenience and ridiculous results. The presumption that Parliament never intends to create practical inconvenience and ridiculous consequences is also applicable while construing the Forty-second Amendment. The much criticised Act cannot be made to look worse by judicial construction.

14. Reference was also made during arguments to Arts. 32-A, 131-A and 226-A which were also inserted in the Constitution by the Forty-second Amendment. These Articles do not directly arise for consideration in the present case and as I do not get much assistance from them in the construction of Art. 228-A, I do not want to discuss them any further.

15. For the reasons stated above, I am of the opinion that a Division Bench can, at the stage of motion hearing, see whether a point as to the constitutional validity of a State law raised in a petition under Art. 226 is arguable; and, if it reaches the conclusion that the point is not reasonably arguable or that it has prima facie no substance, it can reject the petition. However, if the Division Bench comes to the conclusion that the petition raises an arguable point, having prima facie substance, it has to admit the petition and then the question as to the constitutional validity can be determined only by a Bench of five Judges.

SHIV DAYAL C. J. (Majority view):—

16. When this writ petition was placed before a Division Bench for admission, it directed that it be placed before a Bench of five Judges because a question of constitutional validity of S. 19-C (2) of the M. P. Co-operative Societies Act, 1960, has to be determined.

17. When the matter came up before this Bench, a preliminary question was raised whether a Bench of less than five Judges can, at the admission stage, dismiss a petition which raises any question as to the constitutional validity of any State law.

18. Under Cl. (1) of Art. 228-A of the Constitution jurisdiction of the High Court to declare any Central law to be constitutionally invalid has been taken away. Under Cl. (2) of that Article, jurisdiction has been retained in the High Court to "determine any question" relating to the "constitutional validity" of any State law. Clause (3) prescribes the minimum number of Judges who shall sit for that purpose. Clause (4) prescribes the minimum majority of two-thirds of the Judges sitting under Cl. (3) to declare any State law to be constitutionally invalid. Article 228-A reads thus:—

"228-A (1) No High Court shall have jurisdiction to declare any Central law to be constitutionally invalid.

(2) Subject to the provisions of Article 131-A the High Court may determine all questions relating to the constitutional validity of any State law.

(3) The minimum number of Judges who shall sit for the purpose of determining any question as to the constitutional validity of any State law shall be five:

Provided that where the High Court consists of less than five Judges, all the Judges of the High Court may sit and determine such question.

(4) A State law shall not be declared to be constitutionally invalid by the High Court, unless—

(a) where the High Court consists of five Judges or more, not less than two-thirds of the Judges sitting for the purpose of determining the validity of such law, hold it to be constitutionally invalid; and

(b) where the High Court consists of less than five Judges, all the Judges of the High Court sitting for the purpose hold it to be constitutionally invalid.

(5) The provisions of this Article shall have effect notwithstanding anything contained in this Part."

19. Shri Gulab Gupta argued that it is not necessary for five Judges to hear a petition at the admission stage, although the petitioner may have raised any question as to the constitutional validity of any State law. His argument was that at the admission stage the Court does not determine a question; it is only after the petition is admitted and both parties are heard that the question is "determined."

20. It is undoubted that where a petition or any other case which,

Rules of the High Court, is first to be admitted comes before the Court for admission and it is admitted, there is no determination of any question. When a Bench admits a petition under Art. 226 or any other case for that matter, it merely means that it has been entertained for hearing parties. It cannot be said that by admitting a case the Court has determined the question raised in it in favour of the first party.

21. But the position is quite different when a case is dismissed at the admission stage. The practice in this High Court is to give a hearing to the first party at the admission stage and if it is to be dismissed, the Court gives its reasons for not accepting the ground raised by the petitioner. When a case is dismissed in this manner, the questions raised are determined so far as this Court is concerned. Dismissal at the admission stage has the same force and effect as dismissal after hearing parties. In either case, it is binding on the parties. It operates as res judicata. Thus, the dismissal of a petition or an appeal or revision at the admission stage or after hearing parties makes no difference so far as its effect is concerned. It cannot then be said that a case is dismissed at the admission stage without determining the question raised in it.

22. When the Court hears a question, applies its mind to it and holds that it cannot be accepted, it is clearly determination of the question. The term "determination" may properly, and according to the legal use as well as according to its derivation, signify the coming to an end in any way whatever; end or expiration; more specifically the final result of a proceeding (26-A C. J. S. 885). When a case is dismissed at the admission stage by any Bench of this Court, after considering the question raised, and holding that the contention cannot be accepted, it must be said that the question has been determined conclusively by this Court, with its effective expression of opinion which ends the controversy or the dispute so far as this Court is concerned.

23. It is not the length of the reasons given in the order which will make it determination". For instance, if in a where both parties have been heard the Court decides the question in or three sentences only, it is all the "determination" of the question. Here, the test is whether the effect of the order is to end the controversy or dispute so far as this Court is concerned. This view is in accord with their Lordships' decision in Jaswant Sugar Mills Ltd., Meerut v. Laxmichand, AIR 1963 SC 677, where Mr. Justice J. C. Shah, speaking for the Court, succinctly pointed out:—

"The expression 'determination' in the context in which it occurs in Art. 136 signifies an effective expression of opinion which ends a controversy or dispute by some authority to whom it is submitted under a valid law for disposal."

If I may say so with respect, this is succinct and precise definition of "determination". This test is satisfied when a writ petition or any other case for that matter is dismissed at the admission stage. Can the party again approach the Court by saying that the question was determined at the admission stage so that it may be reheard? Can it plead before the subordinate Court that the question was not determined just because it was negatived at the admission stage?

24. In Divisional Personnel Officer v. T. R. Challapan, AIR 1975 SC 2216, their Lordships laid down thus:—

"The word 'consider' merely connotes that there should be active application of the mind by the disciplinary authority after considering the entire circumstances of the case in order to decide the nature and extent of the penalty to be imposed on the delinquent employee on his conviction on a criminal charge."

25. Therefore, I am of the undoubted view that when a question is decided against the first party at the admission stage, the question raised by him is "determined" within the meaning of Article 228-A. It cannot be said that the question was not determined merely because the petition, or the appeal, as the case may be, was dismissed at the motion hearing stage, because then it will have to be said that the question remained undetermined. And, if the question remained undetermined, a second petition will lie. In other words, the difference does not lie in the stage at which the question is determined. If it satisfies the test laid down in Jaswant Sugar Mills' case (AIR 1963 SC 677) (supra), it is determination. That test is satisfied when, in any proceeding, be it a petition or an appeal or a revision, the question is decided whether before notice is issued to the second party or after hear-

ing both parties, and irrespective of the length of the reasons given by the Bench deciding the question.

26. For the reasons I have stated above, I am unable to agree with the Full Bench of the Allahabad High Court in Chandrakanta v. State, AIR 1977 All 270 (FB).

27. It was then suggested that the word "question" should be given such interpretation as may allow dismissal at the admission stage and that this can be done if the word "question" be interpreted to mean "real question" or "substantial question" and not any question of whatever weight or worth. It was suggested that this must necessarily be done; otherwise, there will be a flood of cases in which parties will raise any futile or frivolous question as to the constitutional validity of any State law. It will entail waste of time of the Court because every now and then five Judges will have to assemble. This High Court, so far, has not been confronted with such a situation and there is no reason to look at the Bar with that suspicion. However, I shall deal with the point of administrative inconvenience a little later. I shall understand the word "question" according to well settled rules of interpretation of statutes. Now, the expression used is "any question". There is no qualifying word like "substantial" or "difficult", which words are well known and have been freely used by Parliament. For instance, in Art. 133 of the Constitution, the word "substantial" is employed. Here also, cl. (3) of Art. 228-A could be differently worded by Parliament. For instance, it could have used an expression, such as "any substantial question" or "any question", which, in the opinion of the Bench hearing it, needs to be decided by a Bench of five Judges. Prefixing the word "question" by the word "any" makes the expression emphatic and comprehensive enough to include any question whatever, provided it relates to the constitutional validity of any State law. "Question" is "a subject or point of investigation, examination, or debate; theme of inquiry; problem; matter to be enquired into; as a delicate or doubtful question; a proposition; something in controversy; or which may be the subject of controversy; including every issue capable of judicial determination". (74 CJ8 4). Similarly, the word "any" when used as an adjective, means "all" and excludes limitation or qualification, as per the meaning given in Stroud's Judicial Dictionary, 3rd Edn. P. 150. It means "whichever, no matter which". In the Oxford Dictionary also, "any" has been taken to mean "all".

28. When the learned Advocate General was asked the distinction between "point" and "question" has promptly replied that a point, when raised and argued, becomes a question. In my opinion, he is right.

29. In Nalinakhva v. Shyam Sunder, 1953 SCR 533: AIR 1953 SC 148, Mr. Justice S. R. Das, as his Lordship then was, laid down thus:—

"It must always be borne in mind, as said by Lord Halsbury in Commr. for Special Purposes of Income Tax v. Pemsel, 1891 AC 531, that it is not competent to any Court to proceed upon the assumption that the Legislature has made a mistake. The Court must proceed on the footing that the Legislature intended what it has said. Even if there is some defect in the phraseology used by the Legislature, the Court cannot, as pointed out in Crawford v. Spooner, (1846) 6 Moo Ind App 1 (PC), aid the Legislature's defective phrasing of an Act or add and amend or, by construction, make up deficiencies which are left in the Act. Even where there is casus omissus, it is, as said by Lord Russel of Killowen in Hansraj Gupta v. Dehra Dun Mussorie Electric Tramway Co. Ltd., AIR 1933 PC 63, for others than the Courts to remedy the defect."

30. It is not permissible to add words to a statute. In Shriram Ramnarayan v. State of Bombay, 1959 Supp (1) SCR 489: (AIR 1959 SC 459 at p. 470), Mr. Justice N. H. Bhagwati laid down thus:—

"If the language of the enactment is clear and unambiguous, it would not be legitimate for the Courts to add any words thereto and evolve therefrom some sense which may be said to carry out supposed intention of the legislature. The intention of the legislature is to be gathered only from the words used by it and no such liberties can be taken by the Court for effectuating a supposed intention of the legislature. There is no warrant at all, in our opinion, for adding these words in the plain terms of Art. 31A (1) (a) and the words 'extinguishment or modification of any rights' must be understood in their plain, grammatical sense without any limitation of the type suggested by the petitioners."

That case was decided by a Bench of five Judges, presided over by S. R. Das, C. J. On that high authority and on parity of reasons it must be held that, under the garb of interpretation, no limitation can be imposed on the expression "any question" by adding the word "substantial" or "real."

31. I shall presently cite a few, out of numerous cases decided by the Supreme Court, where it has been laid down, time without number, that hardship or inconvenience is no ground to reject the plain meaning and that considerations of propriety of justice, as understood by the Court, cannot be availed at the stake of ordinary meaning of the statute. However, we would first of all quote Lord Brougham in Gwynne v. Burnell, (1840) 7 Cl & F 572 at p. 696:

"If we depart from the plain and obvious meaning on account of such views (as those pressed in argument on 43 Geo 3 C 99), we do not in truth construe the Act but alter it. We add words to it, or vary the words in which its provisions are couched. We supply a defect which the legislature could easily have supplied, and are making the law, not interpreting it."

These observations are quoted in M/s. New Savan Sugar and Gur Refining Co. Ltd. v. Commr. of Income Tax, Calcutta, AIR 1969 SC 1062 at p. 1068.

32. In Kamalaranjan v. Secy. of State, AIR 1938 PC 281 at p. 283, it was held:—

"The Court cannot put into the Act words which are not expressed, and which cannot reasonably be implied on any recognized principles of construction. That would be a work of legislation, not of construction, and outside the Province of the Court. It is said that it is reasonable that the holder of the estate from time to time who gets the benefit of the survey should have to bear the cost till it is entirely discharged and also that in practice this principle has been assumed and acted upon. That may well be so. But the question having been raised must be decided on legal principles and on the relevant statutes. If these do not give any such powers as the respondent claims, the difficulty can only be remedied by a change in the law."

In R. G. Jacob v. Republic of AIR 1963 SC 550, it was urged the word "subordinate" in section 5 of the Penal Code be read as subordinate in respect of those very official functions with which the business of transaction has connection. Their Lordships said:—

"By the use of the word "subordinate" without any qualifying words, the legislature has expressed its legislative intention of making punishable such subordinates also who have no connection with the functions with which the business or transaction is concerned. To limit the meaning of "subordinate" in the section by adding the words would be defeating that legislative intention and laying down a different legislative policy. This the Court has no power to do. The argument that 'subordinate' means something more than 'administratively subordinate' must, therefore, be rejected."

34. In S. T. Commr., U. P. v. Parson Tools and Plants, Kanpur, (1975) 3 SCR 743: (AIR 1975 SC 1039), their Lordships said (at pp. 1043 & 1044 of AIR):

"If the legislature wilfully omits to incorporate something of an analogous law in a subsequent statute, or even if there is a casus omissus in a statute, the language of which is otherwise plain and unambiguous, the Court is not competent to supply the omission by engrafting on it or introducing in it under the guise of interpretation by analogy or implication, something what it thinks to be a general principle of justice and equity. To do so, would be entrenching upon the preserves of the legislature, the primary function of a Court of law being jus dicere et non jus dare."

Again, in S. T. Commr., U. P. v. Mangal Sen, AIR 1975 SC 1106 (at p. 1110 of AIR), it was observed:—

"A statute is supposed to be an authentic repository of the legislative will and the function of a Court is to interpret it 'according to the intent of them that made it'. From that function the Court is not to resile. It has to abide by the maxim ut res magis valeat quam pereat lest the intention of the legislature may go in vain or be left to evaporate into thin air."

35. In Umed v. Rajsingh, (1975) 1 SCR 918: (AIR 1975 SC 43), Lord Watson in Solomon v. Solomon, 1897 AC 22, has been cited, where it was observed (at pp. 63-64 of AIR):

"The intention of the Legislature is a common but very slippery phrase, which popularly understood, may signify any-

thing from intention embodied in positive enactment to speculative opinion as to what the legislature would probably have meant, although there has been an omission to enact it. In a Court of law or equity, what the legislature intended to be done can only be legitimately ascertained from what it has chosen to enact, either in express words or by reasonable and necessary implication."
Their Lordships observed (at p. 64 of AIR):

"The function of the Court is to gather the intention of the legislature from the words used by it and it would not be right for the Court to attribute an intention to the legislature, which though not justified by the language used by it, accords with what the Court conceives to be reason and good sense and then bend the language of the enactment so as to carry out such presumed intention of the legislature. For the Court to do so would be to overstep its limits."

36. In State of Rajasthan v. Leela Jain, (1965) 1 SCR 276: AIR 1965 SC 1296, their Lordships said:—

"Unless the words are unmeaning or absurd, it would not be in accord with any sound principle of construction to refuse to give effect to the provisions of a statute on the very elusive ground that to give them their ordinary meaning leads to consequences which are not in accord with the notions of propriety or justice entertained by the Court."
In a still earlier case, Commr. of Agricultural Tax v. Keshab Chandra, (1950) 1 SCR 435: AIR 1950 SC 265, it was held that hardship or inconvenience cannot alter the meaning of the language employed by the legislature, if such meaning is clear on the face of the statute or the rules. In Martin Burn Co. Ltd. v. Calcutta Corporation, (1966) 1 SCR 543: AIR 1966 SC 529, the Supreme Court said:—

"The result flowing from a statutory provision is never an evil. A Court has no power to ignore that provision to relieve what it considers a distress resulting from its operation. A statute must of course be given effect to whether a Court likes the result or not."
In the celebrated case of Bengal Immunity Co. v. State of Bihar, (1955) 2 SCR 603: AIR 1955 SC 661 at p. 685, their Lordships laid down thus:—

"Why should the Court be called upon to discard the cardinal rule of interpretation for mitigating a hardship which after all may be entirely fanciful, when the Constitution itself has expressly provided for another authority more competent to evaluate the correct position to do the needful?"

37. In State of M. P. v. Vishnu Prasad Sharma, AIR 1966 SC 1593, the Supreme Court said that the supposed difficulty would not provide any justification for accepting an interpretation against an ordinary meaning of the language used in it. In Bhikraj v. Union of India, (1962) 2 SCR 880: (AIR 1962 SC 113), it was held that hardship is no ground for changing the nature of the statute. So also in Mysore State Electricity Board v. Bangalore Woollen Cotton and Silk Mills, 1963 Supp (2) SCR 127: AIR 1963 SC 1128 at p. 1139, it was held that inconvenience is not the decisive factor in interpreting a statute. In Commr. of Income-tax, West Bengal v. M/s. Vegetable Product Ltd., (1973) 3 SCR 448: AIR 1973 SC 927, it was observed: (At p. 928)

"There is no doubt that the acceptance of one or the other interpretations sought to be placed on S. 271 (1) (a) (i) by the parties would lead to some inconvenient result, but the duty of the Court is to read the section, understand its language and give effect to the same."

38. In Ramanjaya Singh v. Baijnath Singh, (1955) 1 SCR 671: AIR 1954 SC 749, the Supreme Court held:—

"The spirit of the law may well be an elusive and unsafe guide and the supposed spirit can certainly not be given effect to in opposition to the plain language of the sections of the Act and the rules made thereunder. If all that can be said of these statutory provisions is that construed according to the ordinary, grammatical and natural meaning of their language they work injustice by placing the poorer candidates at a disadvantage the appeal must be to Parliament and not to this Court."
It is not necessary to multiply authorities. There are several other decisions of the Supreme Court, where the same thing has been held.

39. From this discussion it follows that the expression "any question", as employed in Art. 228-A (3) of the Constitution is of widest connotation so as to embrace every question relating to constitutional validity, irrespective of worth or weight. Further, there nothing in the express language of provision or to infer by necessary plication, that it comes into play

after a case is admitted but not at the admission stage, so as to make it permissible that a Bench of less than five Judges can determine the question of constitutional validity and dismiss a petition in limine.

40. It is quite true that the provisions contained in Art. 228-A (3) give rise to unnecessary waste of time. In this High Court, all these years, Benches of two Judges only have been hearing and determining questions of constitutional validity. Questions, which, in the opinion of a Division Bench, need to be determined by a larger Bench, are freely referred to the Chief Justice for constituting larger Benches. If it had been left to me to draft Art. 228-A, in all probability, I would not have enacted Cl. (3), particularly when any error committed by the High Court can be corrected by the Supreme Court. If the High Court erroneously strikes down a provision as to constitutional validity, it can be corrected by the Supreme Court. Even Cl. (4) of Art. 228-A does not confer an absolute finality to the decision of two-thirds majority, although the Bench may be of 5 Judges or 7 Judges. Now, two questions arise: (1) Whether it is given to the Court to rewrite the law by substituting its own wisdom for that which is expressed by Parliament in the words used by it. (2) Whether in the garb of interpretation, we should assume a different intention than what is expressed by the words used in the Constitution and then recast the provision in such a way as to give effect to such supposed intention. In our opinion, neither course is permissible. As regards the first, legislation is not the function of the Court. The Court cannot arrogate to itself the function of Parliament. Aristotle was perhaps the first to trisect the functions of the State into legislature, executive and judiciary. In our country, the Constitution is supreme. The three limbs of the State, i. e. the legislature, the executive and the judiciary, are independent in their respective spheres. One cannot entrench upon the province of another. The second course also is not open. It is a celebrated rule of interpretation of statutes that the Court must interpret provisions of law according to the intention of those who made it, and that the words of the statute are repository of such intention. It is not given to the Court to imagine another secret intention and to add words to or subtract words from, or otherwise alter the words of a statute so as to bring it in conformity with such supposed or secret intention, or so as to make it expressive of what the Court thinks the law should be.

41. If, in the garb of interpretation we have to rewrite the law, we will have to add the word "substantial" or "real" between the words "any" and "question". Furthermore, the words, such as "at the stage of hearing parties" will have to be added at the end of the clause, after the words "shall sit."

42. It may also be mentioned that so far this High Court has not been faced with the situation where the whole of the M. P. Land Revenue Code, or the M. P. Accommodation Control Act, or the M. P. Co-operative Societies Act, has been challenged as constitutionally invalid. Therefore, such apprehension as raised by Shri Dharmadhikari is hypothetical. However, if such an extreme question is raised (and it will be reasonable to suppose that it would be raised once in a blue moon). the remedy lies in rejecting the question within a couple of minutes. There is no evidence before us that the Members of the M. P. Bar would be so unreasonable as to raise such question and thereby make themselves a laughing stock.

43. Nor is the rule of absurdity attracted. Administrative inconvenience is not the same as absurdity.

44. In two recent decisions of the Supreme Court, their Lordships have expressed themselves very strongly against the corresponding provisions contained in Art. 144-A of the Constitution and have pointed out the inconvenience entailed and the unreasonableness of those provisions. But, it must be seen that their Lordships did not strike down the provisions as absurd, nor did they add any words to the Article so as to give it any effect other than the one conveyed by the plain words.

45. In Misrilal Jain v. State of Orissa, AIR 1977 SC 1686, Mr. Justice Chandrachud, made the following observations (at p. 1690):—

"We may take this opportunity to dwell upon the inconvenience resulting from the enactment of Art. 144-A which was introduced by the 42nd Amendment to the Constitution. That Article reads thus:

"144-A. Special provisions as to disposal of questions relating to constitutional validity of laws:— (1) The mini-

mum number of Judges of the Supreme Court who shall sit for the purposes of determining any question as to the constitutional validity of any Central law or State law shall be seven.

(2) A Central law or a State law shall not be declared to be constitutionally invalid by the Supreme Court unless a majority of not less than two thirds of the Judges sitting for the purposes of determining the question as to the constitutional validity of such law hold it to be constitutionally invalid."

The points raised in these appeals undoubtedly involve the determination of questions as to the constitutional validity of a State law but they are so utterly devoid of substance that Mr. Asoke Sen and Mr. Gokhale who appear for the appellants could say nothing in support of their contentions beyond barely stating them. Were it not for the valiant, though vain, attempt of Mr. Govind Das to pursue his points, the appeals would have taken lesser time to dispose of than for a Court of seven to assemble. Article 13 (3) of the Constitution defines 'law' to include any Ordinance, Order, by-law, rule, regulation, notification, etc. having the force of law with the result that seven Judges of this Court may have to sit for determining any and every question as to the constitutional validity of even orders and notifications issued by the Government which have the force of law. A Court which has large arrears to contend with has now to undertake an unnecessary burden by seven of its members assembling to decide all sorts of constitutional questions, no matter what their weight or worth. It is hoped that Art. 144-A will engage the prompt attention of the Parliament so that it may, by general consensus, be so amended as to leave to the Court itself the duty to decide how large a Bench should decide any particular case".

46. In Trustees for the Improvement of Calcutta v. C. S. Mallick, (1977) 3 SCC 448 : (AIR 1977 SC 2034), Mr. Justice Bhagwati made the following observations (at p. 2040 of AIR) :—

"We cannot part with this case without making one final observation. The unarguably small dimension of the constitutional question raised here is apparent from what we have said. This Court has dual responsibility to the country. It has to decide cases brought before it justly and satisfactorily and at the same time, liquidate arrears of pending cases. Both bear upon the credibility of the judicial system. But because of Art. 144-A brought in by the Forty Second Amendment Act, seven Judges of this Court have to sit and hear every case where the constitutionality of an Act, rule, by-law or even a small notification is challenged. Procedural pragmatism in the light of actual experience of the working of this Court will easily convince anyone that in the context of the current docket explosion and long pendency of cases, the insistence on this inconvenient plurality which requires more than half the full strength of the Court to sit to hear such cases, is decisive step in the negative direction. Many questions of constitutional importance have already been covered by the rulings of this Court so that he who runs and reads may resolve them. To require seven Judges to perform such jobs is surely supererogatory. The present appeal itself is a striking illustration. Where really important issues arise for consideration, any Bench of this Court would certainly refer, where necessary, such matters for consideration or reconsideration by a larger Bench — less or more than seven, according to the requirement of the situation. To prescribe arithmetically is to petrify unimaginatively. We do not say anything about the validity of Art. 144-A one way or the other but merely highlight the paralysing impact on the highest Court and the long-term cause of justice, flowing from the numerical rigidity newly inserted by the Forty Second Constitution Amendment Act. We hope and trust that this matter will receive urgent attention of Parliament."

Both their Lordships in the two cases merely expressed the "hope and trust" that the matter would receive urgent attention of Parliament. Learned Advocate General (whom we requested to appear as amicus curiae) emphasised that that is the correct path. If their Lordships did not interpret Art. 144-A otherwise, and did not say that the word "question" in that Article means a real or substantial question, it was not open to the High Court to say so and thus rewrite the law as it thinks it should be. He entertained a strong hope that Parliament would undo most of the things brought about by the Constitution 42nd Amendment Act and the amendment of Arts. 228-A and 144-A may be one of those things. However, so long as the Articles are not amended, the Court

bound by them and cannot arrogate to themselves the functions of Parliament under the garb of interpretation. He urged that the legislature and the judiciary must function within their own spheres and not entrench upon those of each other.

47. Shri Dharmadhikari (who also addressed us as amicus curiae) strongly argued that nothing remained to be said in view of the decision in State of West Bengal v. Manmal, AIR 1977 SC 1772. The argument is that in that case a Bench of two Judges of the Supreme Court determined a question as to the constitutional validity of a West Bengal law, which was attacked as violative of Art. 14 of the Constitution. His argument was that if a Division Bench of the Supreme Court could determine such question, a Division Bench of the High Court also could do so at the admission stage.

48. In my opinion, the observations made by their Lordships of the Supreme Court in Manmal's case, (AIR 1977 SC 1772) do not lay down that at the admission stage a question as to the constitutional validity can be rejected, even if it is relevant. By reading paras 14 and 15 of the aforesaid judgment, it is apparent that the plea raised before the Supreme Court was about the applicability of Art. 14, on the basis of the judgment in Venkataraman's case AIR 1958 SC 107. The Supreme Court rejected the contention that the appeal should be heard by a minimum number of 7 Judges of the Supreme Court as contemplated by Art. 144-A of the Constitution of India, by observing that since the particular section of the Act was not applicable to the public servant, after he had ceased to be in office, the question of the Act being violative of Art. 14 of the Constitution did not arise at all, and, therefore, it was held that there was no substance in the contention that the said appeal should be referred to a larger Bench of 7 Judges. The observations made by their Lordships in para 14 are as below:—

"There is some misconception both in the judgment of the High Court as well as in the submission made by counsel on this point. In view of the decision in Venkataraman's case, AIR 1958 SC 107, there is no warrant for including in one category public servants in office and public servants who have ceased to be in office. These two classes of public servants are not similarly situated as has been clearly pointed out in Bansi's case, AIR 1971 SC 786. The plea of applicability of Art. 14 on the basis of the judgment in Venkataraman's case (supra) is, therefore, wholly misconceived. It cannot be argued that the decision in Venkataraman's case (supra) is violative of Art. 14 of the Constitution. That decision only says that section 6 of the Act is not applicable to a public servant if at the time of taking cognizance by the Court he ceases to be so. Because a particular section is not applicable to a public servant after he has ceased to be in office, the question of the Act being violative of Art. 14 of the Constitution will not arise. This Court has clearly placed a public servant, who has ceased to be in office, in a separate category and that classification has held the field all these years without demur. There is, therefore, no substance in the contention that this appeal should be referred to a larger Bench."

(Underlining is mine)

49. Thus, when a question about the constitutional validity does not arise at all, being irrelevant, it is apparent that such a question, even if raised, will not be a question requiring determination for the purposes of deciding the case and, therefore, the provisions of Art. 228-A sub-cl. (3) will not at all be attracted.

50. Manmal's case (AIR 1977 SC 1772), was decided on May 5, 1977, whereas Mishrilal's case (AIR 1977 SC 1686) (supra), was decided 3 days earlier (2nd May), and Trustee for the Improvement of Calcutta (AIR 1977 SC 2034) (supra), was decided a day later (6th May). The two last mentioned decisions were rendered by a Bench of five Judges. In those two decisions, there are clear observations that a Bench of prescribed number of Judges (7, under Article 144-A) has to be constituted for the determination of "questions utterly devoid of substance", "any and every question as to the constitutional validity", "all sorts of constitutional questions, no matter what their weight or worth", "unarguably small dimension of constitutional questions raised." If in Manmal's case their Lordships have taken a view that even a Bench of two Judges can determine a question as to the constitutional validity at the hearing stage, the observations which we have quoted from Misrilal's case and Trustee's case would

have been quite different, particularly when Mr. Justice Murtaza Fazal Ali was a party to all the three decisions. Clearly, the view that we take finds full support in the observations in Misrilal's case and Trustee's case.

51. Article 228-A (3) is a jurisdictional provision. It has to be interpreted as it is; otherwise, the Court by the process of interpretation would confer jurisdiction to a smaller Bench, what Parliament, in its wisdom, wanted to be done by a larger Bench.

51A. However, there is no difficulty in saying at once that (i) if a question is irrelevant, it is not a question which arises for determination. For instance, if in a given case, constitutional validity of any Act is challenged, but on the facts and circumstances of the said case, the Act concerned is itself not applicable, there will be no occasion for determining the question raised. Similarly, if on the facts and in the circumstances of the case the Bench is of the opinion that the petitioner is not entitled to the relief claimed on the ground of delay, laches or suppresssion of facts, etc. it will not be necessary to determine any question, though the same might be not only relevant but also of sufficient weight and worth. (ii) Then, again, when a question as to the constitutional validity of a State law is raised before a High Court, which has already been determined by the Supreme Court, it must be said that there is no question for determination by the High Court so that it need not go before a Bench of five Judges. (iii) Similarly, when a question relating to the constitutional validity of a State law has already been determined by a Bench of at least five Judges of the High Court, such question can be rejected by a Division Bench at the admission stage, because it does not remain to be determined. However, if, in the opinion of the Division Bench the question requires reconsideration by a larger Bench, it can make a reference under the Rules of the High Court. But that situation is different and it would not be a case of the mandatory provision of Article 228-A.

52. Shri Dharmadhikari strongly argued by reference to Section 113, Civil Procedure Code, and Ss. 394, 395 and 396, Cr. P. C. that if a Civil Judge of the lowest grade can examine and has to form an opinion within the meaning of the first proviso whether the challenged Act, Ordinance, Regulation or provision is invalid or inoperative, why cannot a Division Bench of the High Court? Similarly, if a Magistrate has to form an opinion under the above cited provisions of the Code of Criminal Procedure, why cannot a Division Bench of the High Court? There is no substance at all in this argument. The language of the proviso to Section 113 of the Code of Civil Procedure requires all that to be done. A Civil Judge of the lowest grade or a District Judge for that matter cannot refer a case to the High Court, unless he sets out a case stating his opinion and reasons therefor. But this is because the law expressly says so. I would very much wish that the provisions like the proviso to S. 113 of the Civil P. C. were engrafted on Art. 228-A of the Constitution, but the legislature in its wisdom did not do so, and, in my opinion, we cannot arrogate to ourselves that function of Parliament.

53. It is not expected of the responsible profession of Advocates, and there is no evidence before us, that a question, such as the whole of the Land Revenue Code or whole of the M. P. Accommodation Control Act, is constitutionally invalid, has so far been raised in any case in this High Court.

54. I have perused the opinion of my learned brother Singh, J. I refrain from entering into political considerations because they do not afford either internal aid or external aid to interpretation of a statute.

55. The above discussion may be summed up thus:—

(1) Not to accept a question as to the constitutional invalidity of a State law and to dismiss a petition even at the admission stage amounts to "determination" of that question within the meaning of Art. 228-A of the Constitution. The word "determine" in cl. (3) of Art. 228-A of the Constitution must be read in its usual connotation, which means an application of the mind and expression of the conclusion. It makes no difference whether the question is determined at the stage of admission or after hearing the parties, nor does the length of reasons given for rejecting the contention matter.

(2) The duty of the Court is to interpret the law as it is and not to arro[gate] to itself the functions of the legisl[ature] and to rewrite the law in the ga[rb] interpretation.

(3) The expression "any question" as employed in cl. (3) of Art. 228-A is comprehensive enough to include any question which, in the opinion of the Court, may not be substantial. A question does not cease to be a "question" because it is not of any weight or worth. The word "any" is significant. When Parliament did not qualify the word "question" by any word such as "substantial", it is not given to the Courts to add words and thus rewrite the law in the guise of interpretation. The law has to be interpreted according to the intention of them who made it. The words are the authentic repository of their intention. It is not permissible to imagine a supposed or secret intention and then to add words to the provision so as to express such supposed or secret intention.

(4) The requirement of the law has to be complied with. It cannot be circumvented because, in the opinion of the Court, it will cause administrative inconvenience.

(5) A question, which is irrelevant and does not arise, need not go before a Bench of 5 Judges, not because it is not a "question" but because it "does not arise for determination."

(6) A question, which has been determined by the Supreme Court, need not go before a Bench of 5 Judges because, whether it is a Bench of two Judges or five Judges or more Judges, no different view can be taken. It must be said that there remains no question "for determination by the High Court."

(7) Where a question relating to constitutional validity of a State law has already been determined by a Bench of at least 5 Judges of the High Court, the same question can be rejected by a Division Bench at the admission stage and the case need not go before a Bench of five Judges, unless, in the opinion of the Division Bench, the question requires reconsideration by a larger Bench.

(8) There is no doubt that the provisions contained in Art. 228-A of the Constitution have created administrative inconvenience because whenever any question of constitutional validity of a State law is raised, it has to be referred to a Bench of five Judges, which otherwise would have been dealt with by a Bench of two Judges and consequently the cases could be disposed of within time. But it is difficult to suppose Parliament was not aware of these consequences; even then it has given the provision which is contained in Art. 228-A. The Courts can only point out the administrative inconvenience, but they must leave it to Parliament to rectify it. It is not permissible for the Court to arrogate to itself the role of Parliament. Confronted with such inconvenience, their Lordships of the Supreme Court have in Misrilal v. State of Orissa, AIR 1977 SC 1686, and again in Trustees for the Improvement of Calcutta v. C. S. Mallick, (1977) 3 SCC 448 : (AIR 1977 SC 2034), made observations inviting the attention of Parliament to the administrative inconvenience and emphasised the need for early change in the law. But, their Lordships did not themselves rewrite the law. What the Supreme Court could not do, the High Court certainly cannot.

(9) In the above decisions of the Supreme Court, there are clear observations that a Bench of prescribed number of Judges has to sit for determination of "questions utterly devoid of substance"; "any and every question as to the constitutional validity"; and "all sorts of constitutional questions, no matter what their weight or worth." Similarly, in Trustees for the Improvement of Calcutta v. C. S. Mallick (supra) a Bench of 7 Judges observed that despite the question of constitutional validity having already been covered by the rulings of the Supreme Court and the fact that one who runs and read the said decisions may resolve them the provisions of the amended Constitution require 7 Judges to perform such job. Therefore, the view that I take finds support in those observations.

56. Therefore, I would answer the preliminary question thus :—

(1) A writ petition must, in the first instance, be placed before a Division Bench for admission, although a question of constitutional validity of a State law has been raised in it. A Division Bench is competent to admit it and also to grant interim relief, such as, stay, injunction, etc.

(2) A Bench of less than five Judges cannot dismiss a petition even at the admission stage where any question as to constitutional validity of a State law is to be determined, except in the following cases :—

(i) when the question is irrelevant and, therefore, does not arise for determination.

(ii) When the question has already been determined by the Supreme Court.

(iii) When the question has already been determined by a Bench of at least five Judges of the High Court, and Division Bench does not feel reconsideration of the decision by a larger Bench to be necessary.

57. We thank Shri Garg, Advocate General and Shri Y. S. Dharmadhikari, Advocate, for their useful assistance as amicus curiae.

J. P. BAJPAI, J. (Majority view):—

58. I have had the advantage of reading the valuable opinions separately recorded by Hon. brother Singh J. and Hon. the Chief Justice.

59. I am of the opinion that the specific observations made by the two Benches of 7 Judges of the Supreme Court (in Misrilal's case (AIR 1977 SC 1686) (supra) and Trustees for the Improvement of Calcutta v. C. S. Mallick's case (AIR 1977 SC 2034) (supra), that a Bench of the prescribed number of Judges has to be constituted for the determination of 'questions utterly devoid of substance', 'any and every question as to the constitutional validity', 'all sorts of constitutional questions no matter what their weight or worth', 'unarguable small dimensions of constitutional questions raised' etc., will prevail and cannot be overlooked even if there may be some possibility as suggested by Hon. brother Singh J. to infer otherwise by implication from the observations made by the Division Bench of the Supreme Court in Manmal's case (AIR 1977 SC 1772) (supra).

60. For the same reason, in view of the above quoted observations of the Supreme Court in the aforesaid two cases, decided subsequently in May 1977, it is not possible to agree with the view expressed by the Full Bench of the Allahabad High Court in Chandrakant's case (AIR 1977 All 270) (FB) (supra), decided earlier in March 1977.

61. There is no difference of opinion in between Hon. Singh J. and Hon. the Chief Justice on the point that when the question of constitutional validity of a State law is irrelevant and accordingly does not necessarily arise for determination, or the point involved has been already concluded by a decision of the Supreme Court, there is no question which requires determination by the High Court and such contentions when raised can be dismissed even by a Division Bench or any Bench of less than 5 Judges.

62. In para 4 of his opinion, Hon. brother Singh J. has observed that if a point as to the constitutional validity of a State law is already concluded by a decision of the Supreme Court, no question at all arises requiring determination. Hon. the Chief Justice is also of the same view, but Hon. Singh J. has further observed that similar will be the position where any such question has been decided by an authoritative decision of the High Court also. In my opinion, the modification suggested by the Hon. the Chief Justice in this respect is necessary. Hon. the Chief Justice has opined that decision of a Bench of 5 Judges or more of the High Court may alone be taken as to have concluded the matter unless the Division Bench before whom a petition has been laid for hearing is of the opinion that such decision needs reconsideration by a larger Bench. This view find support from the observations made by the Supreme Court in Trustees for the Improvement of Calcutta v. C. S. Mallick (AIR 1977 SC 2034) (supra), where the Bench of 7 Judges had observed that due to the requirement of Art. 144-A (which are undisputedly in pari materia with the Art. 228-A), many questions of constitutional importance, which have already been covered by the rulings of the Supreme Court and one, who runs and reads those decisions; can easily resolve them, a Bench of 7 Judges is still required to perform the said job.

63. So far as the observations made in Manmal's case (AIR 1977 SC 1772) (supra), are concerned, I am of the opinion that the ratio of the said decision is that if certain enactment itself is not applicable to the facts of a case, there is no relevancy of any question regarding the constitutional validity of such law and the question being irrelevant for deciding the petition, there is no occasion for referring the matter to a larger Bench of 7 Judges. This is clear from the observations made in para 14 of the judgment as reproduced below:

".....There is some misconception both in the judgment of the High Court as well as in the submission made by counsel on this point. In view of the decision in Venkataraman's case (AIR 1958 SC 107), there is no warrant for including in one category public serv[illegible]

in office and public servants who have ceased to be so. These two classes of public servants are not similarly situated as has been clearly pointed out in Bansi's case (AIR 1971 SC 786). The plea of applicability of Article 14 on the basis of the judgment in Venkataraman's case (supra) is violative of Art. 14 of the Constitution. That decision only says that Section 6 of the Act is not applicable to a public servant if at the time of taking cognizance by the Court he ceases to be so. Because a particular section is not applicable to a public servant after he has ceased to be in office, the question of the Act being violative of Article 14 of the Constitution will not arise. This Court has clearly placed a public servant, who has ceased to be in office in a separate category and that classification has held the field all these years without demur. There is, therefore, no substance in the contention that this appeal should be referred to a larger Bench."

(Underlining is mine).

Actually speaking, the contention claiming reference of the case to a Bench of 7 Judges in accordance with Art. 144A of the Constitution was rejected by their Lordships of the Supreme Court on the aforesaid ground itself.

64. I am, therefore, of the view that the question referred to this Bench may be answered as suggested by Hon. the Chief Justice in paragraph 42 (paragraph 56 of this report) of his opinion.

M. L. MALIK, J. (Majority view):— 65. I have had the advantage of reading the draft Judgments prepared by the Hon'ble the Chief Justice, Hon'ble Justice G. P. Singh and Hon'ble Justice Bajpai. I am disposed to take a somewhat different view. The controversy raised had, in my view, a better solution in referring the matter to the Rules Making Committee to frame Rules in consonance with Art. 228-A of the Constitution instead of setting down a practice by judicial pronouncement. We are guided at present by the Rules framed under Art. 225 in the matter of proceedings under Art. 226 of the Constitution. The Rules were framed when Art. 228-A was not in the Constitution and a question of constitutionality of a statute could be resolved by a Bench of two Judges. Article 228-A now gives a special provision for disposal of questions relating to constitutional validity of the State laws.

The High Court exercises jurisdiction under sub-cl. (2) to determine all questions relating to the constitutional validity of any State law. Sub-clause (3) provides for minimum number of Judges who shall sit for the purpose of determining any question as to the constitutional validity of any State law. The forum for deciding the question is now a Bench of not less than five Judges. The Rules that were framed under Art. 225 have now become obsolete insofar as proceedings to challenge the constitutionality of the State law are concerned, since they do not take note of the change brought about by Art. 228-A. So long no new Rules are framed. Art. 228-A, which prescribes the forum, must alone determine the question. When it comes to framing of Rules, I have my serious doubts if the Committee could prescribe any number less than five even for the purpose of motion hearing.

66. Why I say so is plain enough. An appropriate Bench would be a Bench of not less than five Judges. Any number less than five would raise a jurisdictional question. It is that Court alone which has jurisdiction to hear a matter which can reject a plaint for non-disclosure of cause of action. So in original proceeding in the High Court, the appropriate Bench, be that a Single Bench or a Division Bench which under Rules can hear a matter, can dismiss it in motion hearing. It seems impermissible that a Bench otherwise incompetent to decide upon a matter finally should be permitted to sit for screening the cases as to which of them should go before a Bench of five Judges and which of them ought to be dismissed for raising no triable issue. Envisage a situation when the two Judges hearing differ on the point whether or not an arguable question arises; one could argue, follow the convention that when the two Judges differed, the matter deserved admission for final hearing. But what if the counsel were to argue that the other three Judges would probably have agreed with him though the two hearing at motion stage were not inclined to agree. He would say that the opinion of the two Judges is not binding on him and will not assume finality when the law says that the matter must be heard by five Judges. His argument would be that the mandatory requirement of Art. 228-A could not be whittled down by Rules of ad-

ministrative convenience. That provision had been given an overriding effect in sub-cl. (5) and the Rules of business formulated to regulate the sittings of the Court could not control that provision. If screening were to be permitted, would that not be introducing a provision of Reference as in the Income-tax Act or in the Sales Tax Act? That was not what Art. 228-A contemplated. A party had a right to come straight to the High Court challenging the validity of a State law and demanding determination of all questions raised by him by a Bench of not less than five Judges.

67. It may be noticed that Art. 228-A as it is worded, is not merely procedural. It gives an authority to the High Court under sub-cl. (2) to determine all questions relating to constitutional validity of any State law prescribes a forum in sub-cl. (3) and lays down restrictions by sub-cl. (4) of numerical majority by which alone the State law could be declared invalid. Sub-clause (5) gives the provision an overriding effect. The provision is self-contained and mandatory, and has got to be strictly followed. In my view, therefore, whenever any question relating to constitutional validity of State law arises, the matter must go to a Bench of not less than five Judges.

68. The word 'any' in sub-cl. (3) qualifying the word 'question' is significant. It has to be understood in its plain dictionary meaning. 'Any' means "no matter which" "of whatever kind" and "all and every". Their Lordships of the Supreme Court have in Misrilal Jain's case (Misrilal Jain v. State of Orissa. AIR 1977 SC 1686 (in para. 9) and in The Trustees for the improvement of Calcutta v. Chandra Sekhar Mallick, (1977) 3 SCC 448 at para 7: (AIR 1977 SC 2034 para 8)) interpreted the word 'any' to mean "any and every", "no matter what their weight or worth". Their Lordships said that the provisions of Art. 144-A required seven Judges to sit to determine a question though utterly devoid of substance.

69. These observations have not been made as an obiter dicta. Article 144-A has been fully quoted, interpreted and construed.

70. Singh, J. in his opinion has laid emphasis on the word "question". His Lordship says that there should be a real controversy before a Court a point of difficulty which needed to be answered, a doubt or uncertainty which required resolutions and a point which could be debated upon. If the question raised was already answered by the Supreme Court or was irrelevant, need not go before a Bench of five Judges. The two Judges hearing the matter at motion stage could dismiss such a petition. Singh, J. has relied on certain observations of the Supreme Court in Manmal's case (State of West Bengal v. Manmal Bhutoria, AIR 1977 SC 1772).

71. Bajpai, J. has, in my opinion, rightly distinguished the observations made in Manmal's case (AIR 1977 SC 1772) from those made in Misrilal Jain's case (AIR 1977 SC 1686). In the former, case, the Court declined to refer the matter to a Bench of seven Judges because the question raised was wholly irrelevant and the question of the Act being violative of Art. 14 did not arise. That aside, the opinion expressed by a larger Bench and that too on a later date had to be preferred. (See: The State of U. P. v. Ram Chandra Trivedi, AIR 1976 SC 2547 (para. 22)).

72. For what I have said above, I am of the opinion that a writ petition involving any question of constitutional validity of the State law must go before a Bench of not less than five Judges even at the admission stage since denial of admission on that question would be a "determination" of the question. It is settled practice, nay a requirement of law, that it is that Court alone, which can finally decide a matter on merits which can dismiss it in motion.

73. However, having regard to the administrative convenience, I would concur with what my Lord the Chief Justice said in para. 42 (para. 56 of this report). The practice would not be violative of Art. 228-A of the Constitution.

K. K. DUBE, J. (Majority view):— 74. Under Art. 228-A of the Constitution, the question of validity of a provision of State law could only be decided, as far as this High Court is concerned, by a Bench consisting of not less than five Judges. While sitting in motion hearing the Bench not only sits to consider but also decides the matter before it. There does not appear to be a difference as to the character of jurisdiction while it is sitting to decide a question after notice or when it makes a preliminary hearing at the motion stage. The jurisdiction exercised by the motion Bench is analogous to one exercisable as in references. The latter jurisdiction to refer

expressly a creature of the Statute under certain circumstances. It is true that the Bench hearing the matter has an inherent jurisdiction to refer any question to a larger Bench under certain circumstances. But such inherent powers are used in special circumstances could not provide a basis for laying down a practice. When the Parliament by amending Art. 228 required a minimum of Judges to consider and decide the constitutional validity of a State law, it cannot be said that the administrative difficulties were lost sight of and with all respects to contrary opinion of my brother, we could not carve out a jurisdiction at the time of motion hearing which it was prohibited under Art. 228-A of the Constitution.

75. I fully agree with the reasoning given by Hon'ble the Chief Justice as to the meaning ascribed to the word 'determination'. If the question was already settled as has been pointed out in para. 41 (para. 55 of this report) of the opinion of Hon'ble the Chief Justice, the Bench was merely applying the law and not deciding a question. In such cases, it was not necessary that the five Judges should meet. I agree with the conclusions as reached in para 41 (para 55 of this report) (1) to (9) of the opinion of Hon'ble the Chief Justice.

76. But I wish to add that the plain meaning of Art. 228-A would not permit to arrogate to it the power to consider and decide at the motion hearing stage any matter where the question as to the validity was challenged when the Bench consisted of less than 5 Judges. This would also appear from the decision of Supreme Court in Trustees for the Improvement of Calcutta v. C. S. Mallick, (1977) 3 SCC 448 : (AIR 1977 SC 2034) and State of U. P. v. Ram Chandra Trivedi, AIR 1976 SC 2547. In my opinion, a writ petition requiring determination of any question of constitutional validity of a State law must go before a Bench of not less than 5 Judges even at the admission stage. I am also of the view that in any case, the determination of the question as to the constitutional validity could not be done in motion hearing by the Division Bench.

BY THE COURT

77. In accordance with the majority opinion, the preliminary question is answered thus :—

(1) A writ petition must, in the first instance be placed before a Division Bench for admission, although a question of constitutional validity of a State law has been raised in it. A Division Bench is competent to admit it and also to grant interim relief, such as, stay, injunction, etc.

(2) A Bench of less than five Judges cannot dismiss a petition even at the admission stage, where any question as to constitutional validity of a State law is to be determined, except in the following cases :—

(i) When the question is irrelevant and, therefore, does not arise for determination.

(ii) When the question has already been determined by the Supreme Court.

(iii) When the question has already been determined by a Bench of at least five Judges of the High Court, and the Division Bench does not feel reconsideration of the decision by a larger Bench to be necessary.

Reference answered accordingly.

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FULL BENCH

SHIV DAYAL, C. J., K. K. DUBE, R. K. TANKHA, M. L. MALIK, J. P. BAJPAI, NAVKAR AND H. G. MISHRA, JJ.

Sharadchand and others, **Appellants v.** Vishnupant, Respondent.

Second Appeal No. 687 of 1977, D/- 14-1-1978.

M. P. Accommodation Control Act (41 of 1961), Ss. 13 and 12 — Expression "suit or proceeding" does not include appeal — Provisions of S. 13 do not apply to appeals. AIR 1970 MP 1 (FB), Overruled.

Section 13 of the Act does not apply and no part of that Section applies to an appeal whether the appeal be by the tenant or by the landlord. AIR 1977 Madh Pra 199 (FB), Approved. AIR 1977 SC 1217, Distinguished. AIR 1970 MP 1 (FB), Overruled. (Para 14)

The word "suit" does not include an appeal in the setting of the provisions of the M. P. Act. The word "proceeding" has entered in sub-secs. (1) and (2) of S. 13 by inadvertence of the draftsmen. There are numerous provisions in the law where the word "suit" cannot be read as to include appeal. For instance, in Orders 6 and 7 of the Civil P. C. (Para 9, 10)

Two things are to be noted here. Firstly, the provisions contained in S. 13

were never intended to serve as a machinery for recovering rent from the tenant, as an alternative to a suit. The object of that section is to put a check on the unscrupulous tenant who would protract litigation without paying rent. That purpose is served in the suit. The object is equitable. When the suit is dismissed, the equity is reversed. Once that is borne in mind, all execise is in futility to somehow make S. 13 applicable to appeals by means of laboured interpretation. Secondly, to defend the landlord's appeal from the dismissal of his suit, is a very valuable right of the tenant. It vests in him as soon as the suit is dismissed. That valuable and vested right cannot be taken away or curtailed except by law in express and unambiguous language. (Para 11)

The words "at any stage of the suit" are undoubtedly comprehensive enough to apply to all stages of the litigation whether in the trial Court or in the first appellate Court or in the second appellate Court or in revision, or even in appeal to the Supreme Court. In the Madhya Pradesh Act, the words "at any stage of the suit" are not there. It cannot be contended that in the M. P. Act also appeal is included in the suit since appeal is a continuation of the suit. It is not correct to think that for all purposes an appeal is to be considered as continuation of the suit. It has to be seen in the context of the statute, in each case, whether an appeal would be a continuation of the suit. for the particular purpose under consideration. Having regard to the provisions contained in sub-sec. (1) of S. 13, their rigour and impact, it is not possible to construe the word "suit" as including appeal on the basis that an appeal is continuation of the suit. That interpretation would lead to such unreasonable and unjust conclusions which the framers of law could not have contemplated. (Para 4)

Cases Referred: Chronological Paras

AIR 1977 SC 1217 1, 4, 6, 14
AIR 1977 Madh Pra 199 : 1977 MPLJ 417 (FB) 1, 10, 11, 13, 14
AIR 1970 Madh Pra 1 : 1969 MPLJ 672 (FB) 1, 8, 11, 13, 14
AIR 1968 Madh Pra 1 : 1967 Jab LJ 859 (FB) 5
AIR 1966 SC 1423 8
AIR 1957 SC 540 8

A. P. Tare, for Appellants; Y. S. Dharmadhikari with D. R. Dharmadhikari and Ku. Kanti Roy, for Respondent.

SHIV DAYAL, C. J.: — When this second appeal was placed before a learned single Judge for admission, he passed the following order:—

"The appeal is admitted for hearing on the following questions:—

(1) (a) There being non-compliance with S. 13 (1) of the M. P. Accommdation Control Act, 1961, in the trial Court as well as in the first appellate Court, that first appeal also being by the plaintiff-landlord, was S. 13 (6) of the Act attracted in both the Courts below?

(b) For the same reason, was the plaintiff entitled to a decree on the ground contained in Cl. (a) of sub-sec. (1) of S. 12 of the Act?

2. Is the Full Bench decision in S. S. Harishchandra Jain v. Indersingh Bedi, 1977 MP LJ 417 : (AIR 1977 Madh Pra 199) no longer good law in view of the Supreme Court decision in Radha Kishan Sao v. Gopal Modi, AIR 1977 SC 1217.

Issue notice to the other side for a date to be fixed in the office. B. P. F. within a week.

The aforesaid question No. 2, arising for decision in the appeal, has naturally to be decided by a larger Bench in view of the fact that the correctness of the Full Bench decision in S. S. Harishchandra Jain v. Indarsingh Bedi, (AIR 1977 Madh B 199) has been challenged. The papers be, therefore, laid before the Hon'ble the Chief Justice for constituting a larger Bench for decision of the said question No. 2 after the respondents are duly served."

As Harishachandra's case (supra) was decided by Full Bench of five Judges, this Bench was constituted to reconsider the correcteness of that decision. In Harishchandra's case it was held that S. 13 of the M. P. Accommodation Control Act, 1961 (the Act, for short) does not apply and no part of that section applies, to an appeal, whether the appeal be by the tenant or by the landlord. It was further held that the Full Bench decision reported in Ratanchand Firm v. Rajendra Kumar, 1969 MP LJ 672: (AIR 1970 Madh Pra 1) did not lay down correct law. S. 13 of the Act enacts as follows:—

"When tenant can get benefit of protection against eviction—

(1) On a suit or proceeding being instituted by the landlord on any of the grounds referred to in Section 12, the tenant shall, within one month of the service of the writ of summons on h or within such further time as the Co may, on an application made to it, in this behalf, deposit in the C pay to the landlord an amount

at the rate of rent at which it was paid for the period for which the tenant may have made default including the period subsequent thereto upto the end of the month previous to that in which the deposit or payment is made and shall thereafter continue to deposit or pay, month by month, by the 15th of each succeeding month a sum equivalent to the rent at that rate.

(2) If, in any suit or proceeding referred to in sub-sec. (1) there is any dispute as to the amount of rent payable by the tenant, the Court shall fix a reasonable provisional rent in relation to the accommodation to be deposited or paid in accordance with the provisions of sub-sec. (1) till the decision of the suit or appeal.

(3) If, in any proceeding referred to in sub-sec. (1), there is any dispute as to the person, or persons to whom the rent is payable, the Court may direct the tenant to deposit with the Court the amount payable by him under sub-sec. (1) or sub-sec. (2) and in such a case, no person shall be entitled to withdraw the amount in deposit until the Court decides the dispute and makes an order for payment of the same.

(4) If the Court is satisfied that any dispute referred to in sub-sec. (3) has been raised by a tenant for reasons which are false or frivolous, the Court may order the defence against eviction to be struck out and proceed with the hearing of the suit.

(5) If a tenant makes deposit or payment as required by sub-sec. (1) or sub-sec. (2), no decree or order shall be made by the Court for the recovery of possession of the accommodation on the ground of default in the payment of rent by the tenant, but the Court may allow such cost as it may deem fit to the landlord.

(6) If a tenant fails to deposit or pay any amount as required by this section, the Court may order the defence against eviction to be struck out and shall proceed with the hearing of the suit.

2. If the corresponding provisions contained in Section 11-A of the Bihar Buildings (Lease, Rent and Eviction) Control Act (3 of 1947), which were for consideration before the Supreme Court, are perused with a little care, it can at once be seen that they are quite different from those contained in S. 13 (1) of the M. P. Act, and, therefore, the Supreme Court decision is patently distinguishable. S. 11-A of the Bihar Act is reproduced in para 11 of the Supreme Court decision. It reads thus:—

"Deposit of rent by tenants in suits for ejectment:—

If in a suit for recovery of possession of any building the tenant contests the suit, as regards claim for ejectment, the landlord may make an application at any stage of the suit for order on the tenant to deposit month by month rent at a rate at which it was last paid and also the arrears of rent, if any; and the Court, after giving an opportunity to the parties to be heard, may make an order for deposit of rent at such rate as may be determined month by month and the arrears of rent, if any and on failure of the tenant to deposit the arrears of rent within fifteen days of the date of the order or the rent at such rate for any month by the fifteenth day of the next following month, the Court shall order the defence against ejectment to be struck out and the tenant to be placed in the same position as if he had not defended the claim to ejectment. The landlord may also apply for permission to withdraw the deposited rent without prejudice to his right to claim decree for ejectment and the court may permit him to do so. The Court may further order recovery of cost of suit and such other compensation as may be determined by it from the tenant."

(Underlined by us)

3. Now, the two apparently corresponding provisions may be compared:—

(For comparison see next page)

4. The words "at any stage of the suit" are undoubtedly comprehensive enough to apply to all stages of the litigation whether in the trial Court or in the first appellate Court or in the second appellate Court or in revisions, or even in appeal to the Supreme Court. In the Madhya Pradesh Act, the words "at any stage of the suit" are not there. It can be seen from the observations in para 12 of their Lordships' decision that it rests on the expression "at any stage of the suit". Thus, the provisions in the Bihar Act being different from those in the M. P. Act, Radha Kishan's case (AIR 1977 SC 1217) (supra) is not apposite. Shri Tare argued that in the M. P. Act also appeal is included in the suit, since appeal is a continuation of the suit. It is not correct to think that for all purposes an ap-

BIHAR ACT	M. P. ACT
(1) There is no statutory liability of the tenant to deposit rent unless a specific order is made by the Court.	(1) No order of the Court is necessary. The liability is statutory. It accrues as soon as the writ of summons of the suit is served on the tenant.
(2) The landlord has to make an application to obtain such order of the Court.	(2) No such application is contemplated.
(3) The landlord may make such application "at any stage of the suit" for order.	(3) These or any such words are not there.
(4) Parties have to be given an opportunity to be heard on such application of the landlord.	(4) No such provision.
(5) It is discretionary with the Court: (a) It may reject the landlord's application or (b) it may make an order for deposit of rent.	(5) No such discretion is vested in the Court.
(6) If the court makes such order, the rate at which rent is to be deposited is determined by the Court.	(6) The question does not arise. However, under Section 13 (2), the Court has to fix reasonable provisional rent, in case there is a dispute.
(7) If the tenant does not deposit rent in spite of the order of the Court, "the Court shall order the defence against ejectment to be struck out."	(7) Under sub-sec. (6) of S. 13, the Court may order the defence to be struck out and it has been interpreted to be an extreme step which is to be taken in case of contumacy or positive mala fide.

peal is to be considered as continuation of the suit. It has to be seen in the context of the statute, in each case, whether an appeal would be a continuation of the suit for the particular purpose under consideration. Having regard to the provisions contained in sub-sec. (1) of S. 13, their rigour and impact, it is not possible to construe the word "suit" as including appeal on the basis that an appeal is continuation of the suit. That interpretation would lead to such unreasonable and unjust conclusions which the framers of law could not have contemplated. The landlord's appeal would be from the dismissal of his suit either (i) because he was unable to prove one of the grounds contained in Cls. (a) to (p) of S. 12 (1) of the Act, or (ii) the suit for eviction was dismissed because the tenant earned special protection contained in S. 12 (3). In the latter case, the tenant, by virtue of the deterrent in S. 12 (3), will have to go on paying rent directly to the landlord regularly and, at the most, he can commit two consecutive defaults, but he cannot afford to commit the third default; otherwise, he would be evicted and the protection under S. 12 (3) will not be then available to him. It is made available anly once in life and it is subject to the conditions that he will go on depositing rent regularly but would not commit three consecutive defaults thereafter. Thus the landlord is reassured of payment of rent to him. Therefore, there is no equity against the tenant for which he should be required to deposit rent and remain constantly under the risk of his valuable and vested right being destroyed, if he commits even a single default in depositing rent in the appellate Court. Such, an intention could not be attributed to the Legislature. In the former case, obviously there is no equity in favour of the landlord inasmuch as the suit is dismissed because no ground under S. 12 (1) was available to him.

5. Furthermore, when a suit is dismissed by the trial Court and if the word "suit" includes an appeal, the tenant will have to presume and anticipate that the landlord will prefer an appeal against him so that he must go on depositing rent from the very next month of the date of the decree to maintain continuity and not commit any break. If he commits a single default, he loses the protection under S 12 (3). (Jagdish Kapoor v. New Education Society, 1967 Jab LJ 859 : (AIR

1968 Madh Pra 1) (FB)). The Legislature would not contemplate that the tenant would lose the valuable right which vested in him, on the suit being dismissed, simply because he commits a single default in the appellate Court. There is no provision in any law that a successful party must presume that an appeal would be filed against him and should be subjected to an obligation, the non-fulfilment of which would lead to disastrous results.

6. There is no comparison or analogy between the provisions of the Bihar Act, which were before their Lordships in Radha Kishan Sao v. Gopal Modi (AIR 1977 SC 1217) (supra) and the provisions contained in the Madhya Pradesh Act. When is the tenant required to deposit rent in the appellate Court under the Bihar Act? In the first place, there must be an application by the landlord in the appellate Court for an order requiring the tenant to deposit rent. In the second place, the tenant will be given an opportunity of being heard against the order prayed for. In the third place, the Court will apply its mind and exercise its discretion whether, having regard to the facts and circumstances of the case, such an order should be passed. The Court may then pass an order, or it may refuse to pass an order requiring the tenant to deposit rent. All this is just and equitable. The very fact that there must be an order of the Court in obedience of which the tenant will be required to deposit rent, makes it a case of equity. There is no automatic compulsion. Now, in the above setting of the provisions, it can be said that under the Bihar Act, when the real content of the word 'suit' is to be found out, the landlord can make an application under S. 11-A not only in the trial Court but also in the appellate Court because of the words "at any stage of the suit". And, then it must be said that the appeal is a stage of the suit. Their Lordships held so because of the context and not divorced from it.

7. On the other hand, if in the Madhya Pradesh Act, the word "suit" in S. 13 (1) is read as to include an appeal, most inequitable and unjust consequences will follow, as we have pointed out above. It bears repetition that when a suit is dismissed, the tenant acquires a valuable right. Specific language will be required to take away that right otherwise than on merits of the case. What Shri Tare wants us to hold is that even if the tenant commits a single default in depositing rent in the appellate Court, the right vested in him by the dismissal of the suit will be destroyed and his defence would be struck out. We are unable to give that construction to the word "suit" in the setting of the provisions of the Madhya Pradesh Act. We must hold that here the word "suit" does not include an appeal as continuation of the suit.

8. We must now mention two things from the decision in Ratanchand Firm v. Rajendra Kumar (AIR 1970 Madh Pra 1) (FB) (supra) on which Shri Tare strongly relied. The first is that the Full Bench in that case, in strong language, rejected the contention that the word "suit" in S. 13 (1) is to be read as including an appeal being a continuation of the suit. There also it was observed as follows:— (At p. 3 of AIR Madh Pra).

"If an appeal, being a continuation of the suit, is included within the word 'suit' in sub-sec. (1) then even after a landlord's suit is dismissed and before he actually files an appeal the tenant must continue to go on depositing rent on the 15th of each month. That is to say a tenant must, in all cases, assume that an appeal would be filed against him although, in fact, the landlord may not afterwards file any appeal. Unless the tenant proceeds on this assumption he cannot comply with the requirement of sub-sec. (1) of continuing to deposit month by month on the 15th of each succeeding month a sum equivalent to the rent. Such a result is so unreasonable that by itself it goes to show that the Legislature could not have intended to include appeal within the word 'suit'."

In that case also, the Full Bench observed that the dicta in Garikapati v. Subbiah Choudhry, AIR 1957 SC 540 at p. 553 and Dayawati v. Inderjit, AIR 1966 SC 1423 at p. 1427 are not of universal application. That Full Bench observed:- (at pp. 2-3 of AIR Madh Pra)

"It does not, however, follow that in every statute whenever the word 'suit' is used, appeals arising from suit must be included within it. To find out the real content of the word 'suit' and for that matter any word when used in a statute the setting and the context in which the word is used must be taken into account."

The second thing is that in Ratanchand's case it was held that the provisions of S. 13 (1) would not apply to a tenant's appeal. In other words, if a decree has

been passed against the tenant and he prefers an appeal, then he need not deposit rent. If that is so, it is most unreasonable and unjust to construe the provisions as to require the tenant to deposit rent when he has succeeded in the trial Court and the suit has been dismissed. It would be patently anomalous to hold that if the suit has been dismissed, the tenant must deposit rent, but if the suit is decreed against him, he need not deposit rent.

9. We may, in passing, point out that there are numerous provisions in the law where the word "suit" cannot be read as to include appeal. For instance, in Orders 6 and 7 of the Civil P. C. It is not necessary to multiply examples.

10. Then it was urged for the landlord that the word "proceeding" must be read as including "appeal". Now, the opening words of S. 13 (1) of the Act are: On a suit or proceeding being instituted by the landlord on any of the grounds referred to in S. 12..... "Nowhere in the whole of the Act is contemplated any other proceeding for eviction of tenant "on any of the grounds referred to in Section 12" than a "suit". Therefore, all that remains to be considered is whether "proceeding" means "appeal". Patently enough, if that was so, then, as pointed out in Harishchandra (AIR 1977 Madh Pra 199) (FB) there being hardly any other word in legal parlance so well known and common as appeal, it is unthinkable that the framers of the Act would use the word "proceeding" for "appeal", when they have distinctively used the word "suit" in the Act; also in sub-secs. (1) and (2) of S. 13 itself. If the Legislature had intended to apply S. 13 (1) to "appeal", it would have employed that word in it. But the word "appeal" is not seen in sub-sec. (1) at all. As exposed in Harishchandra, clues are available which reveal that the word "proceeding" appears to have, by inadvertence of the draftsman, entered into sub-secs. (1) and (2) from other enactments. For instance, in the West Bengal Act, the word "proceeding" occurs in Ss. 13 and 17, where that word has a meaning. But here it has none. Likewise, the words "or appeal" at the end of sub-sec. (2) evidently crept in by the negligence of the draftsman, when he borrowed the language from Section 5 of the Madhya Bharat Accommodation Control Act, the draftsman little realising that the word "appeal" in that section had a meaning. Under the specific provisions of that Act, the landlord could make an application in the appellate Court as well as in the trial Court for an order requiring the tenant to deposit rent. That section may be reproduced here:—

"5. Rent pending suit or appeal for eviction:—

(1) On a suit being filed for eviction on any one of the grounds mentioned in S. 4 or in case of appeal being preferred, the Court shall, on request of the landlord:—

(a) If the rent is already agreed upon, order the tenant to deposit in the Court the rent payable according to the terms of the agreement from the date of filing of the suit or appeal till the decision of the suit or appeal;

(b) If the rent is not already agreed upon, fix a reasonable provisional rent and order the tenant to deposit such rent every month in the Court till the decision of the suit or appeal. The rent so fixed shall be payable from the date of filing of the suit or appeal.

(2) In the case of default on the part of the tenant in depositing the rent even after the order of the Court, the right of the tenant to defend shall be terminated:

Provided that the Court may before making an order of terminating the right of defence provide an opportunity to the tenant for depositing the rent within fifteen days or such longer period as the Court may deem fit.

(3) If the landlord intends to obtain the rent deposited by or on behalf of the tenant in accordance with the above provision, the amount shall be paid by the Court to the landlord after deducting the proper Court fee therefrom."

There is similarity between the Bihar Act and the Madhya Bharat Act.

11. In our opinion, it is unnecessary to retravel the other grounds on which Harishchandra v. Indersingh (AIR 1977 Madh Pra 199) (FB) (supra) is based. Suffice to remember two things. Firstly, the provisions contained in S. 13 were never intended to serve as a machinery for recovering rent from the tenant, as an alternative to a suit. The object of that section is to put a check on the unscrupulous tenant who would protract litigation without paying rent. That purpose is served in the suit. The object is equitable. When the suit is dismissed, the equity is reversed. Once that is borne in mind, all exercise is in futility to some-

how make S. 13 applicable to appeals by means of laboured interpretation. As pointed out in Harishchandra, you would then have to read "institute" as "preferred" in relation to appeal, because the usual term employed is 'suit instituted' and 'appeal preferred'; the expression 'writ of summons' will have to be read as 'notice of appeal'; and the expression 'hearing of suit' will have to be read as 'hearing of suit in appeal' as was done in Ratanchand v. Rajendra Kumar (AIR 1970 Madh Pra 1) (FB) (supra). In our opinion, it is wholly unnecessary to stretch the words and, by giving them unusual meaning, to rewrite the law. As demonstrated in Harishchandra v. Indersingh (supra), there is no hardship or injustice to the landlord, if the tenant does not deposit rent in the appellate Court after the dismissal of the suit. Secondly, and which is more important, to defend the landlord's appeal from the dismissal of his suit, is a very valuable right of the tenant. It vests in him as soon as the suit is dismissed. That valuable and vested right cannot be taken away or curtailed except by law in express and unambiguous language.

12. It was an argument that the words "till the decision of the suit or appeal" occurring in sub-sec. (2) of S. 13 indicate that rent has necessarily to be deposited in the appellate Court also. Now, it can easily be seen that under sub-sec. (2) what is to be fixed by the Court is "reasonable provisional rent" and this is done when there is a dispute as to the amount of rent. Therefore, what is necessarily envisaged is a dispute in the trial Court. If there is no dispute, sub-sec. (2) does not apply at all. If there is a dispute, the Court is bound to frame an issue and decide it on merits in its final judgment. As soon as the suit is decided, the order fixing provisional rent gets automatically dissolved. By its own force, the word "provisional" means that it is stop-gap arrangement. Sub-sec. (2) aims at fixation of "reasonable provisional rent" so that the tenant may not withhold rent and deposit nothing on the pretext that there is a dispute as to the amount of rent due by him. On the one hand, such a dispute cannot at once be decided; on the other hand, the Legislature did not want the tenant to withhold the entire rent on such a pretext indefinitely. The via media is found in sub-s. (2). When there is a dispute, the section enjoins the Court to fix rent; that rent must be reasonable; and that rent will be provisional that is to say, the order will remain in operation until and unless the dispute as to the amount of rent is decided on merits, after framing issue and trial of that issue. That alone is the force of the word "provisional". Now, as soon as the dispute regarding that issue is decided, there remains no question of depositing any "provisional rent"; the tenant has to deposit or pay rent as determined by the Court in accordance with the adjudication on that issue. It will, therefore, be inapt and incorrect to say that even after the decision of the suit in the trial Court (in which necessarily the dispute will have been decided), the tenant will still deposit in the appellate Court "provisional rent." The position which obtains in the Bihar Act is quite different. It contemplates an application by the landlord which may be made in the trial Court or even if it has not been made in the trial Court, it can be made in the appellate Court. That was also the position under the Madhya Bharat Act with slight variations. It is also noteworthy that in the M. P. Act, in the opening words of sub-s. (2), "appeal" is not found so that in the closing words of the section, the word "appeal" becomes meaningless.

13. Shri Y. S. Dharmadhikari relied on the decision in Harishchandra's case (AIR 1977 Madh Pra 199) (FB) and found himself unable to support Ratanchand's case, (AIR 1970 Madh Pra 1) (FB) where a contrary view was taken. He laid a great deal of stress on the proposition that on the dismissal of the landlord's suit, a valuable right vests in the tenant-respondent, so that, unless the Legislature makes a specific and unambiguous provision, a subsequent event of non-deposit of rent, cannot demolish that right.

14. We answer the question referred to us in the negative. Agreeing with the dicta in Harishchandra v. Indersingh, 1977 MPLJ 417 : (AIR 1977 Madh Pra 199) (FB), we hold that S. 13 of the M. P. Accommodation Control Act, 1961, does not apply, and no part of that section applies, to an appeal (whether the appeal be by the tenant or by the landlord) and that the law was correctly laid down in Harishchandra's case and it continues to be so because their Lordships' decision in Radha Kishan v. Gopal Modi, AIR 1977 SC 1217 is clearly distinguishable, the provisions of the Bihar Act being

different from those of the Madhya Pradesh Act. Further, we say with respect that Ratanchand v. Rajendra Kumar (AIR 1970 Madh Pra 1) (FB) (supra) did not lay down law correctly when it held that S. 13 applies to an appeal also.

15. This second appeal shall now be placed before a learned single Judge for disposal.

Answer accordingly.

AIR 1978 MADHYA PRADESH 150
FULL BENCH

SHIV DAYAL, C. J., J. S. VERMA AND S. S. SHARMA, JJ.

Harbhajansingh, Applicant v. State of Madhya Pradesh, Non-Applicant.

Criminal Revn. No. 23 of 1977, D/- 2-12-1977.*

Essential Commodities Act (10 of 1955), Ss. 6-C, 6-A — Appeals from orders under S. 6-A — Judicial Authority does not act as persona designata — Revision against order of Judicial Authority — Lies under Criminal P. C. — 1975 Jab LJ 884 Overruled — (Criminal P. C. (2 of 1974), S. 401).

A Judicial Authority under S. 6-C of the Essential Commodities Act does not act as a persona designata while hearing appeals from orders under S. 6-A of the Act, but acts as a Criminal Court inferior to the High Court. From the order of the Judicial Authority, a revision would lie under the Code of Criminal Procedure. Where the Judicial Authority is a Sessions Judge, a revision would lie to the High Court under S. 401 of the Code of Criminal Procedure, 1973. 1975 Jab LJ 884 Overruled. (Case law discussed). (Para 10)

Having regard to the scheme of Ss. 6-A, 6-B and 6-C of the Act, the policy of the law, becomes abundantly clear. Legislature was conscious of the fact that while in its wisdom it was empowering the Collector to order confiscation his order would be penal in character and also that questions relating to rights and liabilities based on general law may be involved. It was, therefore, deemed just and proper that the Collector's exercise of that power should be judicial and it should be open to scrutiny by Judicial Court. Therefore, an appeal has been provided and the State Government has been enjoined to appoint a Judicial Authority to hear appeals from the Collector's order. In the setting of these provisions, it must be said that the Judicial Authority, although to be appointed by the State Government, must necessarily be a Judicial Court in the hierarchy of Courts. (Paras 5 & 7)

Anno: (1) AIR Manual (3rd Edn.), Essential Comm. Act, S. 6-A, N. 1; S. 6-C, N. 1; (2) AIR Comm. Cr. P. C. (8th Edn.), S. 401, N. 8; S. 397, N. 8.

Cases Referred: Chronological Paras

AIR 1978 SC 1 : 1978 Cri LJ 1 9
1977 Cri LJ 1539 9
1975 Cri LJ 144 (Andh Pra) (FB) 9
1975 Jab LJ 884 3, 4, 9
1971 Cri LJ 1355 (Mys) 9
AIR 1948 PC 12 8
1913 AC 546 : 109 LT 562, National Telephone Co. Ltd. v. Postmaster General 7

S. C. Datt with S. L. Kochar, for Applicant; S. L. Garg, Advocate General with M. V. Tamaskar Govt. Advocate, for Non-Applicant.

SHIV DAYAL, C. J.:— A Division Bench has framed the following question and referred it to us for answer:—

"Whether or not the Judicial Authority under Section 6-C of the Essential Commodities Act acts as a persona designata while hearing appeals under Section 6-A of the Act and, secondly, whether a revision would lie against the order of the Judicial Authority before the High Court?"

2. It appears that the Collector proceeded against the petitioner and 11 others under Section 6-A of the Essential Commodities Act, 1955 (hereinafter called the 'Act'). He served a show cause notice under Section 6-B of the Act and proposed to confiscate the wheat and trucks. After enquiry, the Collector found the applicants to have contravened the provisions of the Inter-Zonal Wheat and Wheat Products (Movement Control) Order, 1973, and confiscated the wheat as well as the trucks. The petitioner and others preferred an appeal to the Judicial Authority, i.e. the District and Sessions Judge, Khandwa, who dismissed the appeal of the petitioner and two others, but allowed the appeal of the other appellants.

3. Aggrieved by the order of the Judicial Authority, Harbhajansingh (revi-

*(Decided by Full Bench on order of reference made by Shiv Dayal, C. J. and K. K. Dube J., D/- 29-8-1977.)

sion-petitioner) filed this revision under the Code of Criminal Procedure. A preliminary question arose whether the Judicial Authority was persona designata and not a Court inferior to the High Court. In the latter case, this revision would be incompetent. In Sitaram v. State of M. P., 1975 Jab LJ 884, a Division Bench of this Court, to which the question had been expressly referred, took the view that a District and Sessions Judge, appointed as Judicial Authority under Section 6-C (1) of the Act, acts as a persona designata so that his decisions are not revisable by the High Court. The remedy under Article 227 of the Constitution (as it then stood) was available.

4. In the present case, the revision-petitioner urged that Article 227 of the Constitution having been amended by the Constitution (42nd Amendment) Act, 1976, that remedy was not available to him and he could only invoke the jurisdiction of this Court under Article 226 of the Constitution. It was, however, urged on his behalf that the decision in Sitaram v. State of M. P., 1975 Jab LJ 884 (supra) required reconsideration. He urged, alternatively, that his Criminal Revision be converted into a writ petition under Article 226 of the Constitution. This application came up before the Division Bench which has referred the question, reproduced at the outset, for decision by a larger Bench.

5. Having regard to the scheme of Secs. 6-A, 6-B and 6-C of the Act, the policy of the law, becomes abundantly clear. Section 6-A confers power on the Collector of the District, in which the essential commodity is seized in pursuance of an order made under Sec. 3, to order confiscation of the essential commodity, any package, covering etc. and any animal, vehicle etc., if he is satisfied that there has been a contravention of the order. Patently enough, this power is penal in nature. Under Section 6-B an opportunity of making a representation and also of being heard is provided. Now, the Legislature was conscious of the fact that while in its wisdom it was empowering the Collector to order such confiscation. his order would be penal in character and also that questions relating to rights and liabilities based on general law may be involved. It was, therefore, deemed just and proper that the Collector's exercise of that power should be judicial and it should be open to scrutiny by Judicial Court. Therefore, an appeal has been provided and the State Government has been enjoined to appoint a Judicial Authority to hear appeals from the Collector's order. In the setting of these provisions, it must be said that the Judicial Authority, although to be appointed by the State Government, must necessarily be a Judicial Court in the hierarchy of Courts. "Judicial Authority" is defined in Black's Law Dictionary as "power and authority appertaining to the office of a Judge, jurisdiction, the official right to hear and determine question in controversy." In 14 American Jurisprudence, Courts, S. 4, Page 248, it is stated:—

"While there is a well defined and generally recognised distinction between a Judge and a judicial tribunal and while it takes more than a presiding officer to constitute a Court, yet the Judge of a Court while presiding over it is by common courtesy called 'the Court' and the words 'Court' and 'judge' are frequently used in the statutes of various States as synonymous and convertible terms."

6. Although the State Government has a discretion under Section 6-C to appoint any Judicial Authority as appellate authority, it cannot be an authority other than a judicial authority. Again, the intention of the Legislature is clear that the judicial authority here refers to Judicial Court; otherwise, an appeal would ordinarily lie to higher Revenue Authorities, such as, the Commissioner, from the order passed by the Collector. See, for instance, Sections 44 and 56 of the M. P. Land Revenue Code.

7. In Madhya Pradesh, District and Sessions Judge has been appointed Judicial Authority. He being a Court in the hierarchy of Courts, he acts as a Court and his jurisdiction is enlarged. Where by a statute matters are referred to the determination of a Court of record with no further provision the necessary implication is that the Court will determine the matters, as a Court. Its jurisdiction is enlarged, but all the incidents of such jurisdiction, including the right of appeal from its decision, remain the same. (Per Lord Parker in National Telephone Co. Ltd. v. Postmaster General, 1913 AC 546). It is simply the question of extending the jurisdiction of an existing Court of law, with all its incidents including a right of appeal to a

new matter closely resembling in character those matters over which it has already jurisdiction as a Court of law. Per Lord Atkinson in National Telephone Co. Ltd. (supra).

8. In Adaikappa v. Chandrasekhara, 74 Ind App 264 : AIR 1948 PC 12, Lord Simonds spoke for the Judicial Committee thus :—

"The true rule is that where a legal right is in dispute and the ordinary Courts of the country are seized of such dispute the Courts are governed by the ordinary rules of procedure applicable thereto and an appeal lies, if authorised by such rules, notwithstanding that the legal right claimed arises under a special statute which does not in terms confer a right of appeal."

9. A Full Bench of the Andhra Pradesh High Court, in Public Prosecutor (A.P.) v. L. Ramayya, 1975 Cri LJ 144 (Andh Pra) (FB), also took the above view and the same view was taken by the Karnataka High Court in Vasundara Traders v. State of Karnataka, 1977 Cri LJ 1539, which overruled the earlier view of the Mysore High Court in State of Mysore v. Pandurang Parusappa Naik, 1971 Cri LJ 1355 (Mys). A contrary view was taken in Sitaram v. State of M. P., 1975 Jab LJ 884 (supra). The question is now concluded by the decision of the Supreme Court in Thakur Das v. State of M. P., Cr. A. No. 109 of 1974, decided on October 14th, 1977 : (AIR 1978 SC 1), where it is laid down thus :—

"We are accordingly of the opinion that even though the State Government is authorised to appoint an appellate authority under Section 6-C, the legislature clearly indicated that such appellate authority must of necessity be a judicial authority. Since under the Constitution the Courts being the repository of the judicial power and the officer presiding over the Court derives his designation from the nomenclature of the Court, even if the appointment is made by the designation of the judicial officer the appellate authority indicated is the Court over which he presides discharging functions under the relevant Code and placed in the hierarchy of Courts for the purposes of appeal and 'revision'. Viewed from this angle, the Sessions Judge, though appointed an appellate authority by the notification what the State Government did was to constitute an appellate authority in the Sessions Court over which the Sessions Judge presides. The Sessions Court is constituted under the Code of Criminal Procedure and indisputably it is an inferior criminal Court in relation to High Court. Therefore, against the order made in exercise of powers conferred by S. 6-C a revision application would lie to the High Court and the High Court would be entitled to entertain a revision application under Ss. 435 and 439 of the Code of Criminal Procedure, 1898 which was in force at the relevant time and such revision application would be competent."

Their Lordships broadly approved the decision in Public Prosecutor (A.P.) v. L. Ramayya, 1975 Cri LJ 144 (Andh Pra) (FB) (supra).

10. Our answer to the question is that a Judicial Authority under Section 6-C of the Essential Commodities Act does not act as a persona designata while hearing appeals from orders under Section 6-A of the Act, but acts as a Criminal Court inferior to the High Court. From the order of the Judicial Authority, a revision would lie under the Code of Criminal Procedure. Where the Judicial Authority is a Sessions Judge. a revision would lie to the High Court under Section 401 of the Code of Criminal Procedure, 1973 (Act No. 2 of 1974).

11. This revision willl now be placed before a Division Bench.

Reference answered accordingly.

AIR 1978 MADHYA PRADESH 152
FULL BENCH

SHIV DAYAL, C. J. AND
K. K. DUBE AND J. P. BAJPAI, JJ.

Manoharlal Awal, Petitioner v. The State of Madhya Pradesh and others, Respondents.

Misc. Petn. No. 164 of 1971. D/- 15-12-1977.*

(A) M. P. Land Revenue Code (20 of 1959), Ss. 150 (3) and 257 (h) — Distinction between 'arrear of land revenue' and 'dues recoverable as an arrear of land revenue' — S. 150 (3) is not applicable in the latter case and is not an alternative remedy under Art. 226 (3) of the Constitution — (Constitution of

*(Decided by Full Bench on order of reference made by K. K. Dube and R. K. Tankha, JJ. D/- 28-4-1977.)

India, Art. 226 (3).) AIR 1976 M.P. 175, Overruled.

Chapter XI of the M. P. Land Revenue Code was primarily enacted for the recovery of Land Revenue. A clear distinction has been made throughout the Chapter between an "arrear of Land revenue" and "dues recoverable as an arrear of land revenue". Where the expression 'an arrear of land revenue' alone is used, it does not include 'money recoverable as an arrear of land revenue'. (Paras 5, 10)

Section 150 of the M. P. Land Revenue Code applies to recovery of "an arrear of land revenue" but not to proceedings for the recovery of any sum of money which is "recoverable as an arrear of land revenue" within the meaning of S. 155 of that Code. AIR 1976 Madh Pra 175, Overruled. (Para 16)

In a proceeding for the recovery of an "arrear of land revenue", the person proceeded against has an alternative remedy by applying to the Sub-Divisional Officer for the determination of the objection that no amount was due or that the amount due was less than the amount claimed in the proceeding, and that decision is subject to a civil suit. The suit contemplated in sub-sec. (3) of S. 150 is an alternative remedy within the meaning of Art. 226 (3) of the Constitution and S. 58 (2) of the Constitution (42nd Amendment) Act, 1976. (Para 16)

In a proceeding for the recovery of a sum of money "recoverable as an arrear of land revenue", the provisions of S. 150 of the Land Revenue Code are inapplicable. Neither the proceeding under sub-sec. (2), nor a civil suit under sub-sec. (3) of S. 150 is available to a defaulter. Thus, in such a case, a civil suit contemplated under S. 150 (3) of the Code is not an alternative remedy. A petition under Art. 226 of the Constitution for quashing notice of demand of additional royalty and recovery proceedings is not barred. Observations to the contra in AIR 1976 Madh Pra 175 held obiter. (Para 16)

(B) M. P. Land Revenue Code (20 of 1959), Ss. 150 and 257 (h) — Suit under Section 150 (3) not maintainable without complying with S. 150 (1) and (2). AIR 1976 Madh Pra 175, Overruled.

The levy and assessment of land revenue is a subject-matter within the exclusive jurisdiction of revenue authorities. The Sub-Divisional Officer can give a decision on the objection raised by the defaulter about his non-liability for the entire arrears of land revenue claimed from him or part thereof. The Legislature did not intend to empower the Sub-Divisional Officer to give a decision on an objection in respect of any dues other than land revenue, the jurisdiction regarding levy and assessment of which vests in other authorities exercising powers under other enactments. The question whether the whole or any part of the land revenue claimed as arrears is really due or not, being within the jurisdiction of the Sub-Divisional Officer, a civil suit will not lie without complying with S. 150 (2). Opening words of S. 257 override Cl. (h) with the result that a civil suit will be competent under sub-sec. (3) of S. 150 provided it satisfies the conditions precedent i. e. the compliance of sub-sec. (1) and sub-section (2). AIR 1976 Madh Pra 175, Overruled. (Paras 11, 12)

Cases Referred: Chronological Paras

AIR 1976 Madh Pra 175 : 1976 MPLJ 254 13

Y. S. Dharmadhikari, for Petitioner; M. V. Tamaskar Govt. Advocate (for Nos. 1, 2 and 4) and R. P. Sinha (for No. 3), for Respondents; V. S. Dabir, for Intervenor.

SHIV DAYAL, C. J.:— By this petition under Art. 226 of the Constitution the petitioner seeks a writ in the nature of certiorari to quash the orders of assessment, the orders of the Central and the State Governments holding that the petitioner is liable to pay royalty on limestone according to use, the notices of demand for recovery of additional royalty and the recovery proceedings pending before the Tahsildar, Maihar. He further seeks a writ of mandamus or prohibition to restrain the respondents from recovering the amounts of additional royalty in accordance with the impugned assessment and the notices of demand by coercive process, and further to direct respondents 1 and 2 to assess the petitioner properly.

2. The respondents, while resisting the petition, raised a preliminary objection at the hearing before the Division Bench. The preliminary objection is based on S. 150 of the M. P. Land Revenue Code. It was urged that an alternative remedy by way of a suit being available under that section, this petition

abated by force of S. 58 (2) of the Constitution (42nd Amendment) Act, 1976. The Division Bench has referred this preliminary question for decision by a larger Bench. That is how the matter is before us.

3. The recovery proceedings are in respect of royalty on limestone. It is common ground that the proceedings have been taken under Chapter XI of the M. P. Land Revenue Code, inasmuch as by virtue of S. 155 of the Code moneys are recoverable in the same manner as an arrear of land revenue. That section enacts that moneys may be recovered, as far as may be, under the provisions of that Chapter in the same manner as an arrear of land revenue. Now, S. 150 runs thus :—

"150. Payment under protest and suit for recovery.—(1) If proceedings are taken under this Chapter against any person for the recovery of an arrear of land revenue, he may, at any time before the property is knocked down at a sale, pay the amount claimed and may, at the same time, deliver a protest signed by himself or by his authorised agent to the Revenue Officer taking such proceedings, and thereupon they shall be stayed.

(2) Any person complying with the provisions of sub-sec. (1) may, notwithstanding anything contained in S. 145, apply to the Sub-Divisional Officer that nothing was due or that the amount due was less than the amount for the recovery of which proceedings were taken and the Sub-Divisional Officer shall decide the objection so raised.

(3) No appeal shall lie against the order of the Sub-Divisional Officer passed under sub-sec. (2) but the person concerned may institute a civil suit for the recovery of the sum or part thereof paid under protest."

4. The preliminary objection raised for the respondents is that the defaulter may deposit the amount and get his liability determined by the Sub-Divisional Officer. In case he is not satisfied with that decision, he can file a civil suit. Thus a civil suit being an alternative remedy within the meaning of S. 58 (2) of the Constitution (42nd Amendment) Act, 1976, this petition under Art. 226 of the Constitution is barred.

5. In order to appreciate the applicability of S. 150 of the Code, the scheme of Chapter XI has to be seen. This Chapter was primarily enacted for realisation of land revenue. That is the title of the Chapter. Land revenue is the first charge on land and on the rents and profits thereof (vide S. 137). However, S. 155 enables recovery of certain other moneys enumerated and classified in that section, in the same manner as an arrear of land revenue. It must, however, be noted that a clear distinction has been maintained throughout the Chapter between an "arrear of land revenue" and "dues recoverable as an arrear of land revenue". Once that distinction is appreciated, it will be clearly seen that S. 150 applies to the former and not to the latter. Section 139 speaks of arrears of land revenue, pure and simple. Sub-sec. (1) of S. 142 reads thus :—

"Where a Patel, Patwari, Gram Sabha or Gram Panchayat receives a payment from any person (i) on account of land revenue or (ii) on account of any sum of money recoverable as an arrear of land revenue he/it shall grant a receipt for such sum in the prescribed form."

(Numbering by us)

The two expressions are not confused and mixed together. An obligation is cast on the Patel, etc, to grant a receipt when he receives a payment either on account of land revenue or on account of any money recoverable as an arrear of land revenue.

6. Section 143 speaks of penalty for default of payment of land revenue. Section 145 enacts a presumption in respect of a certificate issued by the Collector or the Tahsildar about the amount of arrears payable to Government and about the person who is a defaulter. Section 147 describes the process for the recovery of arrears, primarily an arrear of land revenue in the strict letter of the section. It is this recovery provided in S. 147 which is referred to in S. 155 by employing the expression "in the same manner as an arrear of land revenue."

7. Section 151 deals with application of proceeds of sale. Sub-sec. (1) speaks of three things: (i) Arrears on account of which the sale was held, which necessarily means both arrears of land revenue and moneys recoverable as an arrear of land revenue; (ii) arrears of cesses and (iii) any other arrear payable to the State Government by the defaulter. Under sub-sec. (2) it is further clarified that arrears of land revenue is the first charge.

8. Section 152 enacts that the purchaser of the land sold for arrears of land revenue shall acquire title free of all encumbrances. Again, the basis for this provision is that land revenue being the first charge on land, a tenure holder is not allowed to create encumbrances on the land so as to jeopardise the right of the State to realise land revenue. This section does not speak of a sale for the recovery of money as an arrear of land revenue.

9. By virtue of S. 153, a purchaser at a sale under Chap. XI acquires title to the property from the time when the property was sold, and not from the time when the sale becomes absolute. This provision thus applies both to arrears of land revenue and money recoverable as an arrear of land revenue. Section 154-A again speaks of both separately :—

"When the arrear of land revenue is due in respect of a holding or where any money is recoverable in the same manner as an arrear of land revenue under S. 155, the Tahsildar may ... ... let out the holding."

Under sub-sec. (3) of this section again the distinction is maintained: on the expiry of the period of lease the holding shall be restored to the person concerned free of any claim on the part of (i) the State Government (in the case of land revenue) and (ii) any other authority whatsoever for the money recoverable in the same manner as an arrear of land revenue under S. 155. Section 156 provides for recovery of moneys from surety under any provisions of the Code or any other enactment as an arrear of land revenue.

10. From the above analysis, it can be clearly seen that (i) "an arrear of land revenue" is distinct and separate from (ii) "money recoverable as an arrear of land revenue"; and this distinction has been studiously maintained thoughtout the chapter. The intention of the Legislature becomes obvious enough. In every section only that expression has been used to which it was meant to apply. There does not appear to be any confusion. Where the expression "an arrear of land revenue" alone is used it does not include "money recoverable as an arrear of land revenue". Bearing in mind this distinction, S. 150 of the Code may now be read carefully. The first sub-section speaks of "an arrear of land revenue" alone. There is no mention of 'money recoverable as an arrear of land revenue', in the whole of the section. To put it differently it is only the person against whom proceedings are taken for the recovery of an arrear of land revenue, who can pay the amount claimed before the property is knocked down and deliver a protest. As soon as this is done, the proceedings shall be stayed. On an application by that person, the Sub-Divisional Officer shall determine whether anything at all was due from him or any amount was due from him less than the amount for the recovery of which proceedings were taken. The decision of the Sub-Divisional Officer is not appealable but the person concerned may institute a civil suit for the recovery of the amount which he paid under protest or any part thereof.

11. The whole of S. 150 is applicable only to a proceeding for the recovery of an arrear of land revenue but not to a proceeding for the recovery of money recoverable as an arrear of land revenue. Although it is not necessary to enter into wisdom of the law makers, it is apparent enough that the levy and assessment of land revenue is a subject-matter within the exclusive jurisdiction of revenue authorities. The Sub-Divisional Officer can give a decision on the objection raised by the defaulter about his non-liability for the entire arrears of land revenue claimed from him or part thereof. The Legislature did not intend to empower the Sub-Divisional Officer to give a decision on an objection in respect of any dues other than land revenue, the jurisdiction regarding levy and assessment of which vests in other authorities exercising powers under other enactments. For instance, the Excise Act, the Sales Tax Act, etc. Having provided for a deposit and protest and having conferred jurisdiction on the Sub-Divisional Officer to decide the objection the section provides for the remedy of a civil suit as well. But such a suit can be instituted only after the amount has been deposited and decision has been obtained from the Sub-Divisional Officer. This position would not obtain in case of any dues other than land revenue simpliciter, although they have been made recoverable as an arrear of land revenue. Adverting now to S. 257 of the Code itself Cl. (h) bars a civil suit on questions which can be determined by Revenue Authorities under the Land Revenue Code. It follows that the question whether the whole or any part of the

land revenue claimed as arrears is really due or not, being within the jurisdiction of the Sub-Divisional Officer a civil suit will not lie. Opening words of S. 257 override Cl. (h) with the result that a civil suit will be competent under sub-sec. (3) provided it satisfies the condition precedent i. e. the compliance of sub-sec. (1) and sub-sec. (2).

12. Where S. 150 of the Code applies as explained above under the specific provisions contained in that section, undoubtedly. an alternative remedy within the meaning of Art. 226 (3) of the Constitution and S. 58 (2) of the Constitution (42nd Amendment) Act, 1976, is available.

13. Shri Dharmadhikari referred to State of M. P. v. Sunder Lal, 1976 MPLJ 254 : (AIR 1976 Madh Pra 175) and submitted that although it was a case of dues in respect of country liquor, and not a case where any question relating to arrears of land revenue as such was involved, the Division Bench proceeded to examine the impact of S. 150 of the Land Revenue Code. which was out of place.

14. It appears from the facts narrated in para. 2 of that judgment that the plaintiffs in the different suits had been granted a licence for the retail sale of country liquor under the supply system for shops. Their case was that because of shortage of liquor in the warehouse they could not get adequate supplies and they had to close their shops for a number of days causing loss in business. They (except one of them) adjusted the unpaid amounts of licence fee against the compensation which they claimed in the suits. The plaintiff in the remaining suit sought a decree for whole of the compensation claimed by him. One of the contentions for the Department was that the plaintiffs were not entitled to deduct the unpaid licence fee from the amount of compensation and to sue for the balance. It was contended that the suits were not maintainable to the extent the plaintiffs claimed adjustment of the arrears of the licence fee because of the bar contained in S. 257 (h) read with S. 150 of the M. P. Land Revenue Code, 1959. From what we have said above, it can at once be said that the objection raised by the defendant had to be rejected straightway on the ground that S. 150 had no application to that case. However, what the Division Bench said in para. 7 may be reproduced here :—

"The arrears of licence fee payable to the State under an excise licence can be recovered as arrears of land revenue under S. 64 (1) (c) of the Excise Act. The procedure provided for realisation of land revenue in Chapter XI of the Land Revenue Code can, therefore, be utilised by the State for recovering licence fee due under an excise contract. If proceedings are taken for recovery under this Chapter, the person against whom recovery is sought can pay the amount claimed under protest before his property is knocked out at a sale. He can then object to the Sub-Divisional Officer that no amount was due or that the amount due was less than the amount for which recovery proceedings were started. If the Sub-Divisional Officer overrules the objection so raised, the person aggrieved can institute a civil suit. This procedure is prescribed in Section 150 of the Land Revenue Code."

(Underlined by us)

Having said all this, the Division Bench proceeded to see whether Cl. (h) of S. 257 applied and barred the suit. They expressed their opinion thus :—

"In our opinion, the suits with which we are concerned in these appeals do not fall under that clause. But then it is submitted that the plaintiffs after depositing under protest the arrears of licence fee in recovery proceedings under S. 150 could have applied to the Sub-Divisional Officer for adjudication that the arrears were not due as they stood adjusted against the amount of compensation payable to them. It is further argued that the remedy of suit could be resorted to by the plaintiffs only after following this procedure and after rejection of their claim of adjustment by the Sub-Divisional Officer. In our opinion, S. 150 is not open to any such construction. All that the section means is that if the defaulter wants to have first a summary decision of the Sub-Divisional Officer, which is open to challenge in a civil suit, he should deposit the amount of arrears claimed by the State under protest before the sale of his property is knocked down." (Underlined by us)

Shri Dharmadhikari submits that since S. 150 had no application at all inasmuch as it was not a case of "arrears of land revenue' as such, this entire discussion was out of context and irrelevant. He is right.

15. Again, the observations of the Division Bench to the effect that in a case where S. 150 applies a suit under sub-sec. (3) can be instituted straightway without depositing amount of land revenue under sub-sec. (1) or approaching the Sub-Divisional Officer for a decision as contemplated in sub-sec. (2) are not right. The reason is that the right to institute a civil suit under sub-sec. (3) accrues only after the defaulter has deposited the amount under sub-sec. (1) of that section. The civil suit contemplated in sub-sec. (3) is "for the recovery of the sum or part thereof paid under protest." A civil suit is otherwise barred by S. 257 (h), Land Revenue Code.

16. Our answer to the question referred to us is this :—

(1) Section 150 of the M. P. Land Revenue Code applies to recovery of "an arrear of land revenue" but not to proceedings for the recovery of any sum of money which is "recoverable as an arrear of land revenue" within the meaning of S. 155 of that Code.

(2) In a proceeding for the recovery of an "arrear of land revenue", the person proceeded against has an alternative remedy by applying to the Sub-Divisional Officer for the determination of the objection that no amount was due or that the amount due was less than the amount claimed in the proceeding, and that decision is subject to a civil suit. The suit contemplated in sub-sec. (3) of S. 150 is an alternative remedy within the meaning of Art. 226 (3) of the Constitution and S. 58 (2) of the Constitution (42nd Amendment) Act, 1976.

(3) In a proceeding for the recovery of a sum of money "recoverable as an arrear of land revenue", the provisions of S. 150 of the Land Revenue Code are inapplicable. Neither the proceeding under sub-sec. (2), nor a civil suit under sub-sec. (3) is available to a defaulter. Thus, in such a case, a civil suit contemplated under S. 150 (3) of the Code is not an alternative remedy.

(4) The question whether in a case for the recovery of a sum of money "recoverable as an arrear of land revenue" a civil suit under the general law will be an alternative remedy within the meaning of Art. 226 (3) of the Constitution, or S. 58 (2) of the Constitution (42nd Amendment) Act, 1976, is not before us. We, therefore, do not express any opinion on that question.

17. The petition shall now be laid before a Division Bench.

Order accordingly.

AIR 1978 MADHYA PRADESH 157

(INDORE BENCH)

G. L. OZA, J.

M/s. Abdul Hussain H. M. Hasanbhai, Petitioner v. The Shalimar Rope Works Ltd. and another, Respondents.

Civil Revn. No. 93 of 1976, D/- 28-2-1978.

Civil P. C. (5 of 1908), O. 29, R. 2 (b) — Service of summons on company — Mode of.

Service of summons on an employee of the company who was at that time in the registered office and who received the notice putting his signature along with the seal of the company is a valid service on the company as it would amount to leaving the summons in the registered office of the company. AIR 1967 Madh Pra 239, Rel. on; AIR 1935 Rang 144 (SB), Distinguished. (Paras 5, 6)

Sub-clause (b) of R. 2 of O. 29 is applicable to both the modes of service — one by leaving the summons at the registered office or by sending it by post. (Para 6)

Anno: AIR Comm., C. P. C. (8th Edn.), O. 29, R. 2 (b), N. 1.

Cases Referred: Chronological	Paras
AIR 1967 Madh Pra 239	6
AIR 1935 Rang 144 (SB)	6

R. K. Vijaivargiya, for Petitioner; Shekhar Bhargava, for Respondents.

ORDER: — This revision petition has been filed by the plaintiff-petitioner against an order passed by the Additional District Judge, Indore on 20-10-1975 in Misc. Judl. Case No. 23/75; wherein the learned Judge allowed an application submitted by the non-applicants and set aside an ex parte decree.

2. The plaintiff-petitioner filed a suit against the non-applicants for recovery of an amount of Rs. 26,000/-. A summons of this suit was served on the defendant-non-applicants on 17-3-1975; but still on 25-3-75 nobody appeared for the non-applicants. Thereupon on 22-4-75 an ex parte decree was passed. Thereafter on 5-8-75 an application under O. 9, R. 13 of the C. P. C. for setting aside ex parte decree was filed in the

court below by the non-applicants alleging that the summons in the suit was not properly served on defendant No. 1. They also contended that they learnt about passing of the decree on 29-7-75, therefore they sought setting aside of the decree passed against them. It is not in dispute that the summons in the name of the defendant-non-applicant No. 1 was served on an employee in the registered office of the Company on 17-3-1975 and this employee of the Company put his signatures on the summons affixing seal of the Company indicating that he received the summons on behalf of the Company. What was contended in the Court below as well as before me was that this person who received the summons on behalf of the Company was not an Officer authorised to receive the summons as contemplated under sub-cl. (a) of R. 2 of O. 29 of C. P. C. The court below also set aside the ex parte decree on the ground that the summons was not served on the proper person.

3. It was contended by learned counsel for the petitioner that it is strange to note that the Officer who received the summons and signed on behalf of the Company has not been produced in the witness box. Apart from it learned counsel contended that O. 29 R. 2 (b) C. P. C. provides that the summons could be served on a Company either by post or by leaving it in the registered office of the company and according to learned counsel the signatures of an officer of the Company in the registered office having received the summons clearly go to show that the summons was left in the registered office of the company and this is sufficient compliance with sub-clause (b) of Rule 2 of O. 29 C., P. C. According to learned counsel the Court below failed to consider sub-clause (b) on an assumption that sub-cl. (b) is only applicable in cases of service by registered post. But this is clearly a misconception. Consequently learned counsel contended that the court below has committed material irregularity in exercise of jurisdiction.

4. Learned counsel for the non-applicants on the other hand contended that when a notice is sought to be served personally it could only be served in accordance with sub-cl. (a). He also submitted that under the Law of Companies it is always a person authorised or a Director or a Secretary who is entitled to receive the summons on behalf of the Company. He, however, did not dispute that the notice was received by an employee of the Company in the registered office and that person has not been examined; but he contended that he had no authority to receive the summons on behalf of the Company and therefore for his fault the Company could not be penalised.

5. It is not in dispute that the person who received the summons in the office of the Company is not a person who is entitled to be served on behalf of the Company in accordance with sub-cl. (a) of R. 2 of O. 29 of C. P. C. It is also not in dispute that the notice was served on an employee of the Company who was at that time in the registered Office of the Company and he received the notice in the name of the non-applicant Company in the registered office and put his signatures in acknowledgment thereof and also put a seal to indicate that he was receiving it in the registered office of the Company. It, therefore, could not be disputed on fact that the summons was left in the registered office of the Company. As regards the negligence or default made by this employee of the Company is concerned, there is nothing in evidence as this person has not been examined at all. There is also nothing to indicate that he was not authorised to receive papers in the registered office of the Company and he without any authority put the seal of the Company on the summons and signed it. As regards his authority an Officer of the Company has been examined; but the person who received the summons has not been examined and the Officer who was examined has mainly stated that he was not a person as contemplated under sub-cl. (a) of R. 2 of O. 29 of the C. P. C. to receive the summons on behalf of the Company. It is also not in dispute before me that the person who signed the receipt of the summons is neither a Director nor the principal Officer or the Secretary of the Company.

6. Order 29 R. 2 of C. P. C. provides:

"2. Service on Corporation. Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served—

(a) on the secretary or on any director, or other principal officer of the corporation, or

(b) by leaving it or sending it by post addressed to the corporation at the

registered office, or if there is no registered office then at the place where the corporation carries on business."

It is not in dispute that the summons on the Corporation or the Company has not been served in accordance with sub-cl. (a) of R. 2 of O. 29 C. P. C. Sub-cl. (b), it appears, was omitted from consideration by the court below on an assumption that it only applies to service by post. But it could not be disputed and in fact it was not disputed that sub-cl. (b) contemplates two modes of service — one by leaving the summons at the registered office or by sending it by post addressed to the corporation at the registered office and in absence of registered office it could even be left or sent where the corporation carries on business. In the present case we are not concerned with any other place where the corporation carries on business because admittedly the summons was handed over to an employee in the registered office of the Company. It, therefore, could not be doubted that the summons was left in the registered office of the company as contemplated by sub-cl. (b) of R. 2 of O. 29 of C. P. C. and this rule provides this as a mode of service and therefore, that mode was followed and the service has been completed. In Bhagwati Dhar Bajpai v. Jabalpur University (AIR 1967 Madh Pra 239) a Division Bench of this Court considered the impact of the words "or left at his office" and observed — (at p. 242)

"In the same connection, the language of S. 80 of the Civil P. C. was emphasized before us on behalf of the respondents where, in case of notices which are required to be delivered to particular public officers stated in that section. the language used is that the notice shall be delivered to him or left at his office. By contrast of the language it was sought to be urged that the words "or left at his office" are missing in S. 18 (1), the only meaning that could be given to the language used was that the notice should have been handed over personally to the Registrar. In our opinion, the words "or left at his office' as used in S. 80 C. P. C. have merely been used by way of abundant caution and even if those words were not there, it could not be insisted that the notice should have been delivered to the public officer concerned personally."

Learned counsel for the non-applicants placed reliance on a decision reported in Commr. of Income-tax v. Dey Brothers (AIR 1935 Rang 144) (SB) wherein it was observed that where a notice under the Income Tax Act is delivered otherwise than by post to any clerk or servant on the premises where the assessee carries on business, it is not sufficient to hold that the notice was served on the Manager. In this decision their Lordships were considering the service on a person under O. 5 Rr. 9 and 13 of C. P. C. as under S. 63 (1) of the Indian Income Tax Act, 1922, the summonses were to be issued and served in accordance with the provisions contained in the Civil P. C. and in that context their Lordships felt that the summons being served on any employee in the office will not amount to personal service of the assessee; but in that decision the provisions contained in O. 29 R. 2 were not considered apparently because it was not a case of a corporation and therefore this case is of no assistance. Learned counsel referred to certain observations in the Halsbury's Laws of England and also to the provisions contained in S. 51 of the Companies Act. But all that is not necessary for the decision of this case. It, therefore, could not be doubted that the notice on the non-applicant No. 1 Company was served in accordance with sub-cl. (b) of R. 2 of O. 29 of the C. P. C.

7. The trial Court omitted to consider this rule on an assumption that it would only apply to the cases of service by post. Apparently that is not justified, and therefore, the court below committed material irregularity in exercise of jurisdiction in setting aside ex parte decree on the ground that the notice of the suit was not properly served.

8. It was not contended by learned counsel for the non-applicants that even if notice was held to be served there was sufficient reason for the non-applicants to explain the absence from appearance on the date fixed. It appears that that was not the case of the non-applicants. In any event that has not been contended before me, apparently as it would not be possible for the non-applicants to explain the delay as notice was served in the month of March whereas the application for setting aside the ex parte decree was made in the month of August.

9. In the light of the discussion above, this revision petition is allowed. The order passed by the learned Additional District Judge, Indore dated 20-10-1975 is set aside. The petitioner shall be entitled to costs of this revision. Counsel fee Rs. 150/-, if certified.

Revision allowed.

AIR 1978 MADHYA PRADESH 160

(GWALIOR BENCH)

H. G. MISHRA, J.

Mangilal and others, Applicants v. Registered Firm Mittilal-Radheylal Rastogi and others, Respondents.

Civil Revn. No. 38 of 1978, D/- 17-2-1978.*

(A) M. P. Anusuchit Janjati Rini Sahayata Adhiniyam (12 of 1967), Ss. 7, 2 (4) — Debt subsisting on appointed day — Koli Kori caste included in Scheduled Caste in 1976 — Appointed day as applicable to them — Held, not changed by provisions of Central Act 108 of 1976 — (Scheduled Castes & Scheduled Tribes Orders (Amendment) Act (108 of 1976), S. 1).

In order to attract the applicability of the Act, the following things must co-exist :—

(1) The debt must be one which is subsisting on the appointed date;

(2) that the suit or proceeding must be of the nature specified in sub-s. (1) of S. 7, and

(3) that the suit or proceeding of the nature specified in sub-s. (1) of S. 7 must be for recovery of the debt as defined by the Act. (Para 11)

Where the persons belonging to the Caste Koli Kori were included in the list of Scheduled Castes by the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act (108 of 1976) so far as Madhya Pradesh is concerned, it could not be said on basis of the Amendment Act that the appointed date for the purpose of persons belonging to the Koli Kori Caste should be deemed to be 20-9-1976 i.e. the date of publication of the Amendment Act (108 of 1976). Even though the Koli Kori are included subsequently in the list of Scheduled Castes, the appointed day applicable to them will be the same as applicable to the members of the Scheduled Castes i.e. 15-8-1973. The question whether the Amendment Act is retrospective or prospective has no bearing on the controversy as to appointed day. The Amendment Act directs itself only to provide for inclusion in or exclusion from the lists of Scheduled Castes or Scheduled Tribes of certain Castes and Tribes. It does not concern itself with altering the appointed date. (Paras 13, 14)

Where the debt is advanced to a person of Koli Kori Caste on the basis of a bond dated 5-5-1974 it could not be said that the debt was subsisting on the appointed day for the purpose of the Act. Hence a suit in Civil Court for recovery of the debt will not be barred and the plaintiff need not approach Debt Relief Court. AIR 1973 Madh Pra 12 Rel. on. (Para 12)

(B) Scheduled Castes & Scheduled Tribes Orders (Amendment) Act (108 of 1976), S. 1 — Act is not retrospective in effect — (Interpretation of Statutes — Retrospective Act).

The Amendment Act No. 108 of 1976 is not retrospective in effect. In order to give retrospective effect, there must be intention of the Parliament expressed in so many words or such intention must be gathered by necessary implication from the language employed therein. After reading the entire Amendment Act it will be clear that there are neither any words expressly giving the Act retrospective effect nor there are words from which by necessary implication it may be inferred that the Amendment Act was intended to be retrospective in effect. Generally in absence of words giving retrospective effect, a Statute has to be regarded as prospective in effect only. (Para 13)

Cases Referred: Chronological Paras

AIR 1973 Madh Pra 12 : 1972 MP LJ 756 3, 15

R. S. Saxena, for Applicants; B. M. Agarwal, for Respondents.

ORDER :— This is a revision preferred by the defendant-applicants against order dated 10-12-1977 passed by the Second Additional District Judge, Gwalior, passed in Small Cause Suit No. 70/1976, whereby it has been held that the Madhya Pradesh Anusuchit Janjati Rini Sahayata Adhiniyam (12 of 1967) is not applicable, because the loan sought to be recovered on the basis of a bond dated 5-5-1974 was not subsisting on the appointed date.

*(Against order of Smt. Sarojini Saxena, Addl. Dist. J. Gwalior, D/- 10-12-1977.)

2. Learned counsel for the applicants Shri B. S. Saxena has raised the following contentions:—

(i) That although the debt sought to be recovered is alleged to have been advanced on the basis of a bond dated 5-5-1974, yet by virtue of the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1976 (No. 108 of 1976) assented to by the President on 18th Sept. 1976 published in the Gazette of India (Extraordinary) Part II, Section 1 dated 20-9-1976, the appointed date will be deemed to be the date of publication of the aforesaid Amendment Act and, as such, the applicants are entitled to the benefit of the Act No. 12 of 1967.

(ii) That the aforesaid Amendment Act No. 108/1976 should be deemed to be retrospective in effect. Therefore, it should be deemed that the loan was advanced on the appointed date and, as such, the applicants will be entitled to the benefit of the Act. In the alternative it was contended that even if the provisions of the aforesaid Amendment Act are prospective in effect, the benefit of the Act will go to the applicants, as the appointed date will be considered to be 20-9-1976. Consequently, the jurisdiction of the Civil Court is ousted in view of the provisions of S. 7 (2) of the Act No. 12 of 1967.

3. Learned counsel for the plaintiff-non-applicants Shri B. M. Agrawal supported the impugned order and contended that none of the aforesaid contentions raised by the learned counsel for the applicants has any force and that since the debt was not subsisting on the appointed date, the Act No. 12 of 1967 is not applicable. He further argued that the appointed date is 15-8-1973. The loan being advanced on 5-5-1974, the Act No. 12 of 1967 has no applicability to the suit. He placed reliance on the ratio of the case reported in Channilal v. Bundelal, 1972 MPLJ 756 : (AIR 1972 Madh Pra 12).

4. After having heard the learned counsel for both the parties, I am of opinion that none of the contentions advanced by the learned counsel for the applicants has any force.

5. Before taking up for consideration the contentions advanced by the learned counsel for the applicants, it is necessary to trace the history of applicability of the Act No. 12 of 1967. The Act in Section 1 provides that it extends to the whole of Madhya Pradesh. Sub-sec. (3) of S. 1 reads as under:—

"(3) It shall come into force—

(a) in the scheduled areas, on the date on which the Madhya Pradesh Scheduled Tribes Debt Relief Regulations, 1962, in force therein are repealed, and

(b) in other areas, at once."

The definition S. 2 provides that—

"In this Act, unless the context otherwise requires—

(1) "appointed date" means—

(a) in relation to the Scheduled areas, the date on which the Madhya Pradesh Scheduled Tribes Debt Relief Regulations, 1962 in force therein are repealed, and

(b) in relation to other areas, the 15th March 1967. x x x x."

6. It is common ground that the Act No. 12 of 1967 did not extend to Scheduled Castes prior to 15-8-1973. It was applicable to Scheduled Tribes before the State Government by issuing Notification No. 164-73-XXV-II dated 30th June 1973, published in the M. P. Rajpatra Part I dated 20-7-1973, appointed 15th Aug. 1973 as the date on which the said Adhiniyam (Act No. 12 of 1967) shall come into force in its application to the members of the Scheduled Castes.

7. Thereafter, by the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1976 (No. 108 of 1976). referred to above, Koli Kori were included in the list of Scheduled Castes so far as Madhya Pradesh is concerned, and in the Schedule, Part IX, Madhya Pradesh at serial No. 31 Koli Kori stood included in the Constitution (Scheduled Castes) Order, 1950.

8. Now, I revert back and take up the contentions of the learned counsel for the applicants for considerations. The first contentions of the learned counsel is to the effect that although the debt sought to be recovered is alleged to have been advanced on the basis of a bond dated 5-5-1974 yet by virtue of the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1976 (No. 108 of 1976) assented to by the President of India on 18th Sept. 1976, published in Gazette of India (Extraordinary) Part II, Section 1 dated 20-9-1976, the appointed date will be deemed to be the date of publication of the aforesaid Amendment Act and, as such, the applicants are entitled to the benefit of the Act No. 12 of 1967. The arguments advanced by the learned counsel overlook the fact that the Amendment Act No. 108 of 1976 does not concern itself with fixing the ap-

pointed date. The appointed date for purposes of the Act No. 12 of 1967 by virtue of the aforesaid Notification was and remained to be 15th Aug. 1973. What S. 7 of the Act No. 12 of 1967 provides is consequences which shall ensue on coming into force of the Act. In sub-sec. (1) of S. 7 it is provided that as from the appointed date, the following consequences shall ensue, namely—

(i) No Civil Court having jurisdiction shall entertain any suit or proceeding against a debtor for the recovery of his debt.

(ii) All proceedings in execution of any decree for money or proceeding for making final any preliminary decree for foreclosure or sale or proceedings in execution of any final decree for sale against a debtor for the recovery of his debt shall stand withdrawn and all property of debtor under attachment in any such proceeding shall forthwith be released;

(iii) Every debtor in detention in a Civil Prison in execution of any decree for money passed against him by a Civil Court in respect of a debt shall forthwith be released.

9. Sub-section (2) of Sec. 7 of this Act provides that—

(2) "If, on the appointed date any suit or proceeding of the nature specified in sub-sec. (1) is pending before any such Civil Court, the Civil Court shall issue a direction to the plaintiff to submit the claim in respect of such debt before the Debt Relief Court having jurisdiction over the area within a period not exceeding sixty days as may be specified in such direction.

(Underlining is mine)

10. Now, S. 2 (4) of the Act No. 12 of 1967 defines the word 'debt' to include:

"(i) all liabilities owing to a creditor in cash, or kind, secured or unsecured, payable under a decree or order of a Civil Court or otherwise and subsisting on the appointed date whether due or not due;

(ii) arrears of owing or salary subsisting on the appointed date."

11. Reading the aforesaid provisions together, in order to attract the applicability of the Act No. 12 of 1967, the following things must co-exist:—

(1) The debt must be one which is subsisting on the appointed date;

(2) that the suit or proceeding must be of the nature specified in sub-sec. (1) of S. 7. and

(3) that the suit or proceeding of the nature specified in sub-sec. (1) of S. 7 must be for recovery of the debt as defined by the Act.

12. In the instant case, the debt is alleged to have been advanced on the basis of a bond dated 5-5-1974 i.e., after the appointed date (15-8-1973). Therefore the debt which is sought to be recovered in the suit was not subsisting on the appointed date. Consequently the contention of the learned counsel that the Act is applicable to the suit has to be rejected as untenable.

13. The question whether the Amendment Act No. 108 of 1976 has retrospective or prospective effect has absolutely no bearing on the present controversy because the Amendment Act directs itself only to provide for inclusion in or exclusion from the lists of Scheduled Castes or Scheduled Tribes of certain Castes and Tribes. It does not concern itself with altering the appointed date. As stated above, by virtue of the Notification dated 20th June 1973, the State Government had appointed the aforesaid date, and the Act No. 12 of 1967 came into force in its application to the members of the Scheduled Castes from that date alone. No notification is shown to the effect that 20th Sep. 1976 was ever appointed a date for this purpose. Therefore, the contention of the learned counsel on both the hypotheses that the Amendment Act No. 108 of 1976 is prospective or retrospective cannot help the cause of the applicant. The Amendment Act No. 108 of 1976 is not retrospective in effect. In order to give retrospective effect, there must be intention of the Parliament expressed in so many words or such intention must be gathered by necessary implication from the language employed therein. After reading the entire Amendment Act it will be clear that there are neither any words expressly giving the Act retrospective effect nor there are words from which by necessary implication it may be inferred that the Amendment Act was intended to be retrospective in effect. Generally in absence of words giving retrospective effect, a Statute has to be regarded as prospective in effect only. Therefore, the argument of the learned counsel about the retrospective effect of the aforesaid Amendment Act is not tenable.

14. This brings me to the alternative submission of the learned counsel to the effect that even if the Amendment Act is deemed to be prospective in effect, the Act will be deemed to have come into force on and the appointed date will also be deemed to have been as 20-9-1976. By no process of interpretation such a conclusion can be arrived at because the field in which the Amendment Act No. 108/1976 has to operate is entirely different from the field which is covered by the Notification dated 20-9-1976 issued under S. 1 (4) of the Act No. 12/1967.

15. Learned counsel on behalf of the plaintiff-non-applicants relied on the ratio of the case Channilal v. Bundelal (1972 MPLJ 756): (AIR 1973 Madh Pra 12) and contended that since the debt was not subsisting on the relevant date (which for the present case is 15-8-1973), the plaintiffs cannot be asked to approach the Debt Relief Court established under the Act No. 12 of 1967. The ratio of the case relied on by the learned counsel for the plaintiff-non-applicants can be extended to the present situation also. It has been held in this case that the Act, therefore, applies only to a debt borrowed before the appointed date and does not apply to a debt incurred after that date. In the present case, the debt is alleged to have been incurred after the appointed date.

16. In view of the aforesaid discussion, none of the contentions of the learned counsel for the applicants has any force. The revision is devoid of force and is, consequently, dismissed. In view of the nature of the controversy the parties are left to bear their own costs of this revision.

Petition dismissed.

AIR 1978 MADHYA PRADESH 163

G. L. OZA, J.

Premibai, Petitioner v. Parwatibai and others, Respondents.

Civil Revn. No. 403 of 1976. D/- 15-2-1978.*

Civil P. C. (5 of 1908), O. 6, R. 17 — Amendment of plaint — Application for — Consideration of — Time for.

Where the plaint as filed and as sought to be amended was within the jurisdiction of the Court, the Court must consider the application for amendment before considering the preliminary issue of jurisdiction and valuation of property. AIR 1953 Nag 273, Dist. (Para 8)

Anno: AIR Comm., C. P. C. (1908), (9th Edn.), O. 6, R. 17, N. 12.

Cases Referred: Chronological	Paras
AIR 1953 Nag 273	6, 7
AIR 1928 Mad 400	7
AIR 1919 Mad 1071	7

S. K. Agarwal, for Petitioner; M. G. Upadhya, for Respondent.

ORDER:— This revision petition has been filed by the petitioner-plaintiff against an order passed by the Additional District Judge, Indore dated 7-4-1976.

2. It appears that the plaintiff filed the present suit for partition and separate possession claiming one-fourth share in the property. According to the plaintiff in para. 13 of the plaint she valued the claim at Rs. 18,500/-.

3. In the written statement plea was raised that the valuation of the property is shown less but it was also contended that the plaintiff will not be entitled to one fourth share.

4. Issues were framed on the question of valuation and jurisdiction: but the plaintiff-petitioner submitted an application for amendment of the plaint and by this amendment in para. 13 the plaintiff wanted to add the valuation of the property as a whole but wanted to amend it by saying that she claimed only one-eighth share. The learned Court below refused to consider the amendment application before the decision on the preliminary question about jurisdiction and valuation of the property. Against this the present revision petition has been filed.

5. Learned counsel for the petitioner contended that on the averments made in the plaint the court below had jurisdiction to try the suit and even on the averments made in the amendment application the court below will have jurisdiction to try the suit.
Therefore there was no reason for the learned court below to postpone the consideration of the amendment application till decision on the question of valuation and jurisdiction. In fact, the question of jurisdiction which the learned court below was enquiring as preliminary issue depends upon the evidence led by the parties about valuation of the property.

*(Against order of M. L. Tiwari, 3rd Addl. Dist. J., Indore, D/- 7-4-1970).

6. Learned counsel for the non-applicant contended that the evidence is practically complete and the court below was right in postponing the decision on the amendment application. Learned counsel placed reliance on the decision reported Lalji Ranchooddas v. Narottam, (AIR 1953 Nag 273).

7. It cannot be disputed that on the averments made in the plaint para. 13, the plaint as filed was within the jurisdiction of the court below. It also could not be disputed that on the averments made in the plaint as amended if the amendment application was to be allowed still, the court below will have jurisdiction to try the present suit. In AIR 1953 Nag 273 (supra) their Lordships observed (at p. 273):—

"The jurisdiction of a court is determined by the nature of the plaint. That is well settled and authorities need not be cited. Once the jurisdiction is to be found it inheres in the court until something supervenes which ousts it."

The question is whether the court by its own action can create that situation. In our judgment the best answer to this and we say it respectfully is furnished in the observations of Venkatasubba Rao J. in Singara Mudaliar v. Govindswami, AIR 1928 Mad 400 where the learned Judge observed as follows:—

"I conceive that no court will permit a plaint to be so amended as to oust its own jurisdiction to try the suit. Now what is the procedure to be followed by the court? If the amendment is not to be allowed, must the amendment be shut out altogether, or must the plaint together with the application for amendment be returned to the plaintiff for presentation to the proper court? Here something fundamental is involved. If the court disallows the amendment simply on the ground that it has no jurisdiction to entertain it, it might be shutting out a claim which is otherwise good; and if the legal proposition were correct, then the plaintiff would have no remedy in respect of the claim he sought to add. He cannot in the circumstances, ask that the plaint be returned to him because the return of a plaint is dependent upon considerations involved in the first rule of O. 23.

It has been laid down in Kannuswami Pillai v. Jagathambal, AIR 1919 Mad 1071 that a plaint cannot be asked to be returned with a right to represent it merely because the plaintiff wants to make some amendment in his claim. In that case, the claim was undervalued and the plaint was returned at the request of the plaintiff so that the claim be amended. This was allowed by the trial court and was taken to be a wrong exercise of discretion. It is thus clear that the plaintiff cannot ask that the plaint be returned, so that he can make the amendment on his own."

It is therefore apparent that for determining the question of jurisdiction it is averments in the plaint as it stands that have to be considered. Apparently therefore it is not a case where by amendment either the plaint will be changed into one which will not be within the jurisdiction of the learned court below or that originally the plaint as presented is not within the jurisdiction of the learned court below but by amendment it is being brought within its jurisdiction. It is to these two categories, it appears the decision in AIR 1953 Nag 273 applies according to which the court below should return the plaint together with the application for amendment for presentation to the competent court which will have jurisdiction. Admittedly, the plaint as presented in the court below in the present case was within the jurisdiction of the learned court below and even if the application for amendment is allowed on the averments made in the amended plaint it could not be contended that it is not within the jurisdiction of the court below. Consequently this decision is not of assistance in the present case.

8. Apparently, the court below committed a material irregularity in exercise of jurisdiction in refusing to consider the amendment application before determination of the preliminary issues. In fact, the determination of the questions raised in the preliminary issues would be material even after the amendment is allowed or rejected. In such a situation the court below ought to have considered the amendment application first and thereafter proceeded with the determination of the preliminary questions.

9. In this view of the matter the revision petition is allowed. The court below is directed to consider and dispose of the amendment application before deciding the preliminary issues. The petitioner shall be entitled to costs of this revision petition. Counsel fee as per schedule if certified.

Revision allowed.

AIR 1978 MADHYA PRADESH 165
FULL BENCH

SHIV DAYAL, C. J., K. K. DUBE, M. L. MALIK, C. P. SEN AND J. P. BAJPAI, JJ.

Smt. Mankunwar Bai and others, Appellants v. Sunderlal Jain, Respondent.

Second Appeal No. 372 of 1972, D/- 14-2-1978.*

M. P. Accommodation Control Act (41 of 1961), S. 13 — Tenant, if obliged to deposit time barred rent.

Per Majority : The tenant is not obliged to deposit time barred rent under S. 13 (1) or S. 13 (2). AIR 1978 SC 287, Distinguished. AIR 1978 Madh Pra 54 (FB), Approved; AIR 1976 SC 1637. Applied. (Para 17)

The M. P. Accommodation Control Act is not designed to confer any new rights on the landlord. Section 12 or S. 13 does not bestow upon the landlord any new benefit, nor does it enlarge his rights conferred under the T. P. Act. If, under the general law, the landlord cannot enforce recovery of time-barred arrears of rent, S. 13 does not confer such right. The object and scope of the Act is to restrict the right of the landlord to raise rent and to recover possession, except on specified grounds, but not to confer upon him any new right to enforce recovery of time barred rent. A "dispute" contemplated in S. 13 (2) cannot be in respect of time barred arrears because that claim will at once be rejected under O. 7, R. 11, C. P. C. When such a dispute is raised as to the amount of rent payable, that dispute will be relatable only to those arrears which are "payable", i. e. "legally recoverable" and not time barred. (Para 11)

Cases Referred:	Chronological Paras
AIR 1978 SC 287	1, 14, 16, 17
AIR 1976 SC 1637	11, 16
1966 Jab LJ 1028	8
(1953) 2 All ER 458 : (1953) 3 WLR 296, Mauray v. Durley Chine (Investments) Ltd.	4
AIR 1933 PC 63 : 60 Ind App 13	11

K. M. Agrawal, for Appellants; P. C. Naik, for Respondent.

SHIV DAYAL, C. J. (for himself and on behalf of K. K. Dube, M. L. Malik, C. P. Sen and J. P. Bajpai, JJ.) :— One of us (Bajpai, J.) had referred the following question for being decided by a larger Bench :—

"Whether in compliance with the requirement of Sub-sec. (1) of S. 13, is it necessary for the defendant-tenant to pay to the landlord or deposit in Court the amount of arrears of rent, the recovery of which has become barred by limitation and which the landlord-plaintiff on his part cannot recover by process in the Court?"

A bench of three Judges heard the reference and by unanimous opinion dated Nov. 19, 1977 (reported in AIR 1978 Madh Pra 54 (FB)) answered the question in the negative. It was held :—

"The tenant is not obliged to deposit time-barred rent under the first part of S. 13 (1) of the M. P. Accommodation Control Act, 1961."

Thereafter, when this Second Appeal was placed before the Single Bench, the learned counsel for the appellants relied on a decision of the Supreme Court in Khadi Gram Udyog Trust v. Shri Ram Chandraji Virajman Mandir, Civil Appeal No. 1313 of 1977, D/- 28-11-1977 : (reported in AIR 1978 SC 287). It was urged for the appellants that the Supreme Court decision runs counter to the opinion of the Full Bench of this Court. The Single Bench then referred the following question for being answered by a larger Bench :—

"Whether, in the light of the observations made by the Supreme Court in the case of Khadi Gram Udyog Trust v. Shri Ram Chandraji Virajman Mandir (AIR 1978 SC 287), the opinion of the larger Bench given on 19-11-1977 ; (reported in AIR 1978 Madh Pra 54 (FB)) in this appeal, cannot hold the field and the tenant-defendant is bound to deposit even the time barred arrears of rent in compliance with the provisions of S. 13 (1) and (2) of the M. P. Accommodation Control Act, 1961 ?"

2. The question then came before this larger Bench.

3. Section 12 of the M. P. Accommodation Control Act, 1961 (hereinafter called the Act) imposes restrictions on eviction of tenants even when tenancy is determined under the general law. This section bars a suit for eviction of a tenant notwithstanding anything to the contrary contained in any other law or contract, except on one or more of the grounds [(a) to (p)] contained in sub-section (1). For the purposes of the present question and for facilitating the dis-

*(Decided by Full Bench on order of reference made by J. P. Bajpai J., D/- 25-1-1978).

cussion, suffice to reproduce three of them :—

"12. Restriction on eviction of tenants.— (1) Notwithstanding anything to the contrary contained in any other law or contract, no suit shall be filed in any Civil Court against a tenant for his eviction from any accommodation except on one or more of the following grounds only, namely :—

(a) that the tenant has neither paid nor tendered the whole of the arrears of the rent legally recoverable from him within two months of the date on which a notice of demand for the arrears of rent has been served on him by the londlord in the prescribed manner;

(b) x x x x
(c) x x x x
(d) x x x x

(e) that the accommodation let for residential purpose is required bona fide by the landlord for occupation as a residence for himself or for any member of his family, if he is the owner thereof, or for any person for whose benefit the accommodation is held and that the landlord or such person has no other reasonably suitable residential accommodation of his own in his occupation in the city or town concerned;

(f) x x x x
(g) x x x x

(h) that the accommodation is required bona fide by the landlord for the purpose of building or rebuilding or making thereto any substantial additions or alterations and that such building or rebuilding or alterations cannot be carried out without the accommodation being vacated;

x x x x
(2) x x x x

(3) No order for the eviction of a tenant shall be made on the ground specified in Cl. (a) of sub-sec. (1), if the tenant makes payment or deposit as required by S. 13 :

Provided that no tenant shall be entitled to the benefit under this sub-section, if, having obtained such benefit once in respect of any accommodation, he again makes a default in the payment of rent of that accommodation for three consecutive months.

x x x x".

"(7) No order for the eviction of a tenant shall be made on the ground specified in Cl. (h) of sub-sec. (1), unless the Court is satisfied that the proposed reconstruction will not radically alter the purpose for which the accommodation was let or that radical alteration is in the public interest, and that the plans and estimates of such reconstruction have been properly prepared and that necessary funds for the purpose are available with the landlord.

x x x x"

4. The Act is designed to prevent exploitation of tenants by the landlords. Its real object is to limit the rights of the landlords to increase the rent or otherwise obtain possession of the premises for charging exorbitant rent from new tenants. It is stated in 23 Halsbury (Simonds) 713 (para. 1456) :—

"For the purpose of mitigating hardship resulting from scarcity of housing which existed during and after the 1914-1918 World War, and was foreseen at the beginning of that of 1939-1945, a series of Acts has been passed."

See also Mauray v. Durley Chine (Investments) Ltd., (1953) 2 All ER 458. At the same time, a check is put on unscrupulous tenants who would like to protract litigation without paying rent. In genuine cases, genuine needs of the landlord have been given due consideration and ejectment on this ground has been allowed.

5. Section 12 of the Act imposes restrictions on eviction of tenants. Sub-section (1) enumerates the grounds on one or more of which alone, a suit for eviction against a tenant can be instituted. The ground in Cl. (a) of sub-sec. (1) becomes available, if the tenant neither paid nor tendered the whole of the arrears of rent legally recoverable from him within two months of the date on which a notice of demand for the arrears of rent has been served on him. Even in case of default, when a suit has been instituted against him, he is given one more opportunity to pay or deposit rent and further to go on depositing regularly the rent following due every month, thus ensuring regular payment of rent to the landlord. If the tenant complies with this requirement, he gets the same benefit as he would have got if he had paid rent within two months of the receipt of notice of demand of rent contemplated in Cl. (a) of sub-sec. (1). And, in that case, the suit for eviction will be dismissed. The rent so deposited will go to the landlord. It is settled law that the tenant earns this protection only when he complies with the provisions of S. 13 (1). Even a single default destroys that protection.

6. Even where a suit is instituted on any other ground, except the arrears of

rent, the tenant is required to go on depositing rent regularly, although in such a case there is no question of earning such protection as is afforded in sub-sec. (3) of S. 12. However, in case of non-compliance, the defence of the tenant may be struck out on the ground of contumacy or positive mala fide.

7. Section 13 (1) of the Act is in two parts and it may be reproduced in that fashion :—

"13. When tenant can get benefit of protection against eviction. — (1) On a suit or proceeding being instituted by the landlord on any of the grounds referred to in S. 12, the tenant shall, within one month of the service of the writ of summons on him or within such further time as the Court may, on an application made to it, allow in this behalf, deposit in the Court or pay to the landlord an amount calculated at the rate of rent at which it was paid for the period for which the tenant may have made default including the period subsequent thereto up to the end of the month previous to that in which the deposit or payment is made and shall thereafter continue to deposit or pay, month by month, by the 15th of each succeeding month a sum equivalent to the rent at that rate."

The other sub-sections of S. 13 may also be reproduced here for facility of understanding them :—

"(2) If in any suit or proceeding referred to in sub-sec. (1), there is any dispute as to the amount of rent payable by the tenant, the Court shall fix a reasonable provisional rent in relation to the accommodation to be deposited or paid in accordance with the provisions of sub-sec. (1) till the decision of the suit or appeal.

(3) If, in any proceeding referred to in sub-sec. (1) there is any dispute as to the person or persons to whom the rent is payable, the Court may direct the tenant to deposit with the Court the amount payable by him under sub-sec. (1) or sub-sec. (2) and in such a case, no person shall be entitled to withdraw the amount in deposit until the Court decides the dispute and make an order for payment of the same.

(4) If the Court is satisfied that any dispute referred to in sub-sec. (3) has been raised by a tenant for reasons which are false or frivolous the Court may order the defence against eviction to be struck out and proceed with the hearing of the suit.

(5) If a tenant makes deposit or payment as required by sub-s. (1) or sub-s. (2), no decree or order shall be made by the Court for the recovery of possession of the accommodation on the ground of default in the payment of rent by the tenant but the Court may allow such cost as it may deem fit to the landlord.

(6) If the tenant fails to deposit or pay any amount as required by this section, the Court may order the defence against eviction to be struck out and shall proceed with the hearing of the suit."

8. It must at once be seen that under the first part of sub-sec. (1) of S. 13, period for which the tenant has to deposit the arrears of rent is "the period for which the tenant may have made default." These words are most significant. The word "default" necessarily refers to the default described in Cl. (a) of sub-sec. (1) of S. 12 :—

"(a) that the tenant has neither paid nor tendered the whole of the arrears of the rent legally recoverable from him within two months of the date on which a notice of demand for the arrears of rent has been served on him by the landlord in the prescribed manner."

(Underlined by us)

The expression we have underlined above, i. e. "the whole of the arrears of rent legally recoverable" necessarily excludes the arrears which had become barred by time. It is incontestable that if on receipt of the notice of demand under Cl. (a) the tenant makes payment of the whole of the arrears of rent, which are within limitation, the landlord will not be entitled to bring a suit on ground (a). In other words, although the tenant may omit to pay or may even refuse to pay time barred rent and if he specifically makes payment of rent, which is within time, ground (a) will not be available to the landlord, because the tenant's liability would disappear as soon as he pays the whole of the arrears of rent legally recoverable from him, within the prescribed time. It is in that context that S. 13 (1) requires the tenant to pay arrears of rent for the period of default. This section clearly affords another and final opporutntiy to the tenant to pay the arrears of rent. It is the compliance of the first part of the sub-section, coupled with the second part of the sub-section which earns the protection under S. 12 (3).

See Chitrakumar Tiwari v. Gangaram, 1966 Jab LJ 1208 (para 28). The "default" in sub-sec. (1) of S. 13 is clearly referable to the default committed under Cl. (a) of S. 12 (1).

9. The expression "for the period for which the tenant may have made default, including the period subsequent thereto up to the end of the month previous to that in which the deposit or payment is made" speaks of two periods:

(i) The period for which the tenant may have made default; and

(ii) The period subsequent thereto. The word "thereto" necessarily refers to the period of default committed under Cl. (a) of S. 12 (1). The first part of S. 13 (1) refers to the first depositing only. Thereafter, the tenant is required to go on depositing rent regularly for every current month on the prescribed date.

10. Now, sub-sec. (6) of S. 13 may be adverted to. If the tenant does not deposit or pay rent as required either under the first part or the second part of sub-sec. (1), the Court may order his defence against eviction to be struck out and in that case it shall proceed with the hearing of the suit. It must be remembered that the requirement to pay rent under S. 13 (1) is not confined to a suit under Cl. (a) of S. 12 (1), but to every other clause also under S. 12 (1).

11. Having examined these provisions, if the interpretation suggested by the appellants is accepted, S. 13 will turn out to confer a new right on the landlord to recover time barred rent by providing this new machinery for the same. This may be demonstrated thus. Suppose your tenant is in arrears of rent for 7 years. Now, obviously by bringing a suit against him, you can enforce recovery of the arrears of rent for three years only. You know you cannot recover the arrears for the first four years, they being barred by time. What you should do is to institute a suit against your tenant on any pretended ground under S. 12 (1), say under Cl. (e) or (h). Although you do not require the accommodation for residential purpose, nor for the purpose of building or rebuilding, your real object is to recover the time-barred rent and this you will achieve in a suit, because the tenant (according to the appellants' interpretation) will have to deposit time barred rent as well, or to suffer the penalty of striking out of the defence. The tenant will not perhaps suffer the latter, otherwise, in all probability, a decree for eviction will be passed against him.

If, therefore, he deposits all arrears of rent, including time-barred rent, your purpose is served and you may withdraw the suit or get it dismissed. You will have merely to pay costs of the suit. But you have made substantial achievement inasmuch as your time barred rent would be recovered. This illustration makes it clear that by accepting the appellants' interpretation, S. 13 (1) becomes a handle for recovering time barred arrears of rent, or, to borrow respectfully the expression from New Delhi Municipal Committee v. Kalu Ram, AIR 1976 SC 1637, would constitute a source or foundation of a right to claim arrears otherwise time barred. This position cannot be accepted. The Act was not designed to confer any new rights on the landlord. Section 12 or S. 13 does not bestow upon the landlord any new benefit, nor does it enlarge his rights conferred under the T. P. Act. If, under the general law, the landlord cannot enforce recovery of time-barred arrears of rent, S. 13 does not confer such right. When looked at from the landlord's view, the Act is restrictive, not enabling. The object and scope of the Act is to restrict the right of the landlord to raise rent and to recover possession, except on specified grounds, but not to confer upon him any new right.

Having regard to the present socio-economic setup, in the absence of a specific language, the Accommodation Control Act cannot be interpreted to be a source or foundation of a right to enforce recovery of time barred rent, which the landlord otherwise could not have done. (New Delhi Municipal Committee v. Kalu Ram (supra)). The above view is fortified by sub-sec. (2) of S. 13. If there is a dispute as to the amount of rent payable by the tenant, the Court is bound to fix reasonable provisional rent to be deposited by the tenant. A "dispute" contemplated in sub-sec. (2) cannot be in respect of time barred arrears because that claim will at once be rejected under O. 7 R. 11, C. P. C. What will then remain would be arrears "legally recoverable". The dispute will then he confined to the rent legally recoverable and that is the meaning of the word "payable" in S. 13 (2). In other words, when a dispute is raised as to the amount of rent payable, that dispute will be relatable only to those arrears which are "payable", i. e. "legally recoverable"

and not time barred. Section 7 of the Delhi Public Premises (Eviction of Unauthorised Occupants) Act, 1958, reads thus :—

"7. Power to recover rent or damages in respect of public premises as arrears of land revenue.

(1) Where any person is in arrears of rent payable in respect of any public premises, the estate officer may, by order, require that person to pay the same within such time and in such instalments as may be specified in the order.

(2) Where any person is, or has at any time been in unauthorised occupation of any public premises, the estate officer may, having regard to such principles of assessment of damages as may be prescribed, assess the damages on account of the use and occupation of such premises and may by order, require that person to pay the damages within such time and in such instalments as may be specified in the order :

Provided that no such order shall be made until after the issue of a notice in writing to the person calling upon him to show cause within such time as may be specified in the notice why such order should not be made, and until his objections, if any, and any evidence he may produce in support of the same, have been considered by the estate officer.

(3) If any person refuses or fails to pay the arrears of rent or any instalments thereof payable under sub-sec. (1) or the damages or any instalment thereof payable under sub-s. (2) within the time specified in the order relating thereto the estate officer may issue a certificate for the amount due to the Collector who shall proceed to recover the same as an arrear of land revenue."

On a true construction of the word "payable", their Lordships interpreted the section thus :—

"The word 'payable' is somewhat indefinite in import and its meaning must be gathered from the context in which it occurs. 'Payable' generally means that which should be paid. If the person in arrears raises a dispute as to the amount the Estate Officer in determining the amount payable cannot ignore the existing laws. If the recovery of any amount is barred by the law of limitation, it is difficult to hold that the Estate Officer could still insist that the said amount was payable. When a duty is cast on an authority to determine the arrears of rent, the determination must be in accordance with law."

Their Lordships referred to Hans Raj Gupta v. Official Liquidators of the Dehradun-Mussorrie Electric Tramway Co. Ltd., 60 Ind App 13 : (AIR 1933 PC 63), where it was observed :—

"It is a section which creates a special procedure for obtaining payment of moneys; it is not a section which purports to create a foundation upon which to base a claim for payment. It creates no new rights."

The Supreme Court then said :—

"We are clear that the word "payable" in S. 7, in the context in which it occurs, means 'legally recoverable'."

12. In the case of a dispute under sub-sec. (2) of S. 13 as to the amount of rent payable by the tenant, the Court must, while fixing reasonable provisional rent, include the time barred arrears of rent. Now, it will be anomalous that if the tenant raises a dispute under sub-sec. (2) of S. 13, he would have to pay time barred rent also. But if he does not raise a dispute as contemplated in sub-sec. (2), he must deposit time barred arrears of rent as well. Such a position cannot be accepted.

13. This is what the Full Bench of three Judges held in the present case, while answering the question referred in the first instance.

14. Their Lordships' decision in Khadi Gram Udyog Trust v. Shri Ram Chandraji Virajman Mandir (AIR 1978 SC 287), is not apposite to S. 13 (1) of the M. P. Accommodation Control Act, 1961. What was before their Lordships in Khadi Gram Udyog Trust case, was the interpretation of S. 20 (4) of the U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972. Section 20 of that Act enacts as follows :—

"20. Bar of suit for eviction of tenant except on specified grounds.— (1) Save as provided in sub-sec. (2), no suit shall be instituted for the eviction of a tenant from a building, notwithstanding the determination of his tenancy by efflux of time or on the expiration of a notice to quit or in any other manner :

Provided that nothing in this sub-section shall bar a suit for the eviction of a tenant on the determination of his tenancy by efflux of time where the tenancy for a fixed term was entered into by or in pursuance of a compromise or adjustment arrived at with reference to a suit, appeal, revision or execution proceeding, which is either recorded in court or otherwise reduced to writing and signed by the tenant.

(2) A suit for the eviction of a tenant from a building after the determination of his tenancy may be instituted on one or more of the following grounds, namely:

(a) that the tenant is in arrears of rent for not less than four months, and has failed to pay the same to the landlord within one month from the date of service upon him of a notice of demand;

Provided that in relation to a tenant who is a member of the armed forces of the Union and in whose favour the prescribed authority under the Indian Soldiers (Litigation) Act, 1925 (Act No. IV of 1925) has issued a certificate that he is serving under special conditions within the meaning of S. 3 of that Act or where he has died by enemy action while so serving, then in relation to his heirs, the words 'four months' in this clause shall be deemed to have been substituted by the words 'one year';

(b) that the tenant has wilfully caused or permitted to be caused substantial damage to the building;

(c) that the tenant has without the permission in writing of the landlord made or permitted to be made any such construction or structural alteration in the building as is likely to diminish its value or utility or to disfigure it;

(d) that the tenant has without the consent in writing of the landlord used it for a purpose other than the purpose for which he was admitted to the tenancy of the building or otherwise done any act which is inconsistent with such use, or has been convicted under any law for the time being in force of an offence of using the building or allowing it to be used for illegal or immoral purposes;

(e) that the tenant has sub-let, in contravention of the provisions of Section 25, or as the case may be, of the old Act, the whole or any part of the building;

(f) that the tenant has renounced his character as such or denied the title of the landlord, and the latter has not waived his right of re-entry or condoned the conduct of the tenant;

(g) that the tenant was allowed to occupy the building as part of his contract of employment under the landlord, and his employment has ceased.

(3) (Omitted)

(4) In any suit for eviction on the ground mentioned in cl. (a) of sub-sec. (2), if at the first hearing of the suit the tenant unconditionally pays or tenders to the landlord or deposits in Court the entire amount of rent and damages for use and occupation of the building due from him (such damages for use and occupation being calculated at the same rate as rent) together with interest thereon at the rate of nine per cent per annum and the landlords' costs of the suit in respect thereof, after deducting therefrom any amount already deposited by the tenant under sub-sec. (1) of S. 30, the Court may, in lieu of passing decree for eviction on that ground, pass an order relieving the tenant against his liability for eviction on that ground:

Provided that nothing in this sub-section, shall apply in relation to a tenant who or any member of whose family has built or has otherwise acquired in a vacant state, or has got vacated after acquisition, any residential building in the same city, municipality, notified area or town area.

Explanation.— For the purpose of this sub-section —

(a) the expression 'first hearing' means the first date for any step or proceeding mentioned in the summons served on the defendant.

(b) the expression 'cost of the suit' includes one-half, of the amount of counsel's fee taxable for a contested suit.

(5) Nothing in this section shall affect the power of the Court to pass a decree on the basis of an agreement, compromise or satisfaction recorded under R. 3 of O. XXIII of the first Schedule to the Civil P. C. 1908 (Act No. V of 1908).

(6) Any amount deposited by the tenant under sub-sec. (4) or under R. 5 of O. XV of the First Schedule to the Civil P. C. 1908, shall be paid to the landlord forthwith on his application without prejudice to the parties pleadings and subject to the ultimate decision in the suits."

It is at once noteworthy that under the Uttar Pradesh Act, there is no provision analogous or corresponding to S. 13 (1) of the M. P. Act. There is no provision in the U. P. Act that if the tenant does not deposit arrears of rent, or does not deposit rent falling due during the pendency of the suit, his defence would be struck out. This distinction is vital. A provision which takes away a valuable right has to be strictly construed. Section 13 (1) has far-reaching implications. Secondly, S. 13 (1) applies to every suit irrespective of the language of the clause

under S. 12 (1) a suit may have been instituted (sic). Thirdly, the expression "the period for which the tenant may have made default", as pointed out above, necessarily refers to the default under S. 12 (1) (a).

15. Section 20 (4) of the Uttar Pradesh Act is analogous to S. 12 (3) of the M. P. Act. However, there are remarkable features of distinction. Under sub-sec. (4) of S. 20 of the U. P. Act, the tenant has to pay or tender "the entire amount of rent and damages....." while under S. 12 (3) of the M. P. Act, the tenant is required to make payment or deposit as required by Section 13. On a close analysis of S. 13, we have shown above that the tenant is not required to deposit time barred rent. Again, under the U. P. Act, the tenant may avail himself of the protection under sub-sec. (4) of S. 20 in every suit whenever instituted against him on the ground contained in sub-sec. (2) (e). In other words, the tenant may go on committing default and whenever a suit is instituted against him after four months' default, he has merely to pay rent along with interest at 9 per cent per annum and the costs, and the protection will be available to him.

It is remarkable that under the Madhya Pradesh Act the tenant gets only one such opportunity in life, provided the landlord has patience to bear two defaults. After having availed himself of the benefit of S. 12 (3) once, the tenant can afford to commit default in payment of rent for two consecutive months only, but not three. If he does so, the landlord will be free to give him notice and in case of non-payment of rent within the next two months, he is assured of a decree for eviction in his suit to be instituted. And, in such a case, even if the tenant deposits all arrears of rent under the first part of S. 13 (1) and also goes on depositing regularly rent for the current month, even then, a decree will be passed against him. This is the effect of the proviso to S. 12 (3). There is no such proviso under S. 20 (4) of the U. P. Act.

16. These are thus the checks and balance imposed on the tenant so that he may not protract litigation without payment of rent. Subject to that safeguard the Act is for the benefit of the tenant and it does not confer any new right on the landlord, which is not available to him under the Act. It will require specific language such as in the U. P. Act as interpreted in Khadi Gram Udyog Trust case (AIR 1978 SC 287) (supra), to confer a new right and then the principle that the statute of limitation bars a remedy but does not extinguish the right will uphold the validity of that provision. That principle was considered and applied to S. 7 of the Delhi Act in para 2 of the New Delhi Municipal Committee case (AIR 1976 SC 1637) (supra).

17. We are, therefore, of the opinion that (i) the tenant is not obliged to deposit time barred rent under S. 13 (1) or 13 (2) of the M. P. Accommodation Control Act, 1961, and (ii) their Lordships' decision in Khadi Gram Udyog Trust v. Shri Ram Chandraji Virajman Mandir (AIR 1978 SC 287), does not apply to S. 13 (1) and (2) of the M. P. Accommodation Control Act, as there is no corresponding provision in the Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, which was under consideration before the Supreme Court in that case.

18. This is our answer to the question referred to us.

19. This Second Appeal shall now be laid before a Single Bench.

Answered accordingly.

AIR 1978 MADHYA PRADESH 171

(GWALIOR BENCH)

H. G. MISHRA, J.

Lakhmichand Kasliwal, Petitioner v. Gopaldas Nikhara, Opposite Party.

Civil Revision No. 727 of 1977. D/- 2-2-1978.*

Civil P. C. (5 of 1908), O. 6, R. 17 — Amendment of plaint — Suit for eviction — Tenant inducting new sub-tenant during pendency of suit — Landlord seeking amendment of plaint — Tenability of amendment — (M. P. Accommodation Control Act (41 of 1961), S. 12).

Ordinarily the decree in a suit should accord with the rights of the parties as they stand at the date of its institution. But where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate or that it is necessary to

*(Against order of 2nd Civil Judge Class I, Gwalior, D/- 26-7-1977.)

have the decision of the Courts on the altered circumstances in order to shorten litigation or do complete justice between the parties, it is incumbent upon a court of justice to take notice of events which have happened since the institution of the suit and to mould its decree according to the circumstances as they stand at the time the decree is made. AIR 1948 Nag 1, AIR 1963 Raj 198 and AIR 1975 SC 1409 Rel. on. (Para 7)

Where new sub-tenants were inducted during the pendency of the suit and the landlord sought amendment of plaint in view of these subsequent events, the landlord should be allowed to incorporate the subsequent events even though inducting of new sub-tenants constituted new cause of action, because the cause of action as shown had arisen from the action of the tenant who was not in the control of the plaintiff-landlord. AIR 1948 Nag 1; AIR 1963 Raj 198 and AIR 1975 SC 1409 Ref. (Para 8)

Anno: AIR Comm. C. P. C. (9th Edn.), O. 6. R. 17, N. 12-A.

Cases Referred: Chronological	Paras
AIR 1975 SC 1409	7, 8
AIR 1963 Raj 198	7
AIR 1948 Nag 1	7

J. K. Jain, for Petitioner; N. K. Jain, for Opposite Party.

ORDER:— This is a revision directed against an order dated 26-7-77 whereby an amendment of the plaintiff's plaint based on subsequent event has been rejected by the trial court.

2. The plaintiff-applicant herein had filed a suit for ejectment from the suit shop on the grounds under Ss. 12 (1) (a) and 12 (1) (b) of the M. P. Accommodation Control Act, 1961. It was alleged in the plaint that at the time of the institution of the suit two sub-tenants namely, Ashok Kumar Manibhai Patel and Rameshwar Dayal were occupying the suit premises but later on the said sub-tenants had vacated and other sub-tenants, namely, Dhan Kumar and the Bombay Textile Printers and Venus Advertisers (a partnership firm) were inducted. respecitvely w.e.f. 15-6-76 and 31-7-76 in the suit premises.

3. The suit was instituted on 11-9-75. Thus the amendment sought by the plaintiff by his application dated 9-5-77 is based on subsequent event.

4. This application was opposed by the defendant and has been rejected by the impugned order on the ground that the plaintiff is not entitled to base his suit on the ground which has come into existence during the pendency of the suit.

5. The learned counsel for the applicant relies on O. 7, R. 7 read with O. 6, R. 17 C. P. C. and argues that the court has power to allow amendment based on subsequent event. He also places reliance on the ratio of Pasupuleti Venkateshwarlu v. The Motor and General Traders (AIR 1975 SC 1409).

6. After having heard the learned counsel for the parties, I am of the opinion that this revision deserves to be allowed.

7. Ordinarily the decree in a suit should accord with the rights of the parties as they stand at the date of its institution. But where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate or that it is necessary to have the decision of the Courts on the altered circumstances in order to shorten litigation or do complete justice between the parties, it is incumbent upon a court of justice to take notice of events which have happened since the institution of the suit and to mould its decree according to the circumstances as they stand at the time the decree is made. I am fortified in this view by the dictum laid down in Mandli Prasad Ramcharanlal v. Ramcharanlal (AIR 1948 Nag 1) and Dhan Singh v. Badri Prasad (AIR 1963 Raj 198).

8. The learned trial judge has acted contrary to these principles. It is no doubt true that inducting in of new sub-tenants during the pendency of the suit constitutes a new cause of action; but the cause of action as shown, appears to have arisen from the action of the defendant which was not in the control of the plaintiff-landlord, therefore in the altered circumstances, it was necessary to permit the plaintiff to incorporate the subsequent events in the plaint and effect amendment in the light thereof. Leave to amend can be granted and must be granted to effect the amendment based on events which have happened since the institution of the suit. Their Lordships of the Supreme Court in Pasupuleti Venkateswarlu (AIR 1975 SC 1409) have held as under:— (at p. 1410)

"For making the right or remedy claimed by the party just and meaningful as also legally and factually in accord with the current realities, the court

can, and in many cases must, take cautious cognisance of events and developments subsequent to the institution of the proceedings provided the rules of fairness to both sides are scrupulously obeyed.

Where, during the pendency of a proceeding under Rent Control Legislation by the landlord for permission to evict the tenants, a subsequent event in the facts of the case takes place which has a material bearing on the landlord's right to evict, the approach of the High Court in revision, in taking cognizance of the new development cannot be said to be wrong or illegal."

9. In this view of the matter, the revision is allowed. The impugned order is set aside and the amendment prayed for by the plaintiff is hereby allowed. The trial court will permit the plaintiff to effect the amendment on 10-2-78. The defendant will also be permitted to make consequential amendment in the written statement in accordance with law. Since nobody has appeared to oppose this revision I make no order as to costs. The record of the trial Court be sent so as to reach there before 10-2-78.

Revision allowed.

AIR 1978 MADHYA PRADESH 173
(GWALIOR BENCH)

C. M. LODHA AND A. R. NAVKAR, JJ.

Premchand Jain and others, Applicants v. The State of Madhya Pradesh and another, Opposite Parties.

Misc. Petn. Case No. 138 of 1977, D/- 1-2-1978.

(A) Constitution of India, Art. 226 — Joint petition by different persons — Each having independent cause of action —Arising out of independent contracts — Held petition suffers from misjoinder of parties and causes of action. (Civil P. C. (1908), O. 1, R. 9).

A joint petition was filed by three persons. There were three different contracts entered into by the three petitioners on different dates and for different periods. Each petitioner was not interested in the contract entered into by another. Thus there were three different causes of action joined together in the petition.

Held, the petition suffered from the defect of misjoinder of parties and causes of action. (Para 3)

Anno: AIR Comm., Const. of India, (2nd Edn.), Art. 226, N. 44. AIR Comm., Civil P. C. (9th Edn.), O. 1, R. 9, N. 4.

(B) Constitution of India, Art. 226 — Mandamus — Writ to Government — Relief claimed under contractual right and not under legal right — Writ cannot be issued. AIR 1977 SC 2149 and AIR 1968 SC 718 Ref. (Para 5)

Anno: AIR Comm. Const. of India, (2nd Edn.), Art. 226, N. 37.

Cases Referred: Chronological Paras

AIR 1977 SC 2149 4
AIR 1968 SC 718 6

A. B. Mishra, for Applicant; R. S. Bajpai, Govt. Advocate, for the State.

C. M. LODHA, J.:— This is a joint petition by three petitioners under Art. 226 of the Constitution of India for issue of a writ of mandamus against the State of Madhya Pradesh and the Divisional Forest Officer, Gwalior, directing them not to enforce the order dated 20th Oct. 1977 issued by the Divisional Forest Officer.

2. The petitioners who are three different parties entered into separate contracts for sale of fuel in the city of Gwalior according to the terms and conditions of the agreements entered into by them with the Government of Madhya Pradesh. The petitioners' case is that under the terms of the aforesaid agreements they were to purchase fuel from the Government of M. P., and sell it to the consumers at the rate of Rs. 16/- per quintal of the unsplit fuel and Rs. 18/- per quintal of the split fuel. The agreements were for different periods but all of them are to expire by the end of April 1978. However, the Divisional Forest Officer, Gwalior issued an order to the petitioners on 20th Oct. 1977 intimating to them that the Government had decided to sell fuel at the rate of Rs. 8/- to 10/- per quintal in specified places and, therefore, fresh contracts would be given to retailers. He, therefore, directed the petitioners to sell away the stock of fuel with them at the contractual rate by 30th Oct. 1977 and, thereafter, if they wanted to have licence for sale of fuel, they should apply on the prescribed form on or before 30th Oct. 1977. The petitioners have challenged this order on the ground that the Divisional Forest Officer was not competent to issue the same.

3. We may observe, in the first instance, that the petition suffers from the

defect of misjoinder of parties and cause of action. There are three different contracts entered into by the three petitioners on different dates and for different periods. Each petitioner is not interested in the contract entered into by another. Thus, there are clearly three different causes of action joined together in the petition. In ordinary course, we would have permitted the petitioners to treat this petition on behalf of one of the petitioners and to file separate petitions on behalf of the other two petitioners. But in view of the conclusion to which we have arrived on the question of maintainability of the writ petition, we do not consider it necessary to adopt that course.

4. Mr. R. S. Bajpai, learned Government Advocate, has urged that what the petitioners want by this petition is enforcement of a contractual obligation against the Government which can properly be sought by filing a regular Civil Suit. He urged that there was no breach of any statutory duty in the present case and, consequently, a writ of mandamus cannot be issued. In support of his contention, Mr. Bajpai has relied upon the Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. v. Sipahi Singh (AIR 1977 SC 2149). wherein the Supreme Court held that a writ of mandamus can be granted only in a case where there is a statutory duty imposed upon the officer concerned and there is a failure on the part of that officer to discharge the statutory obligation. It was further observed that in order that mandamus may issue to compel the authorities to do something, it must be shown that there is a statute which imposes a legal duty and the aggrieved party has legal right under the statute to enforce its performance.

5. In the instant case, it has not been shown by the petitioners that there is any statute or rule having the force of law which casts a duty on the respondents and which they have failed to perform. All that is sought to be enforced is an obligation flowing from a contract.

6. Mr. A. B. Mishra, learned counsel for the petitioners, placed reliance on Union of India v. M/s. Anglo Afghan Agencies (AIR 1968 SC 718) in support of his contention that the petitioners are entitled to get relief by way of issue of a writ. However, on going through this case, we find that it is clearly distinguishable. In that case, unlike the present one, the petitioners were not seeking enforcement of any contractual right. They were merely seeking to enforce compliance with the obligation which was laid upon the Textile Commissioner by the terms of the Export Promotion Scheme.

7. Accordingly, we are clearly of the opinion that the petitioners are not entitled to apply for grant of a writ of mandamus or issue of any other writ, direction or order under Art. 226 of the Constitution. In this view of the matter, we dismiss the petition, but make no order as to costs.

8. The security amount may be refunded to the petitioners.

Petition dismissed.

AIR 1978 MADHYA PRADESH 174
(GWALIOR BENCH)

C. M. LODHA, J.

Kushalchand, Petitioner v. Harlal and others, Respondents.

Election Petn. No. 15 of 1977. D/- 21-1-1978.

Representation of the People Act (43 of 1951), Ss. 81 (3), 83 (2) and 86 (5) — Failure to supply copy of annexure to election petition, for being served on respondent — Effect.

Documents which are merely evidence in the case but which for reasons of clarity and to lend force to the petition are not kept back but are produced or filed along with the election petition, are in no sense an integral part of the averments of the petition and therefore, cannot be treated as part of the election petition and need not be served upon the respondent. But where annexures or Schedules are treated as integrated with the election petition, by not including in the election petition the averments set out in the annexures or schedules, law requires that those annexures or schedules must be signed and verified and their copies must be served on the respondent, if the requirement regarding service of election petition is to be wholly complied with. AIR 1968 SC 1079, Followed. (Para 14)

Held in the facts and circumstances of the case, the facts consisting the corrupt practices alleged in the election petition would be wholly incomplete and would not at all meet the requirements of S. 83

of the Act in absence of 'Annexure A' which must be treated as an integral part of the election petition and consequently it was necessary to serve a copy of the same on the respondent. Annexure should also have been signed and verified by the petitioner in the same manner as the petition. Failure to do so, had resulted in non-compliance of the provisions of S. 81 (3) and S. 83 (2) of the Act and the defect being fatal, the petition was liable to be dismissed under S. 86 (1) of the Act. (Paras 17, 18, 24)

Held further that the allegations made in the election petition reportedly contained in the pamphlet are different from what they actually were in the pamphlet. Consequently, to allow the petitioner to incorporate the contents of the pamphlet in the petition now would have the effect of introducing particulars of a corrupt practice not previously alleged in the petition. Therefore in view of the latter part of sub-sec. (5) of S. 86, the application for amendment of the election petition was not allowed. (Paras 21, 22)

Anno: AIR Manual (3rd Edn.) Representation of the People Act, S. 81, N. 12; S. 83, Notes 7, 8; S. 86, N. 6.

Cases Referred: Chronological	Paras
AIR 1974 SC 1185	11
AIR 1971 SC 342	11
AIR 1971 SC 372	20
AIR 1969 SC 677	19
AIR 1969 SC 1201	11, 18
AIR 1969 Madh Pra 243	11, 13
AIR 1968 SC 1079	11, 14, 15, 17
AIR 1964 Raj 223	11, 12

A. B. Mishra, for Petitioner; R. K. Shinde, for Respondent No. 1.

ORDER:— This case comes up today for arguments on the preliminary objections filed by the respondent No. 1 Harlal on 6-12-1977 to the effect that the petition is liable to be dismissed on the ground of non-compliance with the provisions of S. 81 (3) read with S. 86 (1) of the Representation of the People Act, 1951.

2. The short facts necessary for disposal of the objections may be stated as follows:—

The respondent No. 1 Harlal was declared elected as a member of the Madhya Pradesh Legislative Assembly from Sadora Constituency in the elections held on 15th June 1977. The petitioner Kushalchand was one of the candidates and since he was defeated in the elections, he filed the election petition on 29-7-1977, inter alia, on the ground of corrupt practices alleged to have been committed by the respondent No. 1. The relevant paragraph in the election petition dealing with the corrupt practices in para. 19 reads as under:—

"Appeal in the name of caste and religion. That the respondent No. 1 distributed pamphlet with the heading "Musalman Kisi Bhi Kimath Par Congress Ko Vote Na Den," from 8-6-1977 to 12-6-1977 in the length and breadth of the constituency himself and by his workers. This pamphlet was got printed and published in the Janata Printing Press by the respondent No. 1 through his agents or Janata Party in which he appealed to the Musalmans as a community not to vote to the 'Jalim', meaning thereby the petitioner, and in this appeal the respondent No. 1 has made a statement of fact against the personal character and conduct of the petitioner which is false and which he believed to be false or did not believe to be true. In this statement by innuendo, the petitioner is said to be 'Jalim'. This was an appeal in the name of caste also. The word 'Jalim' means hardened criminal in the area. The pamphlet is appended herewith as Annexure 'A'."

3. One printed leaflet marked Annexure '1' was submitted along with the original petition. Mr. A. B. Mishra, learned counsel for the petitioner, has stated before me that it was inadvertently marked Annexure '1' but this is the pamphlet referred to in the petition as 'Annexure A'.

4. Notice of the election petition was served on the respondent No. 1 Harlal on 11-10-1977 but copy of the election petition was not served upon him along with it. His counsel Shri Rameshwar Bhargava obtained the copy of the election petition from the office on 24-10-1977 and made the following endorsement in the margin of the order sheet of that date:—

"Recd. copy of the petition without Annexure A.

Sd/- Rameshwar Bhargava
24-10-1977."

5. Now, the preliminary objection raised by the respondent No. 1 is that the petitioner did not supply copy of the leaflet (Annexure A) along with the copy of the election petition to be served on the respondent No. 1 and, therefore, the copy of the election petition served on him is incomplete and, consequently, the petition is liable to be dismissed for non-

compliance of S. 81 (3) of the Representation of the People Act, 1951 (which will hereinafter be called the Act), Shri A. B. Mishra, learned counsel for the petitioner, took time on 6-12-1977 to file a reply to the preliminary objection. Accordingly, he filed the reply on 12-12-1977 in which it was pleaded that there was no procedure for submission of preliminary objections and that the provisions of S. 81 (3) of the Act are directory and can be complied with later on by suitable amendment. Since the objection raised by the respondent No. 1 was a mixed objection of fact and law I directed his counsel to file an affidavit in support of it. As I also felt that the reply filed by the petitioner to the preliminary objections was not complete, I directed that the petitioner may file a complete reply to the preliminary objections by an affdavit (vide my order dated 12th December 1977). In compliance of the aforesaid order the respondent No. 1 filed an affidavit by Shri Rameshwar Bhargava, Advocate, on 9-1-1978. However, the petitioner neither filed a complete reply to the preliminary objections nor filed a counter affidavit.

6. The first point for determination is whether a copy of Annexure A was furnished by the petitioner to be served on the respondent No. 1? On this point there is the uncontroverted affidavit of Shri Rameshwar Bhargava counsel for the respondent No. 1 wherein he has sworn that copy of Annexure A was not annexed to the copy of the election petition supplied by the petitioner for service on respondent No. 1. He has stated that the file of the case was checked by the clerk concerned Shri Nakhne to see whether copy of Annexure A had been annexed to the copy of the election petition to be served on respondent No. 1 but no such copy of Annexure A was found on the file and, therefore, he made a note in the order sheet that he had received the copy of the election petition without a copy of Annexure A. As already stated above, no counter affidavit has been filed on the point on behalf of the petitioner nor it has been asserted before me by the learned counsel for the petitioner that any such copy of Annexure A was supplied, nor any time has been sought for, for filing a counter affidavit nor any opportunity has been asked for, for adducing evidence on the point. There is even no prayer made by the petitioner for cross-examining Shri Bhargava on his affidavit. In these circumstances, I have no alternative but to come to the conclusion that no copy of Annexure A was annexed to the copy of the election petition to be served on respondent No. 1.

7. This brings me to the consideration of the question whether failure on the part of the petitioner to supply copy of Annexure A to the respondent No. 1 is a fatal defect and entails dismissal of the petition on that ground?

8. Section 81 (3) of the Act reads as under:—

"S. 81 (1) x x x x

(2) x x x x

(3) Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signatures to be a true copy of the petition."

9. In this connection attention may also be drawn to S. 83 of the Act.

"S. 83 (1) An election petition—

(a) shall contain a concise statement of material facts on which the petitioner relies;

(b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice; and

(c) shall be signed by the petitioner and verified in the manner laid down in the Civil P. C., 1908 (5 of 1908). for the verification of pleadings;

Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.

(2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition."

10. Section 86 (1) of the Act provides that the High Court shall dismiss an election petition which does not comply with the provisions of S. 81 or S. 83 or S. 117.

11. Learned counsel for the petitioner has urged that Annexure A shall be deemed to be a part of the election petition. In support of this contention he has relied on Sardar Mal v. Smt. Gayatri Devi (AIR 1964 Raj 223); Ramashanker Parmanand v. Jugalkishore

Ramasahaya Bajaj (AIR 1969 Madh Pra 243); Smt. Sahodrabai Rai v. Ram Singh (AIR 1968 SC 1079); Satya Nurain v. Dhuja Ram (AIR 1974 SC 1185); Samant N. Balakrishna v. George Fernandez (AIR 1969 SC 1201) and Jagat Kishore Prasad Narain Singh v. Rajendra Kumar Poddar (AIR 1971 SC 342).

12. In Sardar Mal's case (AIR 1964 Raj 223) (supra) it was held that the word "petition" as used in S. 81 (3) of the Act includes the Annexures to the petition containing particulars of corrupt practices alleged therein.

13. In Ramshanker Parmanand's case (AIR 1969 Madh Pra 243) (supra) it was observed that where an election is challenged on the ground of corrupt practice, but the petitioner fails to supply copies of Annexures to the petition for being served on the respondents, the defect produced by the non-supply of copies is a defect of presentation of the petition and so cannot be allowed to be cured subsequently. Consequently, the petition is liable to be dismissed.

14. However, the law on the point has been authoritatively laid down by their Lordships of the Supreme Court in AIR 1968 SC 1079 (supra) where a distinction has been drawn between documents which are merely evidence in the case but which for reasons of clarity and to lend force to the petition are not kept back but produced or filed with the election petition, and annexures or schedules which are treated as integrated with the election petition. So far as the documents of the former type are concerned, the Supreme Court held that they are in no sense an integral part of the averments of the petition and, therefore, cannot be treated as part of the election petition, and need not be served upon the respondent. But as regards averments not included in the election petition but set out in the schedules or annexures attached to the election petition their Lordships observed as follows (at p. 1082) :—

x x x x x

"The law then requires that even though they are outside the election petition, they must be signed and verified, but such Annexures or schedules are then treated as integrated with the election petition and copies of them must be served on the respondents if the requirement regarding service of the election petition is to be wholly complied with.

x x x x x"

At this stage reference may be made to sub-sec. (3) of S. 81 and sub-sec. (2) of S. 83 of the Act. The first provides that every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and that every such copy shall be an authenticated true copy, whereas the second provides that any schedule or Annexure to the petition must also be signed and verified by the petitioner.

15. Shri A. B. Mishra, learned counsel for the petitioner argued that Annexure A should not be treated as a part of the election petition itself as that would amount to too strict a reading of the provisions. He too has relied upon Sahodrabai Rai's case (AIR 1968 SC 1079) (supra) and has argued that there is no mention of any document accompanying the election petition. It may be pointed out that in that case the election petition itself reproduced the whole of the pamphlet in a translation in English and it could be said that the averments with regard to the pamphlet were themselves a part of the petition and, therefore, the pamphlet was served upon the respondents although in a translation and not in original. It has, therefore, to be seen whether Annexure A was produced as evidence of the averments of the election petition or it was itself an averment of the election petition.

16. For a proper appreciation of this contention I may here reproduce annexure in extenso :—

मुसलमान किसी भी कीमतपर कांग्रेस को वोट न दें। दिल्ली के शाही इमाम अब्दुला बुखारी की अपील :

दिल्ली के शाही इमाम अब्दुला बुखारी ने विधान सभा चुनाव के सिलसिले में जनता के नाम एक अपील जारी करते हुए एलान किया है कि मुसलमान किसी भी कीमत पर कांग्रेस को वोट न दें। श्री इमाम का कहना है कि गरदन कटवाना पसन्द है लेकिन कांग्रेस को वोट देना पसन्द नहीं, 'सूली के तख्त पर चढ जाना मंजूर है, लेकिन जालिमो को गले लगाना पसंद नहीं।

६ जून को प्रकाशित इस अपील में श्री इमाम ने कहा कि मुसलमानों, हरीजनों व दीगर कमजोर तबको पर मजालिम ढाने और उन के हक्क पर छापा मारने के खिलाफ हमने किस तरह जालिम कांग्रेस

सरकार को खत्म किया है, अगर मौजूदा सरकार ने जो हमारी अपनी सरकार है, इंसाफ से काम नहीं किया तो हिन्दुस्तान के आवाम अपनी दी हुई अमानत भी ले सकते है :"

(जनता प्रींटींग प्रेस एंव कॉलेज बुक डिपो अशोकनगर)

17. The contents of Annexure A, it may be noted, have not been reproduced in the election petition as was done in the Supreme Court case (AIR 1968 SC 1079) wherein, in the body of the election petition itself, a translation in English of the pamphlet in Hindi was incorporated and the original pamphlet was attached to the election petition. A careful reading of the pamphlet would show that the petitioner did not even correctly and faithfully narrate the substance of the pamphlet in para. 19 of the election petition. There is nothing in the pamphlet to show that respondent No. 1 had himself made any appeal to the Musalmans not to vote for the Congress. On the other hand, the appeal is by Shahi Imam Abdullah Bukhari of Delhi. Then again, in the election petition it is mentioned that in this appeal (meaning the pamphlet) the respondent No. 1 had a statement of fact against the personal character and conduct of the petitioner which is false or which he believed to be false and did not believe to be true. However, there is no such statement of fact by the respondent No. 1 contained in the pamphlet. Again it is averred in the petition that the petitioner had been referred to as a 'Jalim' in the pamphlet but there is no reference to the petitioner at all in the pamphlet. The reference is only to the Congress. It is thus clear that the intention of the petitioner was clearly to base his allegation regarding corrupt practice on Annexure A and not to use it merely as a piece of evidence. It was, therefore, the duty of the petitioner to have either incorporated fully and faithfully the contents of Annexure A in the petition itself or to have served it on the respondent No. 1. In the facts and circumstances of the case, I have come to the conclusion that the Annexure A must be treated as integrated with the election petition and copy of the same must be served on the respondent No. 1.

18. In this connection reference may also be made to Samant N. Balakrishna v. George Fernandes (AIR 1969 SC 1201) wherein it was observed that S. 83 of the Act is mandatory and requires the election petition to contain first a concise statement of material facts and then requires the fullest possible particulars. The function of particulars is to present as full a picture of the cause of action with such further information in detail as to make the opposite party understand the case as he will have to meet. In my opinion, the facts constituting the corrupt practice alleged in para. 19 of the election petition would be wholly incomplete and would not at all meet the requirements of S. 83 of the Act in absence of 'Annexure A' which must be treated as an integral part of the election petition. I am further of opinion that it was not possible for the respondent No. 1 to file a complete reply to the election petition without being supplied with a copy of the pamphlet.

19. Faced with this situation, learned counsel for the petitioner made an application at the close of the arguments of the learned counsel for the respondent No. 1 that the petitioner may be permitted to amend the petition by incorporating in the petition the matter contained in the pamphlet marked '1'. This application was opposed by Mr. Shinde, learned counsel for the respondent No. 1. It was submitted in the first instance that the limitation for filing the election petition, had expired and in this connection he placed reliance on Mohan Raj v. Surendra Kumar (AIR 1969 SC 677) wherein it was observed that when the Act enjoins the penalty of dismissal of the petition for non-joinder of party the provisions of the Civil P. C. cannot apply. It was further observed that an amendment to delete allegations of corrupt practice against a party cannot be permitted since it would defeat the provisions of S. 86 (1) of the Act and thus every election petition can be saved by amendment in this way, but that is not the policy of law.

20. Apart from that, as stated above, if the petitioner were allowed to incorporate the contents of the pamphlet in para. 19 of the election petition, that would amount to a different allegation of corrupt practice, as para. 19 of the petition as framed at present contains something different from what is stated in the pamphlet. In Kashinath v. Smt. Kudsia Begam (AIR 1971 SC 372) insertion of the words "in whose company Madan Gopal Misra" between the words 'persons' and 'committed' in column 1 of the schedule was disallowed by the trial Judge as a defective petition could not be allow-

ed to be rectified after the period of limitation for filing it had expired and the Supreme Court upheld the view taken by the trial court.

21. Mr. Mishra, learned counsel for the petitioner, however, placed strong reliance on sub-sec. (5) of S. 86 of the Act which provides that the High Court may allow the particulars of any corrupt practice alleged in the petition to be amended or amplified in such manner as may in its opinion be necessary for ensuring a fair and effective trial of the petition. I may, however, draw attention to the latter part of this sub-section which makes it clear that any amendment of the petition which would have the effect of introducing particulars of a corrupt practice not previously alleged in the petition shall not be allowed.

22. As already stated above, the allegations made in para. 19 of the election petition reportedly contained in the pamphlet are different from what they actually are in the pamphlet. Consequently, to allow the petitioner to incorporate the contents of the pamphlet in the petition now would have the effect of introducing particulars of a corrupt practice not previously alleged in the petition.

23. In the facts and circumstances of the case, therefore, I am not inclined to allow the application for amendment. It appears to me that the petitioner was not at all careful in making allegations of corrupt practice in para. 19 of the election petition. He intended to make Annexure 'A' a part of the election petition but did not sign nor verify it according to law nor did he supply a copy of the same to be served on the respondent No. 1. The papers were drafted and filed in a callous manner for which the petitioner is to thank himself.

24. In the result, I hold that Annexure A must be treated as integrated with the election petition and consequently it was necessary to serve a copy of the same on the respondent No. 1. Annexure A should also have been signed and verified by the petitioner in the same manner as the petition. This has resulted in non-compliance of the provisions of S. 81 (3) and S. 83 (2) of the Act and the defect being fatal, the petition is liable to be dismissed under S. 86 (1) of the Act.

25. Consequently I dismiss the election petition with one set of costs to respondent No. 1, if certified. Costs assessed at Rs. 400/-. The amount of costs awarded shall be deducted from the security amount and the rest of the amount may be refunded to the petitioner.

Election petition dismissed.

AIR 1978 MADHYA PRADESH 179

(GWALIOR BENCH)

H. G. MISHRA J.

Pradeep Kumar, Appellant v. Gwalior Improvement Trust, Respondent.

Second Appeal No. 350 of 1976, D/- 23-1-1978*.

(A) Specific Relief Act (47 of 1963), S. 20 (4) — Scope — Doctrine of mutuality — Applicability — Specific performance of contract — Refusal on sole ground that other party not capable of performing its part — Not permissible.

The language used in sub-s. (4) of Section 20 of the Act does not justify the inference that the doctrine of 'mutuality' has been completely thrown out of consideration. But it is clear that the rigour of the doctrine of mutuality has been toned down by the Parliament by introducing sub-s. (4) in the law governing the specific reliefs. The use of the word "merely" in sub-s. (4) indicates that the specific performance of a contract will not be refused on the sole ground that the contract is not enforceable at the instance of the other party. The circumstance that the contract is not enforceable at the instance of the other party (minority in the instant case) can be one of the considerations for refusing the specific performance. But on that ground alone, relief of specific performance cannot be refused. AIR 1974 Madh Pra 24 Followed. (Paras 6, 7)

Anno: AIR Manual (3rd Edn.) Specific Relief Act, S. 20 N. 10.

(B) Specific Relief Act (47 of 1963), S. 20 (4) — Doctrine of mutuality — Applicability — Relevant date is date of filing suit for specific performance and not date of entering into agreement. (Para 8)

Anno: AIR Manual (3rd Edn.) Specific Relief Act, S. 20 N. 10.

Cases Referred: Chronological Paras

AIR 1974 Madh Pra 24: 1974 Jab LJ 296 8

*(Against order of D. P. Pandey, Addl. Dist. J. Gwalior, D/- 31-7-1976).

AIR 1968 Madh Pra 150: 1968 Jab LJ 798 2, 4, 5

M. L. Gupta, for Appellant; J. S. L. Sinha, for Respondent.

JUDGMENT:— This is second appeal preferred by the plaintiff against the judgment and decree passed by the Additional District Judge, Gwalior, whereby the suit pertaining to specific performance of agreement for sale has been dismissed and the matter has been remanded for deciding other issues including the issue whether the plaintiff can get refund of the amount of sale price deposited with the respondent Trust.

2. The facts so far as they are material for purposes of disposal of this appeal are that on 14-12-1961 the defendant-respondent Trust entered into an agreement for sale of a plot of land in favour of the plaintiff. The suit for specific performance of sale was instituted on 5-4-1971. The trial court dismissed the suit, aggrieved by which the plaintiff preferred appeal. The appellate court relying on 1968 Jab LJ 798: (AIR 1968 Madh Pra 150) (Ramchandra v. Manikchand) held that on the date of entering into agreement for sale i. e. on 14-12-1961 the plaintiff was a minor. Therefore, he had no right to enforce the agreement for sale. It was hit by the doctrine of 'mutuality.' For want of mutuality, the plaintiff could not be allowed to enforce the agreement for sale. In this view of the matter, the learned A. D. J. dismissed the suit so far as specific performance of agreement for sale was concerned, but remanded the case so far as the consideration of plaintiff's right to other reliefs was concerned.

3. Aggrieved by this judgment and decree pertaining to dismissal of the suit for specific performance of agreement for sale, this appeal has been filed.

4. The learned counsel for the appellant contends that the learned A. D. J. has erred in over-looking the change of law brought about by the Specific Relief Act, 1963 (hereinafter referred to as the Act). By enacting sub-sec. (4) of S. 20 of the Act, the doctrine of 'mutuality' has been given good-bye and in view of the change of the law the principles laid down in 1968 Jab LJ 798: (AIR 1968 Madh Pra 150) (supra) have not remained good law.

5. Shri Sinha, learned counsel for the respondent has very vehemently opposed the appeal and has argued that the dictum of Ramchandra's case (AIR 1968 Madh Pra 150) holds water even after enforcement of the Act.

6. After having heard the learned counsel for both the parties, I am of the opinion, that the appeal deserves to be allowed. sub-sec. (4) of S. 20 of the Act is reproduced below:—

"The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party."

The language used in sub-sec. (4) of S. 20 of the Act quoted above, does not justify the inference that the doctrine of 'mutuality' has been completely thrown out of consideration. But it is clear that the rigour of the doctrine of mutuality has been toned down by the Parliament by introducing sub-sec. (4) in the law governing the specific reliefs.

7. The use of the word "merely" in sub-sec. (4) indicates that the specific performance of a contract will not be refused on the sole ground that the contract is not enforceable at the instance of the other party. The circumstance that the contract is not enforceable at the instance of the other party can be one of the considerations for refusing the specific performance. But on that ground alone, relief of specific performance cannot be refused.

8. The effect of the change of law brought about by the aforesaid provision was considered by this Court in a Division Bench case reported in 1974 Jab LJ 296: (AIR 1974 Madh Pra 24), (Than Singh v. Barelal). The ratio of this case fortifies my view. The principles of law governing such cases prior to the enforcement of the Act, cannot be regarded as applicable to cases originating after enforcement of the Act. Admittedly, the present suit was instituted on 5-4-1971, the Act came into force on 1-3-1964. In this view of the matter, the suit will be governed by the provisions of the Act. It is not the date of entering into an agreement for sale which is material for adjudging the applicability of the doctrine of mutuality. The relevant date is the date of the suit when the plaintiff-appellant sought enforcement of the impugned agreement for sale through court. In this view of the matter, the appeal deserves to be allowed. Accordingly, the impugned judgment and decree, so far as they pertain to dismissal of the suit regarding specific performance of agreement for sale of land in question, are set aside and the case is remanded to the trial court for trial of the whole suit according to law. Refund of the court-fee paid on

this appeal is directed to be made to the appellant. Office may issue a certificate of refund of the court-fee paid on this appeal to the plaintiff appellant. In view of the misapprehension of law under which the learned ADJ proceeded to decide the appeal, I make no order as to costs of this appeal. It is directed that the costs of the first appeal will follow the ultimate event. If the suit is ultimately decreed, the costs of the first appeal will also be provided for by the trial court in its decree.

9. The learned counsel for the appellant requests for fixing of a date for appearance of the parties in trial court, to avoid delay in fixing of the date and then intimating it to the respective parties. The prayer is reasonable. Accordingly, I direct that the parties will appear in the trial court on 10-2-1978. This will be sufficient notice to the parties. No fresh notice need be issued for this date by the trial court. The record of the trial court be sent within three days from today.

Appeal allowed.

AIR 1978 MADHYA PRADESH 181
(INDORE BENCH)
OZA AND MULYE, JJ.

Mohammad Hussain, Appellant v. Rahimbhai and others, Respondents.

Civil First Appeal No. 112 of 1977, D/- 19-1-1978.

Civil P. C. (5 of 1908), O. 41 R. 5 — Security bond for performance of decree — Does not require registration.

Filing of the bond is just a step in the procedure under O. 41 R. 5 and therefore, it does not require registration as a bond is executed in favour of the court by hypothecating certain properties. It is not a mortgage. (Paras 3 to 5)

Form No. 3 App. 'G' does not indicate that the bond has to be in favour of any one except the Court and if it is in favour of the Court, it is not a mortgage and therefore, it does not require registration. Case law discussed. (Para 4)

Cases Referred: Chronological	Paras
AIR 1961 Madh Pra 2	2, 3
AIR 1960 Pat 305	2, 3
AIR 1958 All 820	2, 3
AIR 1958 Ker 377 (FB)	2, 3
AIR 1956 Cal 375	2, 3
AIR 1947 Nag 26	2, 3, 4
AIR 1936 Rang 303	3
AIR 1934 Lah 138 (FB)	3
AIR 1928 Bom 42 : ILR 52 Bom 72	3
(1920) ILR 47 Cal 85	3
AIR 1919 PC 55	3
(1899) ILR 22 Mad 508 (PC)	3
(1898) ILR 20 All 171 (PC)	3

OZA J.:— In this case a stay order was granted by this Court on 23-9-1977 which was further modified by this Court on 14-12-1977. According to the modified order the appellant was permitted to furnish two securities; one for Rs. 45,000/- and another of Rs. 30,000 and it was directed that the appellant shall furnish securities on or before 23-12-1977. It appears that the securities were filed by the appellant; one was furnished earlier which was verified and accepted and on 23-12-1977 the learned trial Court i. e. the 6th Additional District Judge passed an order that the security bond of Rs. 30,000/- which was filed on that date should be registered. It also passed an order that the earlier security bond which was accepted on 16-12-1977 should also be registered, and the Court will consider these security bonds after they have been registered.

2. Learned counsel for the appellant contended that these security bonds having been furnished in pursuance of O. 41 R. 5 of C. P. C. in view of the decisions of this Court reported in Dadoo Balaji Korku v. Kanhaiyalal Dhannaram (AIR 1947 Nag 26) and Hajijiwakhan v. Gulabchand, (AIR 1961 Madh Pra 2) registration is not necessary as it is a step in the judicial proceedings and the bond becomes operative only when it is accepted by the Court. Whereas learned counsel for the respondents vehemently contended that as the bonds create a charge on immoveable property for more than Rs. 100/- it requires registration under the Transfer of Property Act as well as under the Registration Act and therefore, a bond is not a proper bond so long as it is not registered and the Court below was right in observing that the bond can only be accepted if it is registered. He placed reliance on the decisions reported in Kasemali v. Ajoyendu Paul (AIR 1956 Cal 375), Bishnath Sahu v. Prayag Din (AIR 1958 All 820), R. M. Palat v. P. A. Nedungadi (AIR 1958 Ker 377), (FB) and Chiranjilal Agarwala v. Chittaranjan Mukherjee, (AIR 1960 Pat 305).

3. O. 41 R. 5 of the Civil P. C. provides :—

"O. 41 R. 5 — Stay by appellate Court :—

(1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree: but the Appellate Court may for sufficient cause order stay of execution of such decree.

(2) Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied:—

(a) that substantial loss may result to the party applying for stay of execution unless the order is made:—

(b) that the application has been made without unreasonable delay; and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

(4) (Subject to the provision of sub-rule (3)) the court may make an ex parte order for stay of execution pending the hearing of the application.

(5) Notwithstanding anything contained in the foregoing sub-rules where the appellant fails to make the deposit or furnish the security specified in sub-rule (3) of R. 1 the Court shall not make an order staying the execution of the decree)."

It could not be doubted that the security bonds furnished in this case are in accordance with O. 41 R. 5 of the C. P. C. and a security bond under O. 41 R. 5 C. P. C. enjoins on the surety for the performance of the decree that may be passed in appeal. Apparently, therefore the giving of a security bond is a step in judicial procedure and therefore, it could not be said that the execution of a bond affects the transfer of right in immoveable property. In AIR 1947 Nag 26 (supra) while considering this question it was observed as under:—

"A security bond under O. 41 R. 5 Civil P. C. hypothecating the immovable property of the surety for the performance of the decree that may be passed in appeal does not require registration; ILR 15 Lah 282: (AIR 1934 Lah 138) (FB); ILR 52 Bom 72: (AIR 1928 Bom 42). These decisions are based on (1898) ILR 20 All 171 (PC). (1899) ILR 22 Mad 508 (PC) and (1920) ILR 47 Cal 85. In ILR 42 All 158 at p. 167: (AIR 1919 PC 55 at p. 59) it is stated that the Court is not a juridical person and that a security bond executed in favour of the court hypothecating certain property is not a mortgage. In AIR 1936 Rang 303 it was held that a security bond to the Court operates neither as a mortgage nor as a charge and need not be registered under the Transfer of Property Act. The Privy Council has repeatedly laid it down as a broad general principle that documents which form part of a judicial proceeding do not require registration. Under O. 41 R. 5, C. P. C. no stay can be granted unless the appellant furnishes security for due performance of such decree or order as may ultimately be binding on him.

The giving of security bond is a step in judicial procedure before an order for stay can be granted. The execution of a bond does not effect transfer of rights in the immoveable property described therein so as to make it available for the satisfaction of the decree that might be passed by the appellate Court, but it is an Order of the Court accepting the bond which creates these rights. The bond does not become operative unless and until it is accepted by the Court. I hold that the security bond hypothecating immovable property executed under O. 41 R. 5 C. P. C. does not require registration either under the Registration Act or of the Transfer of Property Act."

Reliance was placed on the decisions of Lahore and Bombay High Courts. It is, no doubt true that Calcutta, Allahabad and Kerala High Courts have taken a different view. In AIR 1961 Madh Pra 2 (supra) this question again was considered although in the context of S. 17 of the Provincial Small Cause Courts Act and the learned Judge followed the decision of the Nagpur High Court and held that a security bond in pursuance of an order does not require registration. A Division Bench of Allahabad High Court in AIR 1958 All 820 (supra) after considering the view expressed in AIR 1934 Lah 138 (FB) and also AIR 1947 Nag 26 (supra), disagreeing with this view held that a security bond under O. 41 R. 6 C. P. C. where property more than Rs. 100/- requires registration. A similar view has been expressed in AIR 1956 Cal 375 (supra) AIR 1958 Ker 377 (FB) (supra) and AIR 1960 Pat 305 (supra). Apparently therefore, on this question there are

divergent views. This Court consistently has taken a view that a security bond under Order 41 Rule 5 of C. P. C. does not require registration as a bond is executed in favour of the Court by hypothecating certain properties. It is not a mortgage, and in our opinion, therefore, there is no reason not to follow the view taken by this Court in the cases referred to above. In AIR 1958 Ker 377 (FB) (supra) it has been held that because a security bond has to be in form No. 3 Appendix G where the person to whom the security bond is given, is to be specified, it creates a mortgage and therefore, it is stated, that if it is of more than Rs. 100/- value, it requires registration under the T. P. Act as well as under the Registration Act. In Raj Raghubar Singh v. Jai Indra Bahadur Singh (AIR 1919 PC 55) their Lordships considered a bond under Order 41 R. 5 C. P. C. and held:

"It is suggested that they are bound to the Court. But the Court is not juridical person. It cannot be sued. It cannot take property, and as it cannot take property it cannot assign it. It remains, therefore, that there is an unquestioned liability, and there must be some mode of enforcing it and that the only mode of enforcing it must be by the Court making an order in the suit upon an application to which the sureties are parties, that the property charged be sold unless before a day named the sureties find the money."

It is on this view expressed by their Lordships that the Bombay, Rangoon and Nagpur High Courts took the view that this bond does not amount to a mortgage or a charge and does not require registration.

4. Consequently, in our opinion the registration of the bond is not necessary. It was contended that in the present code that bond has to be in form No. 3 App. 'G' which is as under:—

"SECURITY BOND TO BE GIVEN DURING THE PENDENCY OF APPEAL.

(O. 41, R. 6)

Title

To,

This security bond on stay of execution of decree executed by witnesseth:

That , the plaintiff in suit No. of 19 , having sued , the defendant, in this court and a decree having been passed on the day of 19 in favour of the plaintiff, and the defendant having preferred an appeal from the said decree in the court, the said appeal is still pending.

Now the plaintiff decree-holder has applied for execution of the said decree and has been called upon to furnish security. Accordingly I, of my own freewill, stand security to the extent of Rs. , mortgaging the properties specified in the Schedule hereunto annexed, and covenant that if the decree of the first Court be reversed or varied by the Appellate Court, the plaintiff shall restore any property which may be or has been taken in execution of the said decree and shall duly acted in accordance with the decree of the Appellate Court and shall pay whatever may be payable by him thereunder, and if he should fail therein then any amount so payable shall be realised from the properties hereby mortgaged, and if the proceeds of the sale of the said properties are insufficient to pay the amount due, I and my legal representatives will be personally liable to pay the balance. To this effect I execute this security bond this

day of 19 .

Schedule

Witnessed by

1.

2. (Signed)

"

But it does not appear that this indicates that the bond has to be in favour of any one except the Court and if it is in favour of the Court, the observations made by their Lordships of the Privy Council quoted above will still be applicable. It also cannot be disputed that filing of the bond being just a step in the procedure under O. 41 R. 5 of C. P. C. and therefore, in our opinion the view taken by the Nagpur High Court in AIR 1947 Nag 26 (supra) is a view which could be taken in view of the provisions contained under O. 41 R. 5 of the Civil P. C.

5. In our opinion, therefore, there is no need of registration of the security bond filed by the appellant in this case.

Order accordingly.

AIR 1978 MADHYA PRADESH 184

SHIV DAYAL, C. J., AND
J. P. BAJPAI, J.

Laxmichand Jagannath Pandey, Appellant v. Challu Raisa, Respondent.

Misc. (Second) Appeal No. 272 of 1974, D/- 3-1-1978.*

Limitation Act (9 of 1908), Art. 182 Cl. (2) — Word 'appeal' — Meaning — Does not include an appeal from an order refusing to set aside ex parte decree.

The word "appeals" as used in cl. (2) of Art. 182 cannot be read so as to include even an appeal from an order refusing to set aside the ex parte decree. (Para 6)

It is true that if a decree-holder is required to prosecute an ex parte decree even when the proceedings for getting the same set aside are pending either at the original stage or before the appellate Court, there is always a possibility that in case of ex parte decree, being set aside, all efforts made for executing the decree will become futile but for this consideration one cannot re-write the provisions contained in Art. 182. One cannot construe the provisions of the statute prescribing limitation de hors of the context. Similarly, one cannot read something which is not there merely on certain equitable considerations because the field covered by the statute prescribing limitation is not of one way traffic. It, on the one hand, bars the remedy and on the other hand, creates a valuable right in favour of the other side due to expiry of the period of limitation. Such a right cannot be taken away by the Courts by re-writing the law in the garb of interpretation. If it is felt that certain provisions are causing hardship and resulting in unfairness, it is for the Legislature to consider the situation and to make suitable amendments. (Para 14)

The provisions of cl. (2) of Art. 182 of the old Limitation Act therefore cannot be availed by relying on an appeal preferred against an order refusing to set aside the ex parte decree. However, if there is any order of stay or injunction prohibiting execution of the decree during the pendency of the proceedings under O. 9 C. P. C., the decree-holder may, according to law, claim the benefits of deductions as provided under S. 15 of the Limitation Act. AIR 1932 P. C. 165 Explained and Distinguished. Case law discussed. (Para 15)

Anno: AIR Comm., Limitation Act (9 of 1908), (2nd Edn.), Art. 182, N. 34.

Cases Referred: Chronological Paras

AIR 1955 All 552	12
AIR 1951 Mad 962 (FB)	13
AIR 1951 Pat 1 (FB)	13
AIR 1950 SC 6	11
AIR 1946 Cal 375	10
AIR 1939 Mad 157	13
AIR 1939 Mad 735	13
AIR 1937 Pat 337	13
AIR 1932 PC 165	2, 5, 7, 10, 12
AIR 1927 Cal 904	12
AIR 1922 Nag 197 (1)	2

A. R. Choube, for Appellant; V. S. Shrouti, for Respondent.

BAJPAI, J.— This miscellaneous second appeal arises out of a reference and it raises a question as to the construction of the word "appeal" in cl. (2) of Art. 182 of the Indian Limitation Act, 1908. The question posed is as under:

"Whether the word "appeal" as used in cl. (2) of the Article means an appeal from the decree which is sought to be executed or could it include even an appeal from an order made in miscellaneous proceedings under O. 9, R. 13 refusing to set aside the ex parte decree?"

2. According to the rules of this Court, such miscellaneous second appeals are ordinarily heard by a single Bench and was accordingly laid before the learned single Judge (Hon'ble Raina, J.). The learned single judge was, however, of the opinion that since some High Courts have taken the view that the word "appeal" in cl. (2) of Art. 182 does include an appeal from an order refusing to set aside the ex parte decree and that there being sufficient scope to construe the word "appeal" in the said manner in view of certain observations made by their Lordships of the Privy Council in the case of Nagendranath Dey v. Sureshchandra Dey AIR 1932 PC 165, the matter required full consideration by a larger Bench, particularly in the absence of any decision of this Court or the Supreme Court directly on the point involved. However, the Judicial Commissioner's Court at Nagpur had taken the view in the case of Jabarkhan v. Rahimkhan AIR 1922 Nag 197 (1) that the words "where there has been an appeal" used in cl. (2) of the Article have been referred to an appeal from the decree or order sought to be executed

*(Against order of K. K. Verma, 2nd Addl. Dist. and S. J. Hoshangabad, D/- 3-9-1974.)

and do not include an appeal from an order dismissing the application to set aside an ex parte decree. Similar is the view taken by the High Courts of Calcutta, Madras and Patna.

3. The facts giving rise to the appeal are that an ex parte decree was passed against the appellant towards rent and mesne profits on 5-3-1959. The appellant moved an application for setting aside the ex parte decree which was dismissed by the trial Court on 30-4-1960. He further preferred an appeal against the said order which was also dismissed by the Additional District Judge on 23-7-1960. Thereafter, the respondent decree holder filed an application for execution of the decree on 9-4-1963. This application was dismissed on 21-10-1964 and thereafter successive applications for execution were filed. The last one was filed on 16-6-1970 and in the course of proceedings on the said application, the appellant judgment debtor raised an objection that the execution proceedings brought by the decree holder were barred by limitation, because the first application itself, having been moved after 3 years from the date of the decree sought to be executed, was barred by limitation. It would be significant to note that there was no order of stay or injunction prohibiting the execution of the decree during the proceedings of the application under O. 9 R. 13 of the Civil P. C. or the appeal arising out of the same. It was not disputed either before the learned single judge or before us that the subject-matter was governed by the provisions of Art. 182 (2) of the old Limitation Act and if the first application for execution moved on 9-4-1963 is held to be barred by limitation, the successive applications moved thereafter will also be hit by bar of limitation and the execution accordingly could not be proceeded.

4. The contention raised on behalf of the judgment debtor was that the word "appeal" used in cl. (2) of the Article cannot be read de hors of the context in which it has been used and must, therefore, be confined to the decree which is sought to be executed and since no appeal against the decree was preferred in this case, the limitation for filing an application for execution started running from the date of ex parte decree itself and was not stopped due to the institution and pendency of the proceedings under O. 9 R. 13 of the Civil P. C. and the date of the decision of the appeal preferred against the order refusing to set aside the decree could not, therefore, become the starting point of limitation.

5. The contention raised on behalf of the decree holder was that since the word "appeal" has not been qualified by using the words "against the decree sought to be executed," it may include any other appeal such as the one preferred in the present case against the order refusing to set aside the ex parte decree and accordingly the first application moved by the decree holder was within limitation having been preferred within 3 years from the date of the final order made in the said appeal. The argument on behalf of the decree holder was based on the proposition that so long as the finality of the decree sought to be executed was sub judice even in the proceedings under O. 9 or appeal arising out of such proceedings, the decree holder was not bound to proceed with the execution of such decree without awaiting the final decision of the said appeal. The contention raised was that a party could not be expected and held bound to prosecute a proceeding when it is apparent that there was every likelihood of the same being rendered futile. Reliance was placed on the observations made by the Privy Council in the case of Nagendranath v. Sureshchandra AIR 1932 PC 165 at P. 167 which are as reproduced below:

"There is, in their Lordships' opinion no warrant for reading into the words quoted (where there has been an appeal) any qualification either as to the character of the appeal or as to the parties to it; the words mean just what they say. The fixation of periods of limitation must always be to some extent arbitrary, and may frequently result in hardship. But in construing such provisions equitable considerations are out of place and the strict grammatical meaning of the words is, their Lordships think, the only safe guide. It is at least an intelligible rule that so long as there is any question sub judice between any of the parties, those affected shall not be compelled to pursue the so often thorny path of execution which, if the final result is against them, may lead to no advantage."

It would be significant to mention that despite the aforesaid observations made by the Privy Council, various High Courts have distinguished the same and have held that these observations could not be construed so as to include appeals which are not preferred against the decree sought to be put in execution.

6. In our opinion, the word "appeal" as used in cl. (2) of Art. 182 cannot be read so as to include even an appeal from an order refusing to set aside the ex parte decree. It is true that the plain words in a statute prescribing limitation have to be construed as they mean and there is no warrant in reading into the word "appeal" any qualification. But it is also equally true that the words used by a statute cannot be read de hors of the context.

7. Shri Choubey, learned counsel for the appellant, contended that in view of the observations made in the case of Nagendranath decided by the Privy Council, (AIR 1932 PC 165), no such view can be taken, because the decree holder cannot be compelled to pursue the thorny path of execution which may lead to no advantage if ultimately the final result of the proceedings under O. 9 R. 13 of the Civil P. C. was to leave the decree holder to no advantage. According to Shri Choubey, the intelligible rule laid down by the Privy Council cannot be overlooked and by implication, the aforesaid observations made by the Privy Council lead to the conclusion that the word "appeal" used in cl. (2) of the Article may include any and every such appeal which might arise out of the connected proceedings irrespective of the fact that the same may not be against the actual decree sought to be put in execution so long as it could be shown that the decision of such appeal may ultimately affect the decree sought to be put in execution.

8. This question in the context of an appeal against the order refusing to set aside the ex parte decree has not been considered till now by the Supreme Court or by this Court and certainly requires careful examination. Since reliance has been mainly placed on the observations made by the Privy Council, it would be necessary to refer to the facts of the case before the Privy Council. Without going into details, the facts in the said case were as follows: Madan Mohan was the plaintiff in a mortgage suit. There were certain other co-mortgagees, who were impleaded as defendants Nos. 11 and 12 in the said suit. The claim of the plaintiff Madan Mohan was that since the other mortgagees i. e. defendants Nos. 11 and 12 had assigned their interest in his favour, he was consequently entitled to add to his own claim, the share of the mortgage money as was allowed to defendants Nos. 11 and 12; his claim was rejected and a final decree was made in favour of the mortgagees. Madan Mohan, being aggrieved by this, preferred an appeal against the said decree claiming that the decree should not have been made in favour of other co-mortgagees. Since the dispute in the appeal was confined in between the co-mortgagees, the judgment debtors were not made parties to the said appeal. Apart from this, the appeal was also found to be defective being insufficiently stamped and for other reasons also. The grievance in the appeal was limited to the question of assignment and was ultimately decided against the appellant. The appeal was dismissed by the appellate Court on the ground of irregularity as well as on merits. After the decision of the appeal when the co-mortgagees who were also the decree holders along with the plaintiff presented the application for execution of the decree, the said application was opposed by the judgment debtors on the ground that it was barred by limitation. This objection regarding the limitation was sought to be met by contending that since an appeal was preferred by the plaintiff against the final decree, which was being executed the provisions of cl. (2) of Art. 182 will come into play and the limitation will start running from the date of decision of the appeal and not from the date of the original final decree.

9. In the aforesaid context, their Lordships of the Judicial Committee observed that the words "where there has been an appeal" (sic) time is to run from the date of decree of the appellate Court, because there was no warrant in reading into the word "appeal" any qualification either as to the character of the appeal or as to the parties to it. Thus, it is apparent that the ratio of the decision of their Lordships was not that an appeal which is not against the decree sought to be executed is also to be included in the word "appeal". The legal position stated is that the word "appeal" is not to be read with any other qualification as to character of the appeal or as to the parties to it. Even if the appeal was defective it was still an appeal against the decree in question, and the date of final order made in the same will naturally be the date of commencement of limitation. In the aforesaid case, the Judicial, Committee was not called upon to decide the case like the present one before us where the appeal was not from the decree sought to be executed, but from the order made on an application to set aside the decree which

was passed ex parte. In the case before their Lordships, the appeal was against the mortgage decree itself. In their opinion, the character of the appeal was absolutely immaterial. It was also immaterial as to who were made parties to it and whether or not the said appeal was to affect the entire decree. What was enough for attracting cl. (2) of the Article in that case was that there was an appeal against the decree sought to be executed. In our opinion, therefore, the observations made by the Judicial Committee cannot be relied on as authority for the proposition that the appeal contemplated by Art. 182 (2) of the Old Limitation Act may include any appeal even if it is not against the decree which is the subject-matter of execution.

10. Similar has been the reasoning adopted by Hon'ble B. K. Mukerji, J. (as he then was) for distinguishing the decision of the Privy Council in the case of Haris Chandra Chowdhury v. Dines Chandra Chowdhury (AIR 1946 Cal 375). The Division Bench of the Calcutta High Court in that case, after discussing the aforesaid position, held that the observations made by the Privy Council in Nagendranath's case (AIR 1932 PC 165) (supra) could not be relied on for applying cl. (2) of Art. 182 to a case where no appeal was preferred against the decree sought to be executed but was against the order rejecting the application for setting aside the ex parte decree under O. 9 R. 13 of the Civil P. C.

11. The other case, which needs reference, is of Bhawanipore Banking Corporation Ltd. v. Gouri Shankar Sharma, AIR 1950 SC 6. This citation has been relied on by both the parties in support of their respective contentions. The decree holders rely on the same by pointing out that their Lordships of the Supreme Court have made clear pronouncement of the legal position regarding the applicability of Art. 182 (2), being not available in cases of appeal arising out of collateral proceedings despite the fact that the decision on the same may indirectly affect the decree. In the case before their Lordships no appeal was preferred against the original decree which was sought to be executed. The appeal preferred was against an order rejecting the application moved by the judgment debtor under the Money-Lenders Act for reopening of accounts and giving the relief of scaling down the debt in question. That application was dismissed in default and restoration of the same having been refused, an appeal was preferred. Their Lordships clearly laid down that the provisions of clause (2) of Article 182 were not attracted and the limitation was to start running from the date of the original decree which was sought to be executed. The learned counsel appearing on behalf of the judgment debtor, however, contended that while expressing the aforesaid view that the appeal arising out of collateral proceedings will not attract the provisions of cl. (2) of Art. 182, their Lordships have stated that the provisions are not attracted to cases where the appeal preferred arose out of the collateral proceedings or had no immediate or direct connection with the decree. The argument was that since the result of the proceedings setting aside the ex parte decree had a direct connection with the decree sought to be executed, the observations made in the said case can be fully relied on for contending that at least to such a case where the appeal arose out of proceedings under O. 9 R. 13 of the Civil P. C. the provisions of cl. (2) of the Article apply, because the decree made ex parte is to be immediately affected by the decision of such appeal. In our opinion, it is not possible to construe the observations made by their Lordships in the manner suggested by the learned counsel for the appellant-judgment debtor. An appeal against the decree sought to be executed has an immediate and direct connection with the decree impugned, and it is not so in case of an appeal preferred against the order made under O. 9 R. 13 of the Civil P. C. The immediate and direct connection of such an appeal is with order refusing to set aside the ex parte decree.

12. It is true that if the appeal against the order refusing to set aside the ex parte decree is allowed, the decree sought to be executed will be set aside. But if this argument is accepted then the limitation could also be extended by an appeal taken against a subsequent decree which might be passed in a suit to set aside the earlier decree sought to be executed, because in that case also the decree sought to be executed will be immediately affected by the decision of the appeal arising out of the subsequent suit to get the said decree set aside. We cannot infer such broad proposition like that either from the observations made by their Lordships of the Judicial Committee in Nagendranath's case (AIR 1932 PC 165) or from the language used in cl. (2) of

the Article. The learned counsel appearing for the judgment debtor referred to a Division Bench decision of the Allahabad High Court reported in Rameshchandra v. Ghanshiam Das, AIR 1955 All 552. It is true that in that decision an appeal against the preliminary decree was treated sufficient for attracting cl. (2) of the Article, though the appeal was not against the final decree. But the Division Bench in that case clearly distinguished a case of the type which is before us. In para 9 of the said decision, while distinguishing the case before the Bench with the facts of the case involved in the decision of the Calcutta High Court in Fakirchand Mondal v. Daiba Charan Parui, AIR 1927 Cal 904 the learned Judges clearly observed that an appeal from dismissal of the application to set aside the decree was distinguishable for the reason that in an appeal against the order dismissing the application to set aside the decree, the question is not whether the decision which resulted in the decree sought to be executed was sound or unsound. The question in such appeal was altogether a different subject matter i. e. whether there was sufficient cause for the absence of the party and thus the same has nothing to do with the merits or demerits of the judgment giving rise to the decree sought to be executed. It is, therefore, clear that the decision of the Bench of the Allahabad High Court also cannot be availed by the judgment debtor in the present case. As a matter of fact, it goes against the contention raised by the appellant.

13. Reliance was placed on certain decisions of the Madras and Patna High Courts wherein it was held that the provisions of cl. (2) of the Article are applicable even to a case where the appeal preferred was against an order refusing to set aside the ex parte decree. A reference was made to the cases reported in A. Veeran Kutti v. P. P. Koya Kutti, AIR 1939 Mad 735 and Nanduri Sriramchandra Rao v. Chintamanibhatla Venkateswara Rao (AIR 1939 Mad 157). In our opinion, it will not be possible to adopt the view earlier taken by the Madras High Court, because thereafter a Full Bench of the same Court has specifically overruled the aforesaid decision in the case of Shivramachari v. Bayya Anjaneya Chhety, AIR 1951 Mad 962 (FB). Similarly, the Full Bench of the Patna High Court has in Rameshwar Prasad Sahu v. Parmeshwar Prasad Sahu, AIR 1951 Pat 1 overruled the earlier view taken in Firm Dedhraj Lachminarayan v. Bhagwandas, AIR 1937 Pat 337.

14. It is true that if a decree-holder is required to prosecute an ex parte decree even when the proceedings for getting the same set aside are pending either at the original stage or before the appellate Court, there is always a possibility that in case of ex parte decree, being set aside, all efforts made for executing the decree will become futile but for this consideration you cannot re-write the provisions contained in Art. 182 of the Limitation Act. You cannot construe the provisions of the statute prescribing limitation de hors of the context. Similarly, you cannot read something which is not there merely on certain equitable consideration because the field covered by the statute prescribing limitation is not of one way traffic. It, on the one hand, bars the remedy and on the other hand creates a valuable right in favour of the other side due to expiry of the period of limitation. Such a right cannot be taken away by the Courts by re-writing the law in the garb of interpretation. If it is felt that certain provisions are causing hardship and resulting in unfairness, it is for the Legislature to consider the situation and to make suitable amendments.

15. For the reasons stated above, we are of the opinion that the provisions of cl. (2) of Art. 182 of the old Limitation Act cannot be availed by relying on an appeal preferred against an order refusing to set aside the ex parte decree. However, if there is any order of stay or injunction prohibiting execution of the decree during the pendency of the proceedings under O. 9 C. P. C., the decree-holder may, according to law, claim the benefits of deductions as provided under S. 15 of the Limitation Act.

16. Since no other point was pressed by either side and the only contention raised for challenging the order impugned made by the lower appellate Court was regarding limitation and the same having been rejected as discussed above, this appeal fails and is dismissed. However, in the circumstances of the case, there will be no order as to costs. Parties will bear their own costs of this appeal.

Appeal dismissed.

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J. P. BAJPAI, J.

Rikhiram Pyarelal and another, Appellants v. Ghasiram Dukalu, Respondent.

Second Appeal No. 768 of 1970, D/- 14-3-1977.*

Specific Relief Act (1 of 1877), S. 31 — Evidence Act (1 of 1872), S. 92, Proviso (1) — Mistake in sale deed as to description of property — Rectification of — Oral evidence to prove mistake — Admissibility.

Oral evidence is admissible to prove that the expression of the contract was contrary to the concurrent intention of all the parties due to a common mistake. It could be shown by evidence that what was intended to be transferred and was actually sold was different from what the document described due to mistake. When a mistake is established, the deed can always be construed as if the mistake has been rectified in a suit brought for the purpose of S. 31 of the Specific Relief Act. Section 31 is an enabling section and the fact that it was not resorted to cannot deprive a purchaser of the rights conveyed to him by the sale deed in his favour. However, this will be subject to the condition that the rights of the third party acquired in good faith should not be prejudiced thereby. Where it is established that there was a mistake as to the description of the property in the sale deed, a third person, who being aware of such mistake and intending to take advantage of it, subsequently purchases that property from the original vendor, cannot plead that he acquired his right in good faith, in answer to a claim made by the first purchaser. AIR 1939 Oudh 10, Rel. on. (Paras 6, 8)

Anno: AIR Manual (2nd Edn.) Specific Relief Act, (1877) S. 31, N. 5; Evidence Act, S. 92, N. 18.

Cases Referred: Chronological Paras

AIR 1939 Oudh 10 6

Ravindra Kumar Verma, for Appellants; N. S. Kale, for Respondent.

JUDGMENT:— This second appeal is at the instance of the defendants against whom the claim of the respondent-plaintiff for possession and mesne profits has been decreed by both the Courts below.

*(Against decree of R. L. Chandnani 2nd Addl. Dist. J. Bilaspur, D/- 27-11-1970.)

BV/BV/A479/78/AS/VBB

2. The facts giving rise to this appeal are that on 27-6-1960, defendant No. 1 Rikhiram executed a registered sale deed in favour of the plaintiff for a consideration of Rs. 300/-. However, khasra No. 165/1 area 0.20 acres was described as the land sold. The case of the plaintiff was that the aforesaid description was under a mistake. What was actually intended to be sold and was sold was the land measuring 0.20 acres of khasra Nos. 81 and 82/2. According to the plaintiff, he was also placed in possession of these khasra numbers and not of khasra No. 165/1 as stated in the sale deed. After entering into possession, his name was also mutated on these khasra numbers and the defendant Rikhiram, despite notice, did not oppose the aforesaid mutation. Mutation had already taken place in December 1960. Thereafter, the plaintiff remained in peaceful possession of the aforesaid land for about 6 years. However, in November 1966, defendant No. 1 executed a sale deed in favour of defendant No. 2 purporting to sell 0.29 acres out of khasra Nos. 81 and 82. Defendant No. 2, after obtaining a sale deed dispossessed the plaintiff in November, 1966, and therefore, the plaintiff brought the present suit for possession immediately within 4 months, i. e. in March 1967.

3. The case of the defendant was that there was no mistake in the description. Sale of Khasra No. 165/1 itself was intended by the parties and the same was actually sold. The plaintiff was put in possession of the said khasra number and not of 81 and 82/2. Since the sale deed in favour of the plaintiff does not relate to the suit land, i. e. Khasra Nos. 81 and 82/2, his claim for possession cannot be decreed on the strength of the aforesaid sale deed. The story of dispossession was also denied. Both the parties led evidence.

4. The Courts below, after due appreciation of the evidence, arrived at the following findings of fact:—

(i) That the plaintiff was actually placed in possession of Khasra Nos. 81 and 82/2 area 0.20 acres in pursuance of the sale deed executed in his favour on 27-6-1960.

(ii) That the plaintiff remained in peaceful possession for 6 years till November, 1966 without any objection from his vendor, defendant No. 1.

(iii) That mutation was accordingly done in respect of Khasra Nos. 81 and 82/2 and the plaintiff was shown as Bhumiswami of the same immediately

after the sale in December, 1960 and the revenue records continue to be so even up to the date of the suit.

(iv) That the defendant No. 1 did not raise any objection to the mutation as stated above despite being noticed by the Revenue Officers.

(v) That the mention of khasra No. 165/1 instead of 81 and 82/2 was by mistake.

(vi) That the subsequent purchase of the same land by defendant No. 2 from defendant No. 1 in 1966 was not bona fide inasmuch as on the date of purchase by the defendant No. 2, the plaintiff was already in actual physical possession of the suit lands and that he was being shown as Bhumiswami holder of the same in revenue records for the last 5 years.

5. In appeal before this Court following two points were pressed:—

(1) It was contended that without getting the sale deed Ex. P-1 rectified by filing a suit, as contemplated under Section 31 of the Specific Relief Act, the plaintiff could not bring a suit for possession on the basis of title claimed to have been derived from the sale deed, Ex. P-1, in which there was no mention of the khasra numbers of the suit land;

(2) It was also urged that no evidence could be led or considered against the contents of the sale deed to show that something other than that stated in the sale deed was sold.

6. As regards the first contention, it would suffice to observe that once it is established that there was a mistake as to the description of the property in the sale deed, a third person, who being aware of such mistake and intending to take advantage of it, subsequently purchases that property from the original vendor, cannot plead that he acquired his right in good faith, in answer to a claim made by the first purchaser. Section 31 of the Specific Relief Act is an enabling section and the fact that it was not resorted to cannot deprive a purchaser of the rights conveyed to him by the sale deed in his favour. This was also the view expressed in Sheikh Barsati v. Sarju Prasad, AIR 1939 Oudh 10.

7. In the present case from the evidence on record, it is apparent that there was a mistake in the description of the land sought to be sold. Had it not been intended to sell Khasra Nos. 81 and 82/2, the plaintiff would not have been placed in possession of the same immediately after the purchase. The vendor would not have sat silent for a period of 6 years and allowed the purchaser to remain in occupation of those khasra numbers instead of the khasra number shown in the sale deed. The vendor did not also raise any objection at the time of mutation of those khasra numbers in favour of the plaintiff on the basis of the sale deed. It was admitted that the vendor had notice of the mutation proceedings. It is borne out from the evidence on record that the mutation was done immediately after the purchase in December, 1960. The revenue records disclosed the plaintiff as Bhumiswami of those khasra numbers. The defendant No. 2 himself has stated on oath before the trial Court that before making the purchase, he had made enquiries about the position of the suit lands in revenue records. Under these circumstances, it is apparent that the defendant No. 2 was aware of the mistake in the sale deed and has purchased the same property again with the intention to take advantage of the mistake.

8. The second contention raised on behalf of the appellant is also of no avail. The Proviso 1 to S. 92 of the Evidence Act applies to the circumstances of the present case. Oral evidence was admissible to prove that the expression of the contract was contrary to the concurrent intention of all the parties due to a common mistake. It could be shown by evidence that what was intended to be transferred and was actually sold was different from what the document described due to mistake. When a mistake is established, the deed can always be construed as if the mistake has been rectified in a suit brought for the purpose of S. 31 of the Specific Relief Act. However, this will be subject to the condition that the rights of the third party acquired in good faith should not be prejudiced thereby. As discussed above, the subsequent transaction in favour of the defendant No. 2 was not in good faith. Under these circumstances, the failure of the plaintiff to get the deed rectified will not extinguish his tilte to the property which was actually sold to him but was not properly described in the sale deed due to mistake.

9. No other point was pressed.

10. This appeal, therefore, has no force and is accordingly dismissed with costs. Counsel's fee at Rs. 50/- if certified.

Appeal dismissed.

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(INDORE BENCH)

C. KONDAIAH AND S. R. VYAS, JJ.

Chhotelal Pannalal Nagar, Applicant v. D. M., Indore and others, Opposite Parties.

Misc. Petn. No. 248 of 1976, D/- 7-10-1977.

(A) Constitution of India, Art. 226 — Writ jurisdiction — Scope of — Whether a bank registered under local Co-operative Societies Act is amenable to writ jurisdiction.

A co-operative society would be amenable to a writ jurisdiction in cases relating to performance of legal duties imposed by statute creating a corresponding legal right in favour of some person. It is true that co-operative society registered under the Act is not a public authority for the purposes of Art. 12 of the Constitution and normally will not be amenable to a writ jurisdiction of the High Court except in cases where according to provisions of the statute or Rules or regulations framed under the Act by which the society is governed there is a statutory or public duty imposed upon it and enforcement of which is sought. The conditions precedent for issue of a writ against the society (a bank) would be that there must be a legal right to the performance of a legal duty. It is not necessary that the person or authority on whom the statutory duty is imposed must be a public official or official body. It is only a case where a breach of statutory provisions or existence of a legal right is made out and obligation on the part of the society to do something in accordance with the provisions of a statute requiring the society to act under the declared manner that it would be permissible for the aggrieved person to approach the High Court for seeking writ commanding compliance of the statutory requirements. (Case law discussed). (Para 8)

Article 226 authorises the High Court to issue to any person or authority directions, orders or writs either for the enforcement of any of the rights conferred by the provisions of the Part III of the Constitution, or for the redress of any injury of a substantial nature by reason of the contravention of any other provision of the Constitution or any provision of any enactment or ordinance or any order, rule, regulation, bye-law or other instrument made thereunder, or for the redress of any injury by reason of any illegality in any proceedings by or before any authority under any provision referred to above where such illegality has resulted in substantial failure of justice. (Para 13)

Anno: AIR Comm: Const. of India (2nd Edn) Art. 226, N. 26 (EE).

(B) M. P. Co-operative Societies Act (17 of 1961), Ss. 22 (2) and 2 (d) — M. P. Co-operative Societies Rules, Rr. 15, 39, 43 and 44 — Bye-laws of the Indore Paraspar Co-operative Sahakari Bank Ltd., Bye-law No. 43 (1) — Termination of membership of directorate by bank registered under the Act for absence from meetings during detention under Maintenance of Internal Security Act — Validity.

Where a director of the bank could not attend the meeting of the Board of Directors due to his detention under Maintenance of Internal Security Act, he could not be said to have absented from the meetings without absence of leave contemplated by bye-law No. 43 (1). Consequently, termination of his membership of the directorate on the ground that he remained absent from the meetings during the period of detention without leave of absence was invalid. 1977 MP LJ 299 : AIR 1977 NOC 293, Foll. (Paras 16, 18)

The person, who is said to be absenting himself must be physically and mentally in a position to attend and his absence must be on account of free will negligence, or act of commission or omission and that where a person is prevented either by law or by force and threat from attending the meeting it cannot be said that he absented himself from attending the meeting. (Para 17)

(C) Constitution of India, Art. 226 — Absence of demand on part of petitioner, a member of the directorate of a bank registered under the local Co-operative Societies Act to cancel illegal termination of his membership — Demand not necessary as, besides mandamus, appropriate order or direction can be issued. (Para 21)

Ann: AIR Comm: Const. of India, Art. 226, N. 112.

Cases Referred: Chronological Paras

AIR 1977 SC 112 8, 13
AIR 1977 NOC 293 : 1977 MPLJ 299 17, 18
AIR 1976 SC 425 : 1976 Lab IC 303 13

AIR 1976 SC 888 : 1976 Lab IC 576 8, 13
AIR 1976 SC 1073 : 1976 Lab IC 698 8, 13
AIR 1976 Madh Pra 152 : 1976 MPLJ 376 (FB) 8, 13
AIR 1969 SC 1306 13

P. K. Vijayvargia, for Applicant; G. M. Chaphekar and R. R. Waghmare, for Opposite Parties.

S. R. VYAS, J.:— This is a petition which purports to be under Art. 226/227 of the Constitution of India by the above named petitioner for an appropriate writ or order to be issued against the respondents regarding the termination of his membership from the Board of Directors of the respondent No. 16 the Indore Paraspar Sahakari Bank Ltd., Indore.

2. Briefly stated the facts alleged by the petitioner in the petition are these:

The petitioner is an elected member of the Board of Directors of the respondent-Bank (The Indore Paraspar Sahakari Bank Ltd.), a bank constituted under the M. P. Co-operative Societies Act (hereinafter referred to as the Act). The petitioner was detained under the Maintenance of Internal Security Act by the District Magistrate, Indore, the respondent No. 1. The remaining respondents Nos. 2 to 15 were aware of this detention while under detention, the petitioner could not attend any meeting of the Board of Directors unless permitted by the District Magistrate. In these circumstances, the petitioner while under detention forwarded applications to the Board of Directors for leave of absence. These applications were allowed but subsequently on 5-4-1976 (?) the respondents informed vide Bank Manager's letter that leave of absence from the Board's meeting could not be granted. The respondents, in these circumstances, illegally terminated the membership of the petitioner under the Bank's bye-law No. 43 (1) vide the Manager's letter dated 20-4-1976. The petitioner's membership from the Board of Directors, in these circumstances, was brought to an end illegally. The petitioner, therefore, prays that any appropriate writ or order may be issued against the members of the Board of Directors to the effect that the termination of the membership is illegal and that he may be treated as continuing as Member of the Board.

3. In the return filed by the District Magistrate it is stated that the petitioner's detention under the Maintenance of Internal Security Act was legal and that the District Magistrate has no information regarding the other allegations made in the petition relating to the termination of his membership from the Board of Directors. Respondents Nos. 2 to 7 and 12 to 15 who were then the members of the Board of Directors of the Bank resisted the claim made by the petitioner on the ground that leave of absence from July 8, 1975 to March 12, 1976 was granted to the petitioner, that further leave of absence was not thought proper in the interest of the management of the bank and it was refused, that under the bye-laws of the bank continuous absence for more than five meetings without leave of absence automatically led to the consequence of the termination of membership of the absent member, that considering the interest of the management of the bank leave of absence though applied for by the petitioner was refused, that between March 12, 1976 and April 16, 1976 the petitioner remained absent without leave for five consecutive meetings, hence under bye-law 43 (1) the petitioner's membership from the Board automatically came to an end, that these respondents did not take any undue advantage of the petitioner's detention under the provisions of the Maintenance of Internal Security Act, that these respodents acted in accordance with the bye-laws and in the interest of the better management of the bank, that the office of the Board of Directors is not a statutory office and the Board cannot be said to be performing any statutory function, that no writ of mandamus or any other appropriate writ could be issued against a bank, a private body, that even for the prayer for a writ of mandamus, the petitioner has not, before filing the present petition, made any demand of justice, that the petitioner could not prosecute the present petition without joining the bank as one of the respondents and that the petition filed against the Directors in their individual capacity was not maintainable.

4. During the course of the hearing, it was stated that after the petitioner's membership had automatically come to an end, there was one more vacancy and for both the vacancies, two other Directors were elected. On an application being made by the petitioner, the petition was allowed to be amended and the bank was impleaded as respondent No. 16 and respondent No. 17 N. K. Mahajan who was elected in one of the vacancies, was also impleaded as respondent No. 17.

The other member elected in the other vacancy was already impleaded as respondent No. 5.

5. After service of the amended petition, return was filed by respondent No. 17. In his return he has also raised the same grounds as were raised by the other respondents. It was further stated in his return that this respondent cannot be said to have been elected in the vacancy caused by the termination of the petitioner's membership as there were two vacancies and in the event of the petitioner succeeding in this petition, the continuance of his membership could not be adversely affected.

6. In the light of the contentions raised by the petitioner in the petition, the grounds raised in the return filed by the respondents and the arguments of the learned counsel for both the parties, the following questions arise for consideration in this petition :—

(a) Whether in view of the fact that the bank which is constituted as a Co-operative Society under the provisions of the M. P. Co-operative Societies Act any writ or direction or order can or cannot be issued against it or against the member of the Board in exercise of the powers of this Court under Arts. 226 and 227 of the Constitution of India ?

(b) Whether the Bank and its Board of Directors acted illegally in discharging their duties under the Act in refusing leave of absence to the petitioner and further in treating the petitioner's membership as having come to an end ?

(c) To what relief the petitioner is entitled?

7. Having considered the various allegations raised by both the parties, we have reached the conclusion that the petition of the petitioner should succeed.

8. The first contention raised by the learned counsel for the respondents was that the bank being a private body functioning under the Act, cannot be said to be a statutory body constituted under the provisions of the statute and is therefore not amenable to a writ jurisdiction of this Court under Arts. 226 and 227 of the Constitution. Reliance for this contention was placed on Vaish Degree College v. Lakshmi Narain, (AIR 1976 SC 888); Arya Vidya Sabha, Kashi v. K. K. Shrivastava (AIR 1976 SC 1073); Nayagarh Co-operative Central Bank v. Narayan (AIR 1977 SC 112) & Ramswarup Ramcharan Gupta v. Madh. Prad. Co-operative Marketing Federation Limited, (1976) MPLJ 376 : (AIR 1976 Madh Pra 152) (FB). It is not disputed that bank has not been created by a statute and does not owe its existence to a statute. A co-operative society registered under the Act is also not a public authority for the purposes of the Art. 12 of the Constitution and normally will not be amenable to a writ jurisdiction of the High Court except in cases where according to provisions of the statute or Rules or regulations framed under the Act by which the society is governed there is a statutory or public duty imposed upon it and enforcement of which is sought. It has been held in the cases cited above that the conditions precedent for issue of a writ against the society (the bank in this case) would be that there must be a legal right to the performance of a legal duty. It is not necessary that the person or authority on whom the statutory duty is imposed must be a public official or official body. It is only in a case where a breach of statutory provisions or existence of a legal right is made out and obligation on the part of the society to do something in accordance with the provisions of a statute requiring the society to act under the declared manner that it would be permissible for the aggrieved person to approach the High Court for seeking writ commanding compliance of the statutory requirements. A co-operative Society would, therefore, be amenable to a writ jurisdiction only in cases relating to performance of legal duties imposed by statute creating a corresponding legal right in favour of some person (Vide the Full Bench Decision of this Court in Ramswarup v. M. P. Co-operative Marketing Federation Limited, 1976 MPLJ 376 : (AIR 1976 Madh Pra 152). It would, therefore, be necessary to examine as to whether there was any legal right and a corresponding legal duty on the bank or its Board of Directors with regard to which performance is sought by the petitioner in this case.

9. In order to determine the aforesaid questions, it would be necessary to examine the scheme of the Act which admittedly imposes certain duties and confers corresponding rights on the members of the society viz. the bank in the present case.

10. Section 2 (d) of the Act defines the 'Committee' as the Board of Management by whatever name it may be called and constituted under Section 48 of the Act. There is no dispute that the Board of Directors of the bank is a committee

for the purposes of Section 2 (d) of the Act in this case. Section 6 of the Act prescribes condition for the registration of the society. Section 9 empowers the Registrar of Co-operative Societies to register a society if he feels satisfied that the society has complied with the provisions of the Act and the Rules and that the proposed by-laws are not contrary to the provisions of the Act or the rules made thereunder. Sections 11 and 12 deal with the question of amendment of the bye-laws and empowers the Registrar to direct amendment. Section 19 (a) of the Act specifies the grounds which disqualify a person from being a member of the society.

The aforesaid provisions, therefore, relate to the power of the Registrar to register a society and control the framing of the bye-laws. They also provide that the Registrar may refuse the registration if it is found that the proposed bye-laws are either contrary to the Act or rules made thereunder.

11. The provisions more relevant for the decision of this petition are contained in Sections 22, 23 and 48 of the Act and Rr. 15, 39, 43 and 44 of the Rules made under the Act. Section 22 confers a right of vote on every member of the society and in sub-section (2) of S. 22 of the Act, it is provided as to how this right of vote is to be exercised. Similar are the provisions in Rr. 39, 43 and 44 which relate to the right of a member to exercise his right of vote in the meeting of the society. These provisions, therefore, make it evident that once any person is elected as a member of the society or its committee, he has a legal right to participate in the meetings of the society or its committee and exercise his right of vote in matters within the jurisdiction of either the society or its committee. Conferal of this right creates a corresponding obligation on the bank and its committee to permit a member to exercise his right in accordance with the provisions of this Act. The petitioner, in this case, was admittedly a member of the committee of the bank (the Board of Directors) and was, therefore entitled as of right to continue his membership unless it could be terminated in accordance with either the provisions of the Act or the rules made thereunder. No doubt, the bank is not a body constituted under the provisions of the Act but is only a private body functioning in accordance with the provisions of the Act. There can, therefore, be no dispute with the proposition that not being a statutory body and also not being an authority for the purposes of Art. 12 of the Constitution, it could not be amenable to the writ jurisdiction of this Court under Arts. 226 and 227 of the Constitution but the question is whether the members of the Committee were under legal obligation to permit the petitioner to exercise his legal rights. If that is so, despite the fact that the Bank is a private body, the petitioner can approach this Court for the exercise of the writ jurisdiction under Arts. 226 and 227 of the Constitution of India.

12. Learned counsel for the respondents relied upon the decisions referred to in para 8 of this order and contended that since the Bank was a private body functioning under the Act, it could not be treated as statutory body or an authority. In this connection we may state that in the present case we proceed on the assumption that the Bank is not a statutory body or an authority for the purposes of Art. 12 of the Constitution of India. The question, as already stated above, still is as to whether the members of the Committee of the Bank were under a legal duty with regard to the rights of the petitioner. If they had a legal duty and the petitioner had a right to enforce the performance of their duty, then certainly the petitioner could come to this Court under Art. 226 of the Constitution of India.

13. Article 226 of the Constitution authorises this Court to issue to any person or authority, directions, orders or writs either for the enforcement of any of the rights conferred by the provisions of Part III of the Constitution, or for the redress of any injury of a substantial nature by reason of the contravention of any other provision of this Constitution or any provision of any enactment or Oridnance or any order, rule, regulation, bye-law or other instrument made thereunder, or for the redress of any injury by reason of any illegality in any proceedings by or before any authority under any provision referred to above where such illegality has resulted in substantial failure of justice. In the case of Praga Tools Corporation v. C. V. Imanual (AIR 1969 SC 1306), it was held that "the condition precedent for the issue of mandamus is that there is in one claiming it a legal right to the performance of a legal duty by one against whom it is sought." In the case of Vaish Degree College v. Lakshmi Narain, (AIR 1976 SC 888) the question was as to what

constitutes a statutory body. In Arya Vidya Sabha, Kashi v. K. K. Shrivastaya, (AIR 1976 SC 1073), the question was that an institution affiliated to the Banaras Hindu University is not a creature of statute but an entity like a company or a co-operative society or other body which has been created under the operation of a statute. In that case the question was whether the Court could order reinstatement of a servant, who has been dismissed by the college authorities.

In the case of Nayagarh Co-operative Central Bank v. Narayan (AIR 1977 SC 112), it was held that as the Registrar of the co-operative societies was acting as a statutory authority in the purported exercise of powers conferred on him by the Co-operative Societies Act, the writ petition was maintainable. In the case of Rohtas Industries Ltd. v. Rohtas Industries Staff Union (AIR 1976 SC 425) it was held in Para 9 that extraordinary power of the High Court under Art. 226 of the Constitution is as wide as the amplitude of the language used indicates, and so can affect any person—even a private individual—and be available for any (other) purpose, even one for which another remedy may exist. In none of these cases, it was held that even if there be a legal duty imposed upon any person and if that duty is not performed in accordance with law, then the person seeking the performance of the duty in the exercise of his rights cannot approach this court under Art. 226 of the Constitution of India. We have already referred to above that this question has been dealt with by this Court in the case of Ramswarup v. M. P. Co-operative Marketing Federation Ltd., 1976 MPLJ 376 : (AIR 1976 Madh Pra 152) (FB) where it has been held that a co-operative society would be amenable to a writ jurisdiction only in case relating to performance of legal obligations and duties imposed by statute creating a corresponding legal right in the person seeking the performance of the legal obligation.

14. We have referred above to the scheme of the Act in para. 11 of this order. We have indicated therein that by virtue of the provisions contained in Ss. 22 and 23 and 48 of the Act and Rr. 15, 39, 43 and 44 of the Rules made under the Act, the petitioner had a right to participate in the management of the Bank as a member of the Committee and exercise his right of vote. The committee was thus under a legal obligation to permit the petitioner to exercise this right conferred upon him and if by any decision taken by the committee the exercise of this right is denied to the petitioner, then certainly the petitioner is within his right to come to this Court and enforce his rights by calling upon the respondents for the discharge of their legal obligation.

15. On behalf of the respondents, too much reliance was placed on bye-law No. 43 (1) of the Bank, the original of which is in Marathi language and the same has been reproduced in para 12 of respondent No. 17's return. The other respondents have translated the same in para 4 of the return. In our opinion, the translation of that bye-law would be as under :—

"If any member of the Board of Directors remains absent in five consecutive meetings of the Board without the written permission of the Board, his membership in the Board will stand destroyed."

The contention of the petitioner is that being a detenu detained by the District Magistrate under the provisions of the Maintenance of Internal Security Act (hereinafter referred to as the MISA), he both sought permission to permit him to attend the meeting of the Board and also forwarded applications through the detaining authority for leave of absence from attending the Board's meeting and that though permission for leave of absence for some of the meetings was granted by the Board but it was refused for the meetings held between March 12 to April 16, 1976 and thus treating him as absent without leave of the Board. It was then intimated to him that he no longer continues to be a member of the Board.

16. The question is as to what is the real meaning of the words remaining absent for five consecutive meetings. According to the petitioner, he was not voluntarily absent but was in fact prevented by process of law issued against him from attending the meetings. The respondents also do not contend that the petitioner though otherwise in a position to attend the meetings voluntarily remained absent. Their contention, however, is that since the petitioner's detention was for an indefinite period the Board of Directors in the interest of the Bank management deemed it fit and proper to refuse leave of absence and elect new members so that the Bank's manage-

ment and working was not to suffer. In our opinion the decision taken by the Board of Directors was illegal and not warranted by law.

17. A similar question was considered by this Court in Basantilal v. District Magistrate, Mandsaur, 1977 MPLJ 299 ; (AIR 1977 NOC 293). There also the question under consideration was as to what is the meaning of the expression absents himself in S. 38 (1) of the M. P. Municipalities Act. It was held that the person, who is said to be absenting himself must be physically and mentally in a position to attend and his absence must be on account of free-will, negligence, or act of commission or omission and where a person is prevented either by law or by force and threat from attending the meeting, it cannot be said that he absented himself from attending the meeting.

18. Learned counsel for the respondents tried to distinguish this decision on the ground that the words used in Section 38 (1) of the M. P. Municipalities Act were different from the words used in bye-law No. 43 (1) of the Bank's Bye-laws and the interpretation given to the words 'absents himself' cannot be given to the words used in the aforesaid bye-law. In our opinion, the distinction sought to be made by the learned counsel cannot be accepted. In the bye law referred to above, the words used are, in case the member remains absent for five consecutive meetings. These words, in our opinion, have the same meaning as the words absents himself which were considered in Basantilal's case (supra). The respondents were, when they treated the petitioner's membership as having come to an end, aware of the fact that the petitioner was detained under the MISA and his absence was neither voluntary nor wilful. On the contrary, they entertained the petitioner's application through the detaining authorities for some dates and granted him leave of absence. It is not contended that when they treated his membership as having come to an end, the petitioner had been released from detention and thereafter had voluntarily remained absent. In these circumstances, we cannot agree with the learned counsel for the respondent that under bye-law No. 43 (1), the respondents could treat the petitioner as remaining absent for the purpose of treating his membership as having come to an end or as having been destroyed. The question raised by the respondents is fully covered by the decision of this court in Basantilal's case (supra) and cannot admit of any further argument on this point.

19. Thus by illegally applying the provisions of bye-law No. 43 (1), the respondents deprived the petitioner of the rights conferred on him by the aforesaid provisions of the Act and the Rules made thereunder. These provisions imposed a legal obligation on the respondents to permit the petitioner to exercise his rights conferred thereunder. Thus, the respondents failed to discharge their legal obligation and if they did so the petitioner was within his rights to come to this court and complain of injury suffered by him.

20. It was then contended that the injury complained of by the petitioner and the alleged illegality attributed to the respondents was not of a substantial nature, inasmuch as fresh elections to the Board are scheduled for the next month and in case the petition is allowed the membership of those directors, who were elected in place of the petitioner, would be very much disturbed. We are not at all inclined to accept this argument. If the action taken by the respondents was in contravention of the specific provisions of the Act and further if the membership has been treated as having come to an end not in accordance with the provisions of the Act but in contravention of it then certainly what would be the effect of this petition being allowed on the election of those members who were elected in the petitioner's vacancy, is not a matter to be considered by us. That is a matter with which the Bank or its Committee has to concern itself. The fact that fresh elections are in contemplation in the next month, does not in any way affect the petitioner's rights, inasmuch as he had filed this petition on 26-4-1976 from jail soon after he was intimated by the Bank Manager that this membership has been treated as destroyed by his letter dated 20-4-1976. If for reasons, for which the petitioner is not responsible, the petition could not be decided earlier, he certainly cannot be made to suffer for the delay.

21. It was lastly contended that a writ of mandamus would not lie against the Bank or members of its committee because before filing the present petition the petitioner did not make demand for justice. It is true that no formal demand was made either against the Bank as a whole or against the members of

the Board of Directors but in this case it is not necessary that only a writ of mandamus should be issued against the respondents because Art. 226 of the Constitution permits the issue of directions, orders or writs, including the writs in the nature of habeas corpus, mandamus, etc. It is, therefore, competent for this court to issue an appropriate direction or order calling upon the respondents to treat the petitioner as continuing his membership of the Board of Directors despite the decision taken by them for treating his membership as having come to an end because of his involuntary absence for five consecutive meetings of the Committee.

22. We, accordingly, allow this petition and hold that the decision of the Board treating the petitioner's membership as having come to an end is illegal, that the petitioner continues to be a member of the Board of Directors of the Bank, viz. respondent No. 16, the Indore Parasper Sahakari Bank Ltd. Indore and that he will continue as the member of the Board of Directors for the unexpired period of his term of membership. The petitioner shall have his costs from the contesting respondents Nos. 2 to 17. Counsel's fee Rs. 200/-, if certified.

Petition allowed.

AIR 1978 MADHYA PRADESH 197

M. L. MALIK, J.

Madhya Pradesh Housing Board, Bhopal and others, Appellants v. Karodi Shah Kohli, Respondent.

Misc. (First) Appeal No. 199 of 1976, D/- 1-2-1977.*

Arbitration Act (1940), S. 34 — Refusal to stay suit — Agreements with Government or corporations containing arbitration by engineer or architect — Contract with Housing Board containing arbitration clause by its engineer — Fact that arbitrator is employee of a party to arbitration and will not give honest and fair decision is no ground for refusal of stay of suit in case of dispute.

It is usual to see that in agreements with the Government or corporations, there is often an arbitration clause providing for arbitration, not by a stranger as a wholly disinterested person, but by an engineer or an architect in their employment. Employers find it in their interest to impose such terms and the Contractors accept these terms so that their tenders may be accepted, and it has been held that it is no part of the duty of Judges to approach such curiously coloured contracts with a desire to upset them or to emancipate the contractor from the burden of such a stipulation. In all such cases, the arbitrator would be, if not directly, indirectly, interested in the sense that it might affect other similar transactions, but it cannot be helped. The parties agree that they might have to go to such an arbitral tribunal and they must stick to it. It cannot even be said in such a case that the arbitrator has a secret interest in the subject-matter, which may vitiate the award. There could be no objection to an employee-engineer being nominated as an arbitrator. What is to be seen is whether the arbitrator was directly or indirectly prejudiced against the Contractor or had exhibited conduct which indicated bias. In the instant case it was held that prejudice or bias could not be inferred in the arbitrator, Secretary of the Board, who, as a high ranking engineer, would judge the quality of the work by himself irrespective of what the Administrator of the Board said. AIR 1958 Punj 19, Rel. on. (Paras 5, 6, 9)

Anno: AIR Manual (3rd Edn.), Arbitration Act, S. 34, N. 16.

Cases Referred:	Chronological	Paras
1976 MPLJ 513		4
1976 MPLJ Notes 62		4
AIR 1958 Punj 19		5

V. S. Pandit, for Appellants; Y. S. Dharmadhikari, for Respondent.

JUDGMENT:— This Miscellaneous Appeal is directed against the order of the District Judge, Jabalpur, dated the 19th July, 1976, refusing to stay the legal proceedings under S. 34 of the Arbitration Act, 1940.

2. The plaintiff, a building contractor, sued the defendants for price of the work done. He complained that the authorities had wrongfully withheld his security deposit and had wrongfully imposed penalty for the delay in execution of the work, for which, in fact, the Housing Board was responsible, and for the below-standard quality work. The plaintiff also said that the imposition of penalty was unauthorized because it was imposed by persons who were incompetent to impose it.

*(From order of K. K. Verma Dist., J., Jabalpur, D/- 19-7-1976).

3. The defendants referred to Cl. 29 of the contract and prayed that the legal proceedings be stayed and the dispute be referred to arbitration. The learned District Judge has rejected the application on two counts: (i) That Cl. 29 of the Contract was not an arbitration agreement and (ii) The Housing Commissioner and Secretary of the Board who is nominated as an arbitrator, it is apprehended, will not give a fair and honest decision.

4. As regards the first point, whether or not Cl. 29 of the Contract was an arbitration agreement, the point is concluded by a Division Bench decision of this Court reported in Gaurishankar v. M. P. Housing Board, Bhopal, 1976 MP LJ 513. Clause 29 has been held to be an arbitration agreement within the meaning of S. 2 (a) of the Arbitration Act. It is conceded that in view of this decision, it would be futile to canvass that this Court sitting singly should take a different view. Another Division Bench authority taking similar view while interpreting a like clause, is reported in Vishni Bai v. Executive Engineer, Raipur Division, 1976 MPLJ Notes 62.

5. The attack, therefore, must be confined to the second ground, whether or not the Housing Commissioner-cum-Secretary was a proper person to arbitrate dispute, he being an employee of the Board or whether for reasons of bias, reference to him should not be made. It is usual to see that in agreements with the Government or Corporations, there is often an arbitration clause providing for arbitration, not by a stranger as a wholly disinterested person, but by an engineer or an architect in their employment. Employers find it in their interest to impose such terms and the contractors accept these terms so that their tenders may be accepted, and it has been held that it is no part of the duty of Judges to approach such curiously coloured contracts with a desire to upset them or to emancipate the contractor from the burden of such a stipulation. In all such cases, the arbitrator would be, if not directly, indirectly, interested in the same that it might affect other similar transactions, but it cannot be helped. The parties agree that they might have to go to such an arbitral tribunal and they must stick to it. It cannot even be said in such a case that the arbitrator has a secret interest in the subject-matter, which may vitiate the award.

In Daulat Ram v. State of Punjab, AIR 1958 Punj 19 their Lordships made the following observations in para 20:

"Normally, the parties to an arbitration are entitled to have their disputes settled by an unbiased arbitrator with no interest in the result of the proceedings. The fact that the Superintending Engineer is interested to the extent that he is employed and paid by the Government would, by itself, be not sufficient to disqualify him from acting as arbitrator in a contract relating to Government work. Where it has not been shown that the Superintending Engineer is biased or that there is a probability that he would be biased the presumption is that the gentleman holding such a high office, would keep in mind the duties and responsibilities of an arbitrator and would act as an honest, disinterested and impartial tribunal, absolutely un-influenced by the fact that he is the head of the department to which the dispute relates."

6. There could be no objection to an employee-engineer being nominated as an arbitrator. What is to be seen is whether the arbitrator was directly or indirectly prejudiced against the contractor or had exhibited conduct which indicated bias.

7. I have perused the plaint allegations carefully. Nothing has been said against the Housing Commissioner-cum-Secretary. The allegations are against the Deputy Housing Commissioner, the Assistant Engineer and the arbitrary way in which the Administrator-Chairman of the Housing Board behaved in imposing 10 per cent. penalty. The argument is that the Administrator being an officer of a superior rank, the Housing Commissioner, judged by the common course of human conduct, would be slow to discredit his assessment of the quality of the work and would support the imposition of penalty however unwarranted and unauthorized it was. It could be reasonably suspected, the counsel said, that the arbitrator would not act fairly.

8. The learned counsel for the appellants submitted that this apprehension was most ill-founded. Firstly, the Administrator at whose instance the amount of 10 per cent. had been withheld was not an engineer and his assessment of the quality of work ought, in the ordinary course, be ignored by the Housing Commissioner who is a highly qualified engineer. Secondly, it should be expected that the Housing Commissioner possessing technical qualifications and hold-

ing a high office should keep in mind that he has to act as an impartial and disinterested tribunal, absolutely uninfluenced by the fact that the Administrator had poor opinion about the quality of work, which he had no technical knowledge to judge.

9. I agree with the contentions of the learned counsel for the appellants. Prejudice or bias cannot be inferred in the Housing Commissioner simply because the Aministrator happened to be the principal officer of the Board and had imposed a penalty of 10% when he had no jurisdiction to evaluate the quality. The Arbitrator who is a high ranking engineer, is expected to judge the quality of the work by himself irrespective of what the Administrator said.

10. The learned counsel for the respondent further argued that the imposition of peanlty was outside the terms of the contract and, therefore, not covered by the arbitration clause. The Court's jurisdiction could, therefore, be invoked.

11. The suit is for price of the work done. If payment is withheld for any reason, the arbitrator has jurisdcition to say whether withholding of payment was justified. The arbitration clause is all comprehensive.

12. In the result, therefore, the legal proceedings must stay under S. 34 of the Arbitration Act and the dispute be referred to the named arbitrator. I accept the appeal and order accordingly.

13. Costs on respondent. Counsel's fee as per schedule or certificate, whichever is less.

Appeal allowed.

AIR 1978 MADHYA PRADESH 199

(GWALIOR BENCH)

H. G. MISHRA, J.

Firm Gwalior Distributing Co., Lashkar and another, Petitioners v. Mrs. Kanta Gupta, Opposite Party.

Civil Revn. No. 191 of 1978, D/- 8-3-1978.*

(A) Civil P. C. (5 of 1908), O. 37, R. 1 (2) (a) (as amended by Act 104 of 1976) and O. 6 R. 17 — Suit not falling within the classes of suits triable in summary manner — Averment in the plaint to try it in summary manner — Does not give jurisdiction to court to try it summarily — Subsequent application for amendment of plaint seeking deletion of averment should be allowed. (Para 8)

Anno: AIR Comm: C. P. C. (9th Edn.), O. 6, R. 17, N. 16-B.

(B) Civil P. C. (5 of 1908), O. 37, R. 1 (2) and O. 6, R. 17 — Suit once filed with prayer to try summarily — Amendment in plaint for trial of suit in ordinary manner — Not prohibited — Defendant cannot be aggrieved by the amendment. (Paras 9, 10, 11)

Ann: AIR Comm: C. P. C. (9th Edn.), O. 6, R. 17, N. 1.

J. R. Sharma, for Petitioners; M. L. Gupta, for Opposite Party.

ORDER:— This is a revision petition filed by the defendant against order dated 27-1-1978 passed by the Fourth A. D. J. Gwalior in Civil Suit No. 26-B of 1977 whereby amendment of the plaint, by deleting reference to O. 37, C. P. C. and addition of words in cause of action clause to the effect that the suit is also based on original transaction of loan, has been permitted.

2. The facts as alleged are as follows: The plaintiff-non-applicant has instituted a suit on 18-11-1977 for recovery of loan of Rs. 10,000/- and Rs. 1,000/- by way of interest. The suit is based on original transaction of giving and taking of the loan of 28th June, 1976. It is also alleged in the plaint that the Hundi was executed by the defendant in favour of the plaintiff in order to supply evidence of the aforesaid transaction of loan on 28th June, 1976. There is also an averment in the plaint that the suit is brought under O. 37 in summary procedure. On 12-1-1978 an amendment application was submitted by the plaintiff-non-applicant seeking leave to amend the plaint by deletion of reference to O. 37 and addition in cause of action clause of the words that the suit is also based on original transaction of loan.

3. This application was opposed by the defendant-applicant but has been allowed by the impugned order. Hence this revision.

4. The contention of the learned counsel for the defendant-applicant in this revision is that by the impugned amendment summary suit is converted into an ordinary suit and that the amendment in cause of action clause was not necessary.

5. The learned counsel for the plaintiff-non-applicant supported the impugn-

*(Against Order of B. L. Singhal, 4th Addl. Dist. J. Gwalior, D/- 27-1-78).

ed order and argued that the court had power to allow the amendment in question.

6. After having heard the learned counsel for both the parties. I am of the opinion, that the revision deserves to be dismissed.

7. A plaintiff may institute suit specified in sub-rule (2) of R. 1 of O. 37 at his option either as a summary suit or as a suit in the ordinary manner. Sub-rule (2) of the R. 1 of O. 37 specifies the following classes of suits which can be filed as summary suits :—

"(a) suits upon bills of exchange, hundies and promissory notes;

(b) suits in which the plaintiff seeks only to recover a debt, or liquidated demand in money payable by the defendant, with or without interest, arising.

(i) on a written contract; or

(ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or

(iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only."

8. A suit not falling within the aforesaid classes of suits cannot be instituted as a summary suit and tried in summary procedure. As stated earlier, the present suit is based initially on the original cause of action i. e. the transaction of giving and taking of the loan on 28-6-1976. It is also stated in the plaint that by way of evidence of the transaction of loan, Hundi was executed by the defendant in favour of the plaintiff. The plaintiff appears to have so framed the suit apprehending that his claim may not fall on account of the Hundi in question being on insufficient stamp. A suit like the present one cannot be regarded to fall within the classes of suits triable in summary procedure. The applicability of procedure for trial of the suit depends upon class of suit and not on option of the party. The plaintiff cannot ask a suit not falling under O. 37, R. 2 (1) to be tried as a summary suit. This is exactly the position in the present case. Therefore, even if the plaintiff would not have applied for deletion of reference to O. 37 from the plaint, the trial court had no jurisdiction to try it as a summary suit i. e. in summary procedure prescribed by O. 37. In this view of the matter, deletion of reference to O. 37 is perfectly justified.

9. A suit falling in classes of suits specified by O. 37, R. 2 (1), Civil P. C. can be filed at the option of the plaintiff either as a summary suit or as a suit in the ordinary manner. Having filed the suit once as a summary suit, there is no prohibition in the Civil P. C. to the effect that the plaintiff will not be allowed to give up the benefit of the procedure under O. 37 and request for trial of the suit in the ordinary manner. The option which the plaintiff has in the matter does not get exhausted by its initial exercise. The plaintiff can later on request for the suit being tried in ordinary manner. At the best, on such a change of option, the plaintiff may be saddled with costs if any, occasioned upto that point of time; but the defendant cannot compel the plaintiff to get the suit tried as a summary suit only.

10. The trial Court had power to grant leave to amend and has exercised that power. Order 6, Rule 17 applied to the case and its extension to O. 37 has nowhere been prohibited. If the plaintiff has choice of taking advantage of summary procedure under O. 37, he has also the liberty of not claiming the benefit of that procedure.

11. An analysis of O. 37 reveals that in Rr. 2 to 6 certain restrictions are imposed on right of the defendant to defend. R. 7 of O. 37 provides that save as provided by this Order (O. 37) the procedure in suits hereunder shall be the same as procedure in suits instituted in the ordinary manner. Therefore, what happens by deletion of reference to O. 37 from the plaint is that the right of the defendant to defend the suit becomes unfettered. The restrictions on his right to defend imposed by the various rules of O. 37 also disappear. Therefore, the defendant cannot have any grievance if the plaintiff seeks deletion of the reference of O. 37 from the plaint.

12. There is no question of taking away of any right vested, in the defendant by lapse of time. The amendment sought is within three years of the institution of the suit. Formerly, under Art. 5 of Sch. I of the Indian Limitation Act of 1908, a summary suit had to be brought within one year from the date on which the debt becomes due but now there is no such period of limitation for such suits under the Indian Limitation Act, 1963. A suit falling in classes of suits under O. 37, R. 2 (1) may be instituted either as a summary suit or a suit in the ordinary manner within the same period of limitation i. e. three years.

Thus there can be no prejudice to a defendant if a plaintiff is granted leave to make the amendment in question.

13. As to the other portion of the amendment viz., adding words in the cause of action clause to show that the suit is also an original transaction of loan, such an amendment is only by way of abundant caution and with an objective to clarify the fact that the suit is based on original cause of action. No valid objection can be sustained to such an amendment being permitted.

14. In this view of the matter, the revision is dismissed without order as to costs.

Revision dismissed.

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N. C. DWIVEDI AND
M. L. MALIK, JJ.

Smt. Yuvrani Tank Rajeshwari Devi, Appellant v. Harilal and others, Respondents.

Misc. (First) Appeal No. 79 of 1972, D/- 15-11-1977.*

(A) Succession Act (39 of 1925), Ss. 263 and 283 — Revocation of probate — Absence or non-service of citation, when a just cause.

Absence or non-service of citation is not defect of substance so as to constitute just cause under S. 263 where non-cited party has knowledge of probate proceedings and contested them or where he is not prejudicially affected thereby. AIR 1940 Cal 296 Relied on. (Paras 25, 29)

Anno: AIR Man. (3rd Edn.) Suc. Act S. 263 N. 10, S. 283 N. 11.

(B) Succession Act (39 of 1925), Ss. 263 and 283 — Revocation of probate — Absence of citations — Burden of proof — (Evidence Act (1 of 1872), Ss. 101-104).

Person claiming issue of citation and its service must show prima facie case for revocation. The absence of citations in a case in which they are ordered but did not issue does not by itself constitute just cause for revocation of probate. In cases where citation had not been ordered, the party impugning the will on the ground of his non-citation must first show that he ought to have been cited, before the burden of proof is shifted to the executor to show that the defect in the proceedings was not one of substance and that no just cause for revocation exists. AIR 1938 Rang 261 (FB), Relied on. (Paras 27, 28)

Anno: AIR Man. (3rd Edn.) Suc. Act, S. 263 N. 10, S. 283 N. 8; AIR Man. (3rd Edn.) Evidence Act, Ss. 101-104, N. 108.

(C) Succession Act (39 of 1925), S. 263 — Scope and ambit of — Whether or not will was a forged one, is the only question to be canvassed before order for revocation can be made.

S. 263 contemplates a case for revocation based on the single ground that the will in respect of which the grant in question was obtained was a forged one. In such a case, whether or not the will was a forged one would be the only question to be canvassed before the Court before the order of revocation could be made out. AIR 1955 SC 566, Relied on. (Para 30)

Where there is no proof that the will was a forged one, there will be no question of revocation of the probate unless there is defect of substance in the petition. (Paras 30, 36)

Anno: AIR Man. (3rd Edn.) Succession Act, S. 263 Notes 1, 9.

(D) Succession Act (39 of 1925), S. 263 — Revocation of probate — Matters to be established — Even if just cause is established, Court can in exercise of its discretion refuse revocation.

An applicant for revocation must, in order to succeed, establish just cause within the meaning of S. 263, that is, as laid down in cls. (a) to (e) thereof, but, even if just cause be established, revocation may still be refused by the Court in the exercise of its discretion under that section if the facts and circumstances of the particular case would warrant such refusal. AIR 1957 Cal 631, Followed. (Para 31)

Held: the petitioner has failed to establish any just cause and the special circumstances of this case are such which will make the Court to refuse to exercise its discretion in favour of the petitioner. (Para 31)

Held further that no case was made out for revocation of probate. (Para 36)

Anno: AIR Man. (3rd Edn.) Succession Act, S. 263 N. 16.

(E) Succession Act (39 of 1925), S. 263 — Revocation of probate — Non-compliance with mandatory provisions of Ss. 19-H and 19-I of Court-fees Act — No objection raised in proceedings for grant of probate — No explanation offered for omission — Such plea cannot be

*(Against order of Shiv Parvati Prasad Srivastava Dist. J. Bilaspur, D/- 24-12-1971).

raised in revocation proceedings. 1973 M. P. L. J. (S. N.) 71 Relied on. (Paras 32, 36)

Anno: AIR Man. (3rd Edn.) Succession Act, S. 263 N. 1.

(F) Succession Act (39 of 1925), S. 273, Proviso — Scope — Value of property affected beyond limits of State exceeding Rs. 10,000/- — Application for probate — District Court does not lose its jurisdiction to entertain it. AIR 1963 Ker 188, Followed. (Para 33)

Anno: AIR Man. (3rd Edn.) Succession Act, S. 273 N. 6.

Cases Referred: Chronological	Paras
AIR 1973 Madh Pra 69	25
1973 MP LJ (SN) 71	32
AIR 1972 SC 1471	25
AIR 1963 Ker 188	32
AIR 1962 Punj 196	25
1962 Jab LJ (SN) 125	25
AIR 1957 Cal 631	31
AIR 1955 SC 566	30
AIR 1955 Mad 576	25
AIR 1955 Pat 362	25
AIR 1942 Cal 283	25
AIR 1940 Cal 296	29
AIR 1938 Rang 261 (FB)	28
AIR 1937 Bom 397	25

Ravindra Kumar Verma with S. K. Mukerjee and O. P. Namdeo, for Appellant; T. C. Naik with Ku. Jaya Choudhary, for Respondents Nos. 1, 2 and 5.

N. C. DWIVEDI J.:— This is an appeal by Smt. Yuvrani Tank Rajeshwari Devi, the petitioner against the decision of the District Judge, Bilaspur, in Misc. Judicial Case No. 2 of 1970 decided on 24th Dec. 1971 whereby her petition under S. 263 of the Indian Succession Act was dismissed.

2. Late Raja Bahadur Leeladhar Singh was the ex-ruler of Sakti and left behind him his widow Smt. Indumati Devi respondent No. 2. Smt. Rajkumari Gyanda Devi respondent No. 5 is the daughter of late Raja Bahadur Leeladhar Singh. Yuraj Jivendranath Bahadur Singh was the pre-deceased son of late Raja Bahadur Leeladhar Singh. He left behind him his two sons. Surendra Nath Bahadur Singh and Pushpendra Nath Bahadur Singh, respondents 3 and 4 respectively and the petitioner his widow.

3. Respondent No. 1 had filed a petition in the Court of District Judge, Bilaspur for obtaining a probate in respect of a will executed by late Raja Bahadur Leeladhar Singh. This was registered as Civil Suit No. 3-A of 1965. The grant of probate of the will was opposed by the petitioner and respondents 3 and 4. Respondent No. 3 Surendra Nath Bahadur Singh put in appearance through Shri Godbole, Advocate of Bilaspur and withdrew from the contest. On this, the probate of the will of late Raja Bahadur Leeladhar Singh was granted in favour of respondent No. 1 Harilal.

4. The petitioner's case is this: The petitioner and respondent No. 4 had put respondent No. 3 in-charge of the proceedings in Civil Suit No. 3-A of 1965. In Sept. 1966, respondent No. 3 informed the petitioner that respondent No. 1 with the consent of respondent No. 2 Rani Indumati Devi had dropped the probate proceedings and, therefore, there was no necessity for summoning the witnesses for examination. Respondents 2 and 3 looked after the election work for Legislative Assembly in which respondent No. 2 Rani Indumati Devi was a candidate. In the month of Dec. 1969, the petitioner learnt that the name of respondent No. 2 was mutated over the plot numbers given in Schedules A-1, A-2 and A-3 of the petition. She learnt that this was done in pursuance of the probate granted by the District Judge, Bilaspur in Civil Suit No. 3-A of 1965.

5. On an enquiry from respondent No. 3, the petitioner learnt that respondent No. 1 Harilal and respondent No. 2 Rani Indumati Devi practised fraud upon him by stating that in the ensuing Assembly election, respondents 1 and 2 have decided to set him up as a Congress candidate in the Sakti Constitutency and that they would give him full support provided he does not contest the probate proceedings. Respondents 1 and 2 further took a word from respondent No. 3 that he would keep the pact concealed from his mother, the petitioner and his brother, respondent No. 4. It was then that the fraud committed by respondents 1 and 2 and respondent No. 3 came to the notice of the petitioner. Thus, there was a conspiracy between respondents 1 and 2 to get the case proceeded ex parte against the petitioner and respondent No. 4. The petitioner thus alleged that respondent No. 1 practised the heinous type of fraud on respondent No. 3 by giving out false hopes that he will be set up as a candidate in the election to the Legislative Assembly. This assurance was made in spite of knowledge that respondent No. 3 was under-age for such candidature. In pursuance of the conspiracy and the fraud behind the back of the petitioner, respondent No. 3, through Advocate

Shri Godbole made an application to the Court on 6th October 1966 that he does not wish to oppose the petition and the Court passed an order on the same day.

6. The petitioner alleged that because of this fraud and undue influence, the probate granted was liable to be revoked. She further alleged that late Raja Bahadur Leeladhar Singh, who was holding lands in Bhumiswami rights could not have bequeathed them before 20th October 1961 under the unamended S. 165 of the Madhya Pradesh Land Revenue Code 1959. Late Raja Bahadur Leeladhar Singh was a joint member of the Hindu family and he could not bequeath these properties. Further, respondent No. 3 was recognised as Ruler of Sakti and, therefore, no case could be instituted against him without previous permission of the Central Government. It was further alleged that the citations were not duly published under Section 283 of the Indian Succession Act and the provisions of Ss. 19-H and 19-I of the Court-fees Act have been violated. On account of these defects, the proceedings in civil suit No. 3-A of 1965 were nullity and the probate granted was liable to be revoked.

7. Respondents 1, 2 and 5 in their separate written statements opposed the petitioner's claim. They denied that respondent No. 3 was put in charge of the case. They further denied that respondents 1 and 2 practised fraud or undue influence on respondent No. 3 or these three respondents i. e., respondents 1 to 3 have practised any fraud on the petitioner. They also denied that respondents 1 and 2 gave assurance to respondent 3 or took a word from him that he would conceal the matter from his mother, the petitioner. It is denied that petitioner came to know of the probate in the year 1969. They contended that the property was not joint Hindu family porperty because Raja Bahadur Leeladhar Singh was a Gond and had not adopted Hindu law. Bhumiswami lands are not exempted from the operation of the will. Guest and out-houses stand on the Nazul land. No permission of the Central Government was necessary for initiating the probate proceedings against respondent No. 3. Respondent No. 3 raised no objection regarding the jurisdiction of the Court or validity of the proceedings. They contended that there was no irregularity in compliance of the provisions of S. 283 of the Indian Succession Act and the provisions of Ss. 19-H and 19-I of the Court-fees Act have no bearing on the validity of the probate proceedings. The respondents are estopped from raising the pleas which they could have taken in the earlier suit. There is thus no valid ground for revocation of the probate granted to respondent No. 1.

8. The other respondents were ex parte.

9. After the scrutiny of evidence, the District Judge, Bilaspur recorded the following findings:—

(i) It is not proved that the petitioner and respondent No. 4 had put respondent No. 3 in-charge of the case on their behalf.

(ii) It is not proved that respondent No. 3 informed the petitioner in Sept. 1966 that respondent No. 1 had dropped the probate proceedings.

(iii) It is not proved that respondents 1 and 2 practised fraud on respondent No. 3 and that there was no assurance given to respondent No. 3 for setting him up as a congress candidate.

(iv) It is not proved that respondent No. 3 withdrew from the contest because of the fraud practised on him by respondents 1 and 2.

(v) The probate proceedings were not defective because respondent No. 1 did not obtain permission from the Central Government.

(vi) The petition was not barred by time.

(vii) The citations were not sent to the District Judge, Bombay in the previous proceedings and were not affixed in the court houses of Collectors Bilaspur, Nagpur and Bombay.

(viii) The notices under S. 19-H of the Court-fees Act were not sent to the Collectors of the districts where the properties were situated.

(ix) The petitioner is estopped from raising grounds under issues 11 (a) to 11 (d) as they were not raised in the previous proceedings.

(x) The valuation of the property in the set form was not filed in the previous proceedings.

On the aforesaid findings, the District Judge held against the petitioner that the proceedings were neither invalid nor illegal and that no case was made out for revocation of the probate of the will granted in Civil Suit No. 3-A of 1965.

10. The petitioner feeling aggrieved by the aforesaid findings filed this appeal.

11. The questions for decision in this appeal are:

(i) Whether in Civil Suit No. 3-A of 1965 respondents 1 and 2 practised fraud

or undue influence on respondent No. 3 and they arrived at a secret pact that respondent No. 3 will not participate in the probate proceedings provided he was set up as a Congress candidate?

(ii) Whether the petitioner learnt of the probate of the will in Dec. 1969?

(iii) Whether respondent No. 3 withdrew from the contest on behalf of him and the petitioner and respondent No. 4 because of the secret pact and the assurance of respondents 1 and 2?

(iv) Whether the petitioner has paid the requisite court-fees?

(v) Whether the citation was sent to the District Judge, Bombay and whether the citations were affixed in the court houses of Collectors, Bilaspur, Nagpur and Bombay?

(vi) Whether under S. 19-H of the Court-fees Act notices were sent to the Collectors of the Districts where the properties were situated?

(vii) Whether as required by S. 19-I of the Court-fees Act the valuation of the property in the set form was filed or not?

(viii) Whether the petitioner is estopped from raising grounds in issues 11 (a) to 11 (d) as they were previously not raised?

12. We have heard Shri Ravindra Kumar Verma for the petitioner and Shri T. C. Naik for respondents 1, 2 and 5. We are of the view, for the reasons stated hereinafter that the appeal deserves to be dismissed.

13. We will first discuss the question of facts before discussing the questions of law involved in the case. According to the petitioner, respondents 1 and 2 practised fraud on respondent 3 by assuring him the support for his candidature in the election of the Legislative Assembly in case he withdrew from contesting the probate proceedings. According to the petitioner, respondent No. 3 fell an easy prey to the persuation of respondents 1 and 2 and after changing the usual advocate; he engaged Shri Godbole and filed an application before the Probate Court that he did not wish to contest the proceedings. The petitioner further stated that respondent No. 3 kept this pact secret from her and that she knew of this in Dec. 1969 when the proceedings for mutation were started. We will, therefore, scrutinize the evidence led in this case to find out whether the petitioner's case on this point is substantiated or not.

14. The petitioner as A. W. 1 stated that she and her two sons were opposing the probate proceedings and had engaged two advocates including Shri Mendhekar. In September 1966, her elder son told her that respondent No. 2 had conveyed to him that they did not want to fight amongst themselves and, therefore, she was withdrawing the probate case. Respondent No. 2 represented to him that after her death respondents 3 and 4 were to get the property and further informed him that they had withdrawn the probate proceedings. Thus, according to para 2 of the petitioner's evidence, the fraud consisted of the representation of respondent No. 2 that she did not want to fight and she was withdrawing from the probate proceedings.

15. The petitioner then stated in para 6 of her deposition that in Dec. 1969 through her advocate Shri Shrivastava, she learnt that the name of respondent No. 2 was being mutated over certain lands. Then she called her elder son, respondent No. 3 and questioned him that he had wrongly informed her about the rejection of the probate proceedings though she was now informed that probate was granted. On this, respondent No. 3 told her that respondents 1 and 2 had practised fraud on him by saying that they will make him a M.L.A. and will spend to the tune of Rs. 40,000 to 50,000 in case he did not contest the proceedings. The petitioner added that respondent No. 3 told her that he had hidden this matter because of shame. This necessitated the filing of the present petition. In para 7 (cross-examination), she stated that she entrusted the task of contesting the probate procoeedings to her elder son. There is no proof that the petitioner has entrusted the task of contesting the proceedings to her elder son because in the probate proceedings, there is an affidavit of the petitioner herself. She was the sitting member of the Legislative Assembly and it is improbable that she will entrust the task of costesting the probate proceedings, which was definitely important proceedings to her son who was hardly aged 20 to 22 years. It is equally surprising that after the proceedings ended, she will not enquire about the progress of the proceedings. All these facts, negative the petitioner's contention that she had entrusted the task of contesting probate proceedings to respondent No. 3.

16. In para 10, the petitioner stated that she did not know that the witnesses were examined on commission at Chhind-

wara. Though the petitioner alleged that the deceased Raja Bahadur Leeladhar Singh was taken to Chhindwara where the will was executed and that he was not in a fit mental condition to execute the will, the petitioner herself has led no evidence to establish that Raja Bahadur Leeladhar Singh was not mentally fit to execute the will or that any kind of pressure or undue influence was exercised on him. Then in para 11, she stated that none was present when her son told her that respondent No. 2 had withdrawn the probate proceedings. She did not contact respondent No. 2 to ascertain this fact. She did not even contact her advocates to know the real position. She even denied that she learnt of the mutation proceedings in the year 1967. In para 12, she admitted that her elder son did not tell her that in the Nai Duniya of 26th April, 1968, respondent No. 2 had published a notice in respect of probate proceedings. She even disowned that Shri Mendhekar advocate had appeared for her in the mutation proceedings or that the proceedings had reached the Court of Commissioner or the Board of Revenue. It is apparent that after the probate was granted, steps were taken by respondents 1 and 2 for mutation of their names and the petitioner must have knowledge about the same which she now suppresses. She admitted that respondent No. 3 could not have contested the Assembly election because he was not of required age. Therefore, there was no question of any assurance to respondent No. 3 that respondents 1 and 2 would support him if he contested the Assembly election and on that ground to secure his withdrawal from contesting the probate proceedings.

17. The petitioner in para 17 stated that from 1966 to 1969, she had no talks with her son in respect of the probate proceedings or other Court proceedings. She even stated that respondent No. 3 did not talk about the probate proceedings at the time of election. It is, therefore, highly improbable that the petitioner who had instructed her son to contest the probate proceedings would not have enquired about the progress of the probate proceedings or about other Court proceedings. The petitioner's evidence, therefore, does not establish that any fraud or undue influence was practised on late Raja Bahadure Leeladhar Singh to execute the will or that respondents 1 and 2 practised any fraud or undue influence or gave any assurance to respondent No. 3 for inducing him to withdraw from the contest of probate proceedings. The petitioner's evidence also falls short of proof that she had placed respondent No. 3 in charge of the probate proceedings. A reading of her deposition shows that respondent No. 3 being her eldest son could not have done anything behind her back and would not have kept her in dark about his move of engaging Shri Godbole advocate and through him withdrawing from the contest to the probate proceedings.

18. Surendra Nath Bahadursingh, son of the petitioner as A. W. 2 stated that he was contesting the probate proceedings. Then he stated that respondent No. 1 had taken him to Bilaspur and some talk took place at the house of Ramgopal Tiwari who has not been examined. Respondent No. 2 told him to withdraw from the contest of probate proceedings. Then he stated that he insisted that she as well as he should withdraw from the probate proceedings. On this point, there was an agreement that both respondents 2 and 3 will withdraw from the probate proceedings. Surendra Nath Bahadursingh further stated that two or four days after this talk, respondent No. 1 met him in the Pila Mahal and asked him to sign two or three blank papers and blank Vakalatnamas. He admitted his signature on the Vakalatnama (Ex. N. A. 3-1). Then he stated that he does not know what respondent No. 1 did with these papers because he did not go to the Court. He further admitted that he had withdrawn the case from Shri Mendhekar. It is surprising that he will not apprise his advocate about the settlement with respondents 1 and 2. It would have been his natural conduct to inform his advocate that he was withdrawing from the contest of probate proceedings.

19. In paragraph 4, Shri Surendra Nath Bahadursingh (A. W. 2) stated that he had not informed his mother because respondent No. 2 had forbidden him to do so. Then he stated that after the elections were over, in Jan. 1970 when the name of respondent No 2. was mutated over the property at Sakti, he told his mother that he was defrauded and that he had kept quiet because of shame. In para 7, he admitted that he had informed his advocates M/s. Kuldeep Sahai and Mendhekar that he had withdrawn from the contest and there was no need to examine wtinesses and to contest the proceedings. As stated above, it would have been natural for him to inform the two advo-

cates the circumstances why he was withdrawing from the contest. In para 8, he stated that he had not told to his mother about the withdrawal of the probate proceedings. This contradicted his mother's statement that in Sept. 1966, her son had told that both he and respondent 2 had withdrawn from the probate proceedings. Then he stated that respondent No. 1 committed fraud on him by assuring him that both of them will withdraw from the probate proceedings but he did not withdraw. If there was an agreement that both will withdraw simultaneously, there is no explanation as to why respondent No. 3 alone made an application to withdraw from the proceedings and did not insist on respondent No. 1 to make an application simultaneously for withdrawal from the proceedings. Surendranath Bahadursingh admitted that the assurance was based on respondents 1 and 2's assisting him in the election. In para 11, he admitted that though in 1967 he was to contest the election, he did not desire a Congress ticket. His own mother was M. L. A. on the Congress ticket. He admitted that he was not of required age to contest the election and even he admitted that he had filed a dummy nomination paper. The moment it is established that respondent No. 3 could not have contested the Assembly election, there could be no basis for his accepting any kind of assurance of help from respondents 1 and 2 in the election.

20. In para 13, Surendra Nath Bahadursingh stated that he had not contested the revocation proceedings. In para 14, he stated that on 3-11-1967 he knew about the probate and the fraud practised on him from the notice of Rani Indumati Devi and Harilal, but it is surprising that he did not bring this fact to the notice of the petitioner. He admitted of the revenue procedings and the orders of the Revenue Court. He could not assign any reason as to why he took no steps when he learnt that the fraud was practised on him. In para 23, he stated that Harilal had met him in the year 1967 in presence of B. P. Sharma who was not examined.

21. The above evidence conclusively established that respondent No. 3 had received no assurance from respondent No. 1 and had withdrawn from the contest of the probate proceedings out of his free will. His evidence also established that the petitioner also must have known about the grant of probate and the subsequent revenue cases.

22. The petitioner examined Balbhadraprasad (A. W. 4) in support of the assurance extended to respondent No. 3 by respondent No. 1. A perusal of his evidence will show that he is highly interested and will go to any length to support the petitioner. It will suffice to mention that he is not a truthful witness. His evidence has been rejected for the valid reasons by the Court below. A particular reference to paragraphs 5 and 9 of his deposition will disclose his interest in the petitioner. We reject his evidence from consideration.

23. Respondents 1 and 2 have entered witness-box and have denied that they had extended any assurance to respondent No. 3. Their evidence is consistent and totally negatives the petitioner's case that respondent No. 3 was either defrauded or was given any kind of assurance to withdraw from the contest.

24. A reference to the proceedings in Civil Suit No. 3-A of 1965 will show that respondent No. 3 himself had filed an application admitting the genuineness of the will executed by Late Raja Bahadur Leeladhar Singh and his readiness to withdraw all contentions. This application is signed by respondent No. 3 and also by his counsel Shri Godbole and a copy of the same was given to counsel of the other side. There is a power in favour of Shri Godbole advocate signed by respondents 3 and 4. The proceedings disclosed that respondent No. 3 had withdrawn from the contest after withdrawing all his contentions and feeling satisfied that the will was genuine. This also shows that the will was a genuine document and that the petitioner, respondents 3 and 4 felt satisfied about the genuineness of the will and their futility to raise any contention of substance. The lower Court, therefore, rightly negatived the petitioner's contentions that respondent No. 3 was either defrauded or that any kind of assurance was extended to him for withdrawing from the contest to the probate proceedings.

25. On behalf of the petitioner, two contentions were pressed with considerable force — (i) that citations were not issued to the respective Collectors and (ii) that there was non-compliance of the provisions of Sections 19-H and 19-I of the Court-fees Act. On behalf of the parties, a number of rulings were cited and some of which are: Moonga Devi v. Radha Ballabh, AIR 1972 SC 1471; Smt. Kamla

Devi v. Kishori Lal Labhu Ram, AIR 1962 Punj 196; Banwarilal Shriniwas v. Kumari Kusum Bai, AIR 1973 Madh Pra 69; Swatantranandji v. Lunidaram Jangaldas, AIR 1937 Bom 397. In the matter of the will of R. Santhana Mudaly; AIR 1955 Mad 576; Mundrika Prasad Singh v. Mst. Kachnar Kuer, AIR 1955 Pat 362 O. V. Forbes v. V. G. Paterson AIR 1942 Cal 283 and Mainabai v. Motidas Misc. Appeal No. 83 of 1958 (Indore Bench) D/-15-12-1960: 1962 Jab LJ (SN) 125. We have gone through these rulings. We find that the probate proceedings are not invalid on the ground of absence of citations to the persons concerned because all the interested parties were before the Court, had knowledge of the probate proceedings and had put in contest therein. Thus, there was no prejudice either to the respondents 3 and 4 or to the petitioner because they were cognisant of the probate proceedings and had an opportunity to contest them.

26. Regarding the citations to the Collectors, the finding of the District Judge is in favour of the petitioner. But the persual of the order-sheet (Civil suit No. 3-A of 65) would show that due citations were ordered by the Court. Order-sheet dated 5-7-1965 shows that the property in Sambalpur district (Orissa State) was not the subject-matter of the proceedings. So no citation was necessary in respect to that property. Regarding the valuation of the property covered by the probate proceedings, the order-sheet dated 5-7-1965 shows that the Court did not insist on the valuation of the property in Sambalpur district and the other property was already valued in Schedule A to the petition. The property situate in Nagpur District (Maharashtra) was valued at Rs. 20,000. Thus, the petition for probate was not defective because the valuation of the property was given as is clear from the order-sheet dated 5-7-1965.

27. Regarding citations, the order-sheet dated 7-4-1965 shows that under S. 283 (3) of Succession Act, copies of citations were ordered to be sent to other District Judges for publication and certifying such publication to the Court. The order-sheet dated 7-4-1965 also shows that process fee for citation was ordered to be paid within three days. The order-sheet dated 16-6-1965 shows that citations were not back. The order-sheet dated 3-8-1965 shows that the citations were already addressed to the District Judge, Nagpur for hearing on 16-6-1965 and they have come back with a report that they were published on 6-5-1965. In view of this, the Court ordered that no fresh citations were necessary. Thus, the citations by the District Judge, Nagpur were already published. In view of these facts, the probate proceedings could not be held to be invalid for want of proper citations.

28. In Eusoof Ahmed Seema v. Ismail Ahmed Seema, AIR 1938 Rang 261 (FB) it is held that person claiming issue of citation and its service must show prima facie case for revocation. The absence of citations in a case in which they are ordered but did not issue does not by itself constitute just cause for revocation of probate. In cases where citation had not been ordered, the party impugning the will on the ground of his non-citation must first show that he ought to have been cited, before the burden of proof is shifted to the executor to show that the defect in the proceedings was not one of substance and that no just cause for revocation exists. In our case, the interested parties duly appeared and contested the probate proceedings and citations to the District Judge Nagpur were sent and published by him. There was thus no defect in the proceedings and no just cause for revocation.

29. In Dinabandhu Roy Brajaraj Saha, Firm v. Sarala Sundari, AIR 1940 Cal 296 it has been held that non-service of citation is not defect of substance so as to constitute just cause under S. 263 of the Succession Act where non-cited party has knowledge of probate proceedings or where he is not prejudicially affected thereby.

30. In Anil Behari Ghosh v. Smt. Latika Bala Dassi, AIR 1955 SC 566 it is held that 'defective in substance' in cl. (a) of the Explanation to S. 263 of the Succession Act must mean that the defect was of such a character as to substantially affect the regularity and correctness of the previous proceedings. It is further held that it cannot be laid down as a general proposition that no question of the genuineness of the will arises for consideration till the Court has decided that the probate must be revoked on one or more of the grounds specified in S. 263. S. 263 contemplates a case for revocation based on the single ground that the will in respect of which the grant in question was obtained was a forged one. In such a case, whether or not the will was a forged one would be the only question to be canvassed before the Court before the order

of revocation could be made out. In our case, there is no proof that the will was a forged one and therefore, there will be no question of revocation of the probate unless there was defect of substance in the petition.

31. In Promode Kumar Roy v. Sephalika Dutta, AIR 1957 Cal 631 it is held that the enumeration of circumstances, in the explanation to S. 263, which would make out a just cause under the Section is exhaustive and not merely illustrative. An applicant for revocation must, in order to succeed, establish just cause within the meaning of S. 263, that is, as laid down in cls. (a) to (e) thereof, but even if just cause be established, revocation may still be refused by the Court in the exercise of its discretion under that Section if the facts and circumstances of the particular case would warrant such refusal. In our case, the petitioner has failed to establish any just cause and the special circumstances of this case are such which will make the Court to refuse to exercise its discretion in favour of the petitioner. The probate proceedings were started on 17-1-1964. The petitioner and respondents 3 and 4 had put in appearance through Shri S. M. Mendhekar advocate and filed their written statement. The witnesses were examined on commission and thereafter, respondent No. 3, through his advocate, withdrew from the contest accepting that the will was genuine. The petitioner thus had full opportunity to contest and raise pleas in those proceedings which she is now raising. She did not do so. There is no reasonable explanation for this conduct of the petitioner and in the facts and circumstances of this particular case, we would be justified in refusing to exercise our discretion in favour of the petitioner.

32. Regarding non-compliance with the provisions of Sections 19-H and 19-I of the Court-fees Act, such pleas were not raised by the petitioner and respondents 3 and 4 in the previous proceedings for which there is no reasonable explanation. The question of Court-fee is a matter between the State and the party. Moreover, this objection could not be raised in these proceedings. In Mathuradas v. Chandrakantabai, M. A. No. 133/70 decided on the 16th February 1973 (Indore) : 1973 M P LJ (SN) 71 it is held that though where the mandatory provisions of S. 19 of the Court-fees Act were not complied with, no order entitling the petitioner to grant of probate could be made, in the present case, an order directing the grant of probate having been made long back no question arose as to whether the respondent was entitled to the grant of probate for want of payment of proper Court-fees or for not stating proper valuation of the property or whether proper notice was given to the Collector or not. We have held that the valuation of the property was duly made and the citations were issued to the Collector, Nagpur. Even if, citations were not issued, the grant of probate could not be questioned on that count.

33. Regarding the application under proviso to S. 273 of the Succession Act, a reference may be made to T. J. George v. Mrs. Lucy Kochuvareed, AIR 1963 Ker 188 wherein it is held that a District Court does not lose its jurisdiction to grant a probate merely because properties worth more than Rs. 10,000/-, belonging to the estate of the deceased are situate outside the State in which it exercises jurisdiction ..... Thus, even if the properties worth more than Rs. 10,000/- are situate outside the State that will not invalidate the probate proceedings.

34. We have examined the various contentions raised before us. The question whether the deceased would have willed away Bhumiswami land or that the property constituted is of joint Hindu family was not seriously pressed before us. The list of the property to the probate proceedings would show that most of the property was nazul plots and there is no proof that there was a joint Hindu family. The District Judge has referred to these questions in para 59 of his order and has decided against the petitioner. We find no reason to take a contrary view.

35. In view of the above, we are definitely of the view that respondent No. 3 had withdrawn from the contest willingly and without any fraud or undue influence being exercised on him. The petitioner must have known from her son about the outcome of the proceedings, more so when the revenue proceedings in pursuance of the grant of probate had been started about which her son was in full know of. The valuation of the property was given and the citations were duly published. There was no proof given by the petitioner that the will was a forged one and the admission of respondent No. 3 was that the will was a genuine document executed by late Raja Bahadur Leeladharsingh. We find no defect of substance in the probate proceedings. No case is made

out for revocation of the probate granted to respondent No. 1. In view of the above, the District Judge was justified in rejecting the petitioner's claim under S. 263 of the Indian Succession Act.

36. In the result, the appeal fails and is hereby dismissed. The order of the District Judge, Bilaspur, dismissing the petition under S. 263 of the Indian Succession Act is hereby confirmed. The costs of this appeal shall be paid by the petitioner. Counsel's fee Rs. 400/-, if certified. The costs of the Court below shall be borne as ordered by that Court.

Appeal dismissed.

AIR 1978 MADHYA PRADESH 209

(INDORE BENCH)

G. L. OZA AND G. G. SOHANI JJ.

Nandram Heeralal, Petitioner v. Union of India and another, Respondents.

Misc. Appeal No. 115 of 1975, D/- 31-3-1978*

Constitution of India, Art. 300 — 'Sovereign function' — Scope — Vicarious liability of State for tortious act of its personnel — Nature. (Torts — Vicarious liability.)

It cannot be disputed that the act of driving the vehicle in bringing back the officers from the place of exercise to the College of Combat is not an act which cannot be lawfully exercised except by a sovereign or a person by virtue of delegation of sovereign rights. Therefore, although the maintenance of Army is a sovereign function of the Union of India, from it alone it does not follow that the Union is immune from all liability for any tortious act committed by an army personnel in the act of such driving. Consequently, the driver and the Union are liable for the death occurring in the course of such driving. (Case law discussed). (Para 10)

Anno: AIR Comm. Const. of India (2nd Edn.) Art. 300, N. 3.

Cases Referred: Chronological Paras

AIR 1974 SC 890: 1974 Lab IC 598 5, 8
1974 ACJ 105 (FB) 6, 9
AIR 1965 SC 1039: (1965) 2 Cri LJ 144 5, 6, 8
(1906) 205 U. S. 349: 51 Law ed 834; Kawananakoa v. Polyblank 8

M. S. Rajpal, for Appellant; S. R. Joshi, (for No. 1) and Rizaram (for No. 2), for Respondents.

OZA, J.:— This appeal has been filed by the two appellants parents of deceased Santoshkumar, who died as a result of an accident on the Bombay Agra Road between Mhow and Manpur by a military vehicle driven by respondent No. 2 an army employee.

2. It was alleged by the appellants that they are residents of village Gawli Palasiya which is situated on the left side of the road while going towards Bombay. It was alleged that at the time of the incident this boy Santoshkumar who was of about six years of age was standing on the left side of the footpath by the side of the road. At that time an army vehicle of the College of Combat Mhow which was being driven by respondent No. 2 was coming from Manpur and was being driven at a high speed and in a negligent manner. This vehicle collided against the boy standing on the side of the road. After receiving injuries as a result of this accident the boy was taken to the hospital where he ultimately died.

3. In the joint written-statement filed by the driver as well as the Union of India it was admitted that respondent No. 2 was driving the vehicle at that time but it was denied that the vehicle was being driven either rashly or negligently. It was also pleaded that as respondent No. 2 was driving the vehicle on duty and on Government work and therefore the Union of India was not in any manner liable.

4. The learned Member of the Claims Tribunal after trial held that the vehicle was being driven negligently resulting in the accident. The learned Member also calculated the amount of compensation and awarded Rs. 6000/- as compensation. As regards the liability of respondent No. 1 Union of India, the learned Member held that as the vehicle was being driven by respondent No. 2 who is in the army service and was discharging his duties by driving the military vehicle carrying military personnel for exercise the Union of India could not be held liable as according to the learned Member respondent No. 2 was discharging sovereign functions of the State. The learned Member only held respondent No. 2 liable for compensation. Against this the present appeal has been filed.

*(Against order of M. M. Dubey 2nd Addl. Member Motor Accident Claims Tribunal, Indore, D/- 16-1-1975).

5. Learned counsel appearing for the appellants contended that the evidence indicates that the army officers were being brought back from the place where they had gone for army exercises and on this return journey the vehicle met with the accident resulting in the death of the boy. This according to learned counsel could not be said to be a sovereign function which could not be discharged by a private individual. According to learned counsel there is nothing in the evidence to indicate that going to the place for exercise and return is a matter of any army secret. It is also contended that it is not indicated in the evidence that it was not open to any officer even to have gone to the place for exercise in his own private vehicle or in any other private vehicle. According to learned counsel it may be a facility made available by the army authorities for the officers under training in the College of combat to go and come back from the place of exercise. But there is nothing on the basis of which it could be said that the function of bringing back the officers from the place of exercise to headquarters at Mhow was a function which could not be entrusted to a private individual. Consequently, according to learned counsel, applying the test laid down by their Lordships of the Supreme Court in Kasturi Lal v. State of Uttar Pradesh, AIR 1965 SC 1039 the Union of India ought to have been held liable. He also contended that the same principle has been reinforced by their Lordships of the Supreme Court in the decision in Shyam Sunder v. State of Rajasthan, AIR 1974 SC 890.

6. Learned counsel appearing for the Union of India on the other hand contended that carrying the army officers from the College of Combat to the place of exercise and return necessarily involves the sovereign function of the State and in fact the officers were being carried in an army vehicle driven by army personnel—respondent No. 2. He also contended that although under the Indian Constitution the concept of sovereign functions may be difficult to justify, but under Art. 300 of the Constitution their Lordships of the Supreme Court have accepted this principle and the line of distinction drawn in AIR 1965 SC 1039 (supra) clearly indicates that where the functions are such which could not be entrusted to a private individual the liability could not be fastened on the Union of India. Learned counsel referred to a decision reported in Bakshi Amrik Singh v. Union of India, 1974 ACJ 105 (FB) wherein all the decisions on the question have been considered although learned counsel frankly conceded that in the evidence and in the pleadings it was not made clear that the place of exercise or the visit of officers for exercise and return was a matter of army secret and was such which could not have been entrusted to any private individual. He also frankly conceded that the only plea raised was that as respondent No. 2 was army personnel discharging his duties liability could not be fastened against the Union of India. But he contended that in the circumstances of the case the learned Member of the Claims Tribunal was right in inferring that it was a function which could not be entrusted to a private individual and was therefore a sovereign function being discharged by an officer of the State and the view taken by the learned Member of the Tribunal therefore, according to learned counsel, is correct.

7. The learned Member of the Claims Tribunal while considering this question observed:

".....in such exercises there must necessarily be some secrecy, and therefore it would not be proper to cast the net wider so as to accept that anyone from the public could carry the military personnel to the place of training of combat exercises without having any regard to the secrecy of the act."

Apparently, the learned Member it appears has inferred that carrying of the officers from the College of Combat to the place of exercise was a matter of secrecy. The only witness examined on behalf of the Union of India is D. W. 1 Lt. Col. Bhuwanchand Khaduri who was one of the occupants of the vehicle, an officer in the College of Combat who had gone for training. But in his evidence he has nowhere stated that going of the officers like him from the College of Combat to the place of exercise and return was a matter of army secret and was therefore such which could not be entrusted to any one else. He only states that they had gone for the exercise in the morning and were returning in the vehicle in later part of the day. The other witness examined is the driver himself respondent No. 2 and he also nowhere in his deposition states that the carrying of the officers from the College of Combat to the place of exercise and their return after the exercise was kept secret and this was en-

trusted to him. He only states that at the time of the incident he was putting on a uniform, probably to impress that he was discharging his official duties. Apparently therefore the conclusion arrived at by the learned Member of the Claims Tribunal about the secrecy of the movement of the army officers to the place of exercise and their return is not based on any evidence and this could not be accepted. The evidence only indicates that these officers of the College of Combat were taken by this vehicle for exercise at some place near Manpur and were being brought back after the exercise was over and the evidence does not indicate that this was in any way connected with the military operations or movements or that it was a matter of secrecy.

8. In AIR 1965 SC 1039 (supra) their Lordships of the Supreme Court considered the impact of Art. 300(1) of the Constitution, although in a different context, and observed: (at p. 1046)

"Thus, it is clear that this case recognises a material distinction between acts committed by the servants employed by the State where such acts are referable to the exercise of sovereign powers delegated to public servants. and acts committed by public servants which are not referable to the delegation of any sovereign powers. If a tortious act is committed by a public servant and it gives rise to a claim for damages, the question to ask is, was the tortious act committed by the public servant in discharge of statutory functions which are referable to, and ultimately based on the delegation of the sovereign powers of the State to such public servant? If the answer is in the affirmative, the action for damages for loss caused by such tortious act will not lie. On the other hand, if the tortious act has been committed by a public servant in discharging of duties assigned to him not by virtue of the delegation of any sovereign power. an action for damages would lie. The act of the public servant committed by him during the course of his employment is, in this category of cases, an act of a servant who might have been employed by a private individual for the same purpose. This distinction which is clear and precise in law, is sometimes not borne in mind in discussing questions of the State's liability arising from tortious acts committed by public servants. That is why the clarity and precision with which this distinction was emphasised by Chief Justice Peacock as early as 1861 has been recognised as a classic statement on this subject."

In this decision the distinction drawn by their Lordships was that the act of a public servant committed by him during the course of employment is in this category of cases an act of a servant who might have been employed by private individual for the safe purpose and the State cannot escape the liability for the tortious act of the servant. Similarly, in AIR 1974 SC 890 (supra) their Lordships were considering the question of negligence in a case under the Fatal Accidents Act and Mathew J. in his judgment while considering the principle enunciated in AIR 1965 SC 1039 quoted above observed: (at P. 893 of AIR 1974 SC)

"Reliance was placed on the ruling of this Court in Kasturilal v. State of U. P (AIR 1965 SC 1039), where this Court said that the liability of the State for a tort committed by its servant in the course of his employment would depend upon the question whether the employment was of the category which would claim the special characteristic of sovereign power. We do not pause to consider the question whether the immunity of the State for injuries on its citizens committed in the exercise of what are called sovereign functions has any moral justification today. Its historic and jurisprudential support lies in the oft-quoted words of Blackstone. Blackstone Commentaries (10th Edn. 1887).

'The king can do no wrong. ...The king, moreover, is not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper thing; in him is no folly or weakness'.

In modern times, the chief proponent of the sovereign immunity doctrine has been Mr. Justice Holmes who, in 1907, declared for a unanimous Supreme Court; Kawananakoa v. Polyblank, (1906) 205 U. S. 349, 353:

"A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends".

Today, hardly any one agrees that the stated ground for exempting the sovereign from suit is either logical or practical.

We do not also think it necessary to consider whether there is any rational dividing line between the so called sovereign and proprietary or commercial functions for determining the liability of the State."

These observations clearly go to show that the concept of sovereign functions and the immunity of the State from tortious liability is not accepted in the modern context. But it appears that still their Lordships after applying the test laid down in AIR 1965 SC 1039 (supra) held in the facts of that particular case that the famine relief work could not be said to be sovereign function of the State.

9. In Bakshi Amrik Singh v. The Union of India (1974 ACJ 105) (FB) a Bench of five Judges of the High Court of Punjab and Haryana at length considered all the decisions on the question and ultimately laid down 11 tests:—

"Though sovereign functions of a State have nowhere been exhaustively enumerated nor is there any authoritative definition of what constitutes the sovereign functions from a review of the ratio of the various authorities that have been noticed above, certain rules of guidance, which appear to be well settled emerge and they may be stated thus:

1. Under Article 300(1) of the Constitution of India, the Union of India and the states in our Republic have the same liability for being sued for torts committed by their employees as was that of the East India Company.

2. The nature and extent of this liability, as stated in P. & O. Steam Navigation Company's case and authoritatively settled by their Lordships of the Supreme Court in Kasturi Lal's case is that the Union of India and states are liable for damages occasioned by the negligence of servants in the service of the Government if the negligence is such as would render an ordinary employer liable.

3. That in view of the rule stated above Government is not liable if the tortious act complained of has been committed by its servant in exercise of its sovereign powers by which we mean powers that cannot be lawfully exercised except by sovereign or a person by virtue of delegation of sovereign rights.

4. The Government is vicariously liable for the tortious acts of its servants or agents which are not proved to have been committed in the exercise of its sovereign functions or in exercise of the sovereign powers delegated to such public servants.

5. The mere fact that the act complained of was committed by a public servant in course of his employment is not enough to absolve the Government of the liability for damages for injury caused by such act.

6. When the State pleads immunity against claim for damages resulting from injury caused by negligent act of its servants, the area of employment referable to sovereign powers must be strictly determined. Before such a plea is upheld, the Court must always find that the impugned act was committed in the course of an undertaking or an employment which is referable to the exercise of the delegated sovereign powers.

7. There is a real and marked distinction between the sovereign functions of the Government and those which are not sovereign and some of the functions that fall in the latter category are those connected with trade, commerce, business and industrial undertakings.

8. Where the employment in the course of which the tortious act is committed is such in which even a private individual can engage, it cannot be considered to be a sovereign act or an act committed in the course of delegated sovereign functions of the State.

9. The fact that the vehicle, which is involved in an accident, is owned by the Government and driven by its servant does not render the Government immune from liability for its rash and negligent driving. It must further be proved that at the time the accident occurred, the person driving the vehicle was acting in discharge of the sovereign function of the State, or such delegated authority.

10. Though maintenance of Army is a sovereign function of Union of India, it does not follow that the Union is immune from all liability for any tortious act committed by army personnel.

11. In determining whether the claim of immunity should or should not be allowed, the nature of the act, the transaction in the course of which it is committed, the nature of the employment of the person committing it and the occasion for it, have all to be considered."

10. It could not be disputed that their Lordships after analysing all the judgments on the question have laid down these 11 tests, and applying the relevant tests, i.e. Nos. 3 and 10, to the facts of

the present case it could not be disputed that the act of driving the vehicle in bringing back the officers from the place of exercise to the College of Combat Mhow, was not an act which could not be lawfully exercised except by a sovereign or a person by virtue of delegation of sovereign rights. And therefore, although the maintenance of Army is a sovereign function of the Union of India, from it alone it does not follow that the Union is immune from all liability for any tortious act committed by an army personnel.

11. From the evidence in the case there is nothing to indicate that when respondent No. 2 was bringing the officers back from the place of exercise to the College of Combat he was discharging functions which could not have been discharged by any private individual. Consequently the conclusions arrived at by the learned Member of the Claims Tribunal that the Union of India is not liable cannot be maintained.

12. The appeal is therefore allowed. The award passed by the learned Member of the Claims Tribunal is modified and both the respondents are held jointly and severally liable for the compensation amount awarded by the learned Member of the Claims Tribunal in favour of the appellants. The appellants shall also be entitled to costs of this appeal from the contesting respondent. Counsel fee Rs. 200/- (Two hundred) if certified.

Appeal allowed.

AIR 1978 MADHYA PRADESH 213

A. P. SEN C. J. AND
J. S. VERMA JJ.

Dr. Srikrishna Rajoria, Petitioner v. The State of Madhya Pradesh and others, Respondents.

Misc. Petn. No. 515 of 1977, D/- 22-3-1978.

(A) Madhya Pradesh Municipalities Act (37 of 1971) S. 341 (1) (d) Second Proviso — Notification under — Stating of reasons — Necessity.

Constitution of a committee consisting only of nominated members is undoubtedly an abnormal course to be adopted as a last resort. It is for this reason that the Second Proviso to cl. (d) has been inserted, its object being to confer an extraordinary power to deal with an unusual situation and at the same time to provide a check against arbitrary or capricious exercise of that power.

Held that the impugned notification dated 30-9-1977 suffer from the defect of non-compliance with the mandatory requirement of stating reasons as required by the Second Proviso to cl. (d) of sub-sec. (1) of S. 341 and it must, therefore, be quashed. (Paras 7, 10)

(B) Constitution of India, Art. 226 — Writ against administrative order.

Writ of certiorari is available to quash administrative acts of the State Government or public authorities done in excess of jurisdiction, and hence a writ of certiorari can be issued to quash a notification issued by the State Government in exercise of statutory power without complying with a mandatory requirement laid down therein. (Para 13)

Anno: AIR Comm. Const. of India Art. 226 N. 31, 165.

Cases Referred: Chronological Paras

AIR 1978 SC 597: (1978) 1 SCC 248 13
AIR 1978 SC 851: (1978) 1 SCC 405 7, 13
AIR 1974 SC 87: 1974 Lab IC 338 8
AIR 1970 Madh Pra 154: 1969 MPLJ 327 9, 11, 12
(1974) MP No. 905 of 1973, D/- 1-5-1974 (Madh Pra) 2, 5, 10, 11
AIR 1970 SC 150 13
AIR 1962 SC 1694 8
AIR 1959 SC 107 10, 11, 12, 13

C. L. Kotechha, for Petitioner; S. L. Saxena Govt. Advocate, (for No. 1) and P. C. Pathak, (for Nos. 2, 3, 5 to 10, 12 and 13, for Respondents.

J. S. VERMA, J.:— By this petition under Art. 226 of the Constitution of India, the petitioner Dr. Srikrishna Rajoria, a medical practitioner residing in the town of Harsud and a voter and tax-payer of Harsud Notified Area, seeks a writ of certiorari to quash the State Government Notification No. 590-XVIII-II-77, dated Bhopal the 30th Sept. 1977 (Annexure-C) by which the State Government has constituted a Notified Area Committee consisting of nominated members only, in exercise of the powers conferred by the Second Proviso to cl. (d) of sub-sec. (1) of S. 341 of the Madhya Pradesh Municipalities Act, 1961 (No. 37 of 1961).

2. In the year 1971, the State Government, by a notification issued under Section 340 of the Madhya Pradesh Municipalities Act, 1961 (hereinafter referred to as 'the Act') declared as 'Notified Area,' the area which earlier existed as a Gram

Panchayat at Harsud. At the same time, the State Government, by another notification dated 3rd Nov. 1971 constituted a Notified Area Committee consisting only of nominated members in exercise of the powers conferred by the Second Proviso to cl. (d) of sub-sec. (1) of S. 341 of the Act. That notification was challenged in this Court by a similar writ petition which was Idan Dass v. State of M. P., MP No. 905 of 1973 Decided on 1-5-1974. The challenge in that petition was on the ground that the impugned notification did not state any reasons for constituting the committee of nominated members only, on account of which it was invalid. The Division Bench dismissed that writ petition taking the view that the State Government had shown from the material contained in the office file that reasons for such an action were contained in the file. Some of these reasons were also stated by the Division Bench in Para 4 of its order which were, inter alia, that some interim arrangement had to be made till holding of elections was feasible and that the action was taken on the basis of the report of the Collector sent in this behalf. Taking the view that the requisite reasons existed when the impugned notification was issued and that the reasons were stated in writing in the office file perused by the Division Bench, that notification was found not to be defective. It was also stated by the Division Bench that inordinate unexplained delay in filing that petition was a further ground to refuse relief to the petitioner. The Division Bench, at the end of its order also observed as follows:

"We may, however, observe that the nominated body, which is not the normal rule, has continued for almost 2½ years, a very long time for an emergency to continue; and the Government, we hope, shall examine the expediency of its further continuance in preference to an elected body."

3. Notwithstanding the above facts, the Harsud Notified Area has continued to have till now only a committee consisting of all nominated members and the first election has yet to be held. The State Government, by the next notification No. 819-XVIII-II-75, dated Bhopal the 22nd Nov. 1975 (Annexure-A) constituted a fresh committee, once again consisting only of nominated members. in exercise of the power conferred by the Second Proviso to cl. (d) of sub-sec. (1) of S. 341 of the Act. This committee continued till it was replaced by a committee of single person, viz., the Tahsildar of tahsil Harsud, district Khandwa, in exercise of the power conferred by S. 341 (1) (d) by the notification dated 8-9-1977 (Annexure-B). This arrangement was for a very short period and then the impugned notification No. 590-XVIII-II-77 dated 30-9-1977 (Annexure-C) was issued by the State Government, once again constituting a committee only of nominated members in exercise of the power conferred by the Second Proviso to cl. (d) of sub-sec. (1) of S. 341 of the Act. It is this notification which has been challenged by this petition filed on 23-11-1977.

4. In the impugned notification dated 30-9-1977 (Annexure-C) admittedly there is no statement of the reasons which led to the constitution of a committee consisting only of nominated members in exercise of the extraordinary power conferred by the Second Proviso to cl. (d) of sub-sec. (1) of S. 341 of the Act. It only states the conclusion that "the circumstances of the Harsud Notified Area are such that it would be in the public interest to appoint a committee of persons consisting of nominated members only." Learned counsel for the petitioner contends that for the valid exercise of the extraordinary power conferred on the State Government by the Second Proviso to cl. (d) of sub-sec. (1) of S. 341 of the Act, compliance with the mandatory requirement of "stating the reasons therefor" in the order, has to be made. It is urged that this mandatory requirement not having been complied with, the impugned notification dated 30-9-1977 (Annexure-C) must be quashed.

5. It is not the case of the State Government that the reasons which led to the issue of the impugned notification Annexure-C dated 30-9-1977 are stated in writing even in the office file although they are not in the impugned notification. At the hearing of the petition, we specifically asked the learned Government Advocate to tell us if the requisite reasons, which led to the exercise of this power and issue of the notification, had even been stated in the office file or elsewhere. The learned Government Advocate was unable to show us the requisite reasons in writing anywhere and he was unable to even say that such a writing was in existence with the State Government in any record. The main ground on which the validity of a similar notification dated 3-11-1971 was upheld by this Court in Idan Dass's case, MP No. 905 of 1973, D/- 1-5-1974 (supra), as earlier stated, is,

therefore, not available in the present case. Since the existence of reasons in writing anywhere in the record is not set up on behalf of the State Government, it is also not necessary for us in the present case to express our opinion on the question whether the "stating of reasons" in any record and not in the notification itself, to support the exercise of this power, amounts to compliance of this requirement, which was the view taken in Idan Dass's case (supra). We are concerned only with the question whether the impugned notification can be upheld when it was issued without "stating the reasons" either in the notification itself or anywhere else in the record.

6. Having heard Shri C. L. Kotecha, learned counsel for the petitioner, the learned Government Advocate Shri S. L. Saxena for the Respondent No. 1, and Shri P. C. Pathak counsel for Respondents 3 to 13 — the nominated members of the committee — we are satisfied that this petition must be allowed and the impugned notification dated 30-9-1977 (Annexure-C) must be quashed.

7. The relevant portion of S. 341 of the Act is as under:—

"341. Power of State Government to impose, taxation and regulate expenditure of proceeds thereof:—

(1) The State Government may:—

(a) to (c) xx xx xx xx xx

(d) appoint, for the purposes of cls. (b) and (c), a single person or a committee of persons elected and nominated of such number and in such proportion as the State Government may fix:

Provided that a majority of the members shall be elected:

Provided further that where, in the opinion of the State Government the circumstances of any notified area are such that it would be in public interest so to do, it may by order stating the reasons therefor, direct that in any notified area such Committee shall consist of nominated members only;

x x x x x x x x"

This provision, read as a whole, clearly shows that the committee so appointed by the State Government should ordinarily consist of a majority of elected members as laid down in the First Proviso to cl. (d). It follows necessarily that constitution of a committee consisting only of nominated members is undoubtedly an abnormal course to be adopted as a last resort. It is for this reason that the Second Proviso to cl. (d) has been inserted, its object being to confer an extraordinary power to deal with an unusual situation and at the same time to provide a check against arbitrary or capricious exercise of that power. The Second Proviso lays down that a committee consisting of nominated members only is to be constituted only where "in the opinion of the State Government the circumstances ..... are such that it would be in public interest so to do" and that this action has to be taken by the State Government in such a situation "by order stating the reasons therefor." It is, no doubt, the State Government which has to form such an opinion. All the same, the exercise of the power is permitted in "public interest" and "by order, stating the reasons therefor." The manner of exercise of this extraordinary power by the State Government, which permits a deviation from the ordinary course of constituting a committee consisting mostly of elected members, is prescribed obviously to check any possible abuse of the power. In case exercise of this power by the State Government is challenged, its validity has to be tested in the light of the stated reasons, to the extent judicial review of subjective satisfaction of a public authority is permitted in a proceeding for a writ of 'certiorari': Mohinder Singh Gill v. Chief Election Commr., New Delhi, (1978) 1 SCC 405 Para 8: (AIR 1978 SC 851). These limits are well settled by now and it is not necessary for us to re-state them here. Moreover, it is well known that the requirement of "stating the reasons" itself acts as an internal check against any possible abuse of the power.

8. In Collector of Monghyr v. Keshav Prasad Goenka, AIR 1962 SC 1694 it was held that the action of the Collector under S. 5-A of the Bihar Private Irrigation Works Act (B and O 5 of 1922) was rendered invalid if the same was done without recording reasons for the exercise of that emergency power and that the requirement in that provision of reasons being recorded by the Collector was a mandatory requirement. It was held that even assuming the Collector's power under that provision to be administrative, his subjective satisfaction to act under Section 5-A permitted him to exercise the power validly only in the manner stated therein, that is, by recording the reasons in writing and not merely his conclusion or finding. A writ of certiorari was held to be available where the Collector exercised the power under S. 5-A without recording the reasons as required by the

provision. That decision continues to hold the field. Following this decision, in Union of India v. M. L. Capoor, AIR 1974 SC 87: 1974 Lab IC 338) the effect of failure to record reasons in writing where it is prescribed as a requirement for the valid exercise of the power was considered in the context of Regulation 5 (5) of the Indian Administrative Service/Indian Police Service (Appointment by Promotion) Regulations, 1955. That regulation provides that if in the process of selection etc. any member of the State Civil Service was to be superseded by the Selection Committee, 'it shall record its reasons for the proposed supersession.' The requirement of recording reasons was held to be mandatory and in that context their Lordships observed as follows (at p. 98 of AIR):

"Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is applied to the subject matter for a decision whether it is purely administrative or quasi-judicial. They should reveal a rational nexus between the facts considered and the conclusions reached."

9. In Suresh Seth v. State of Madhya Pradesh, 1969 MPLJ 327: (AIR 1970 Madh Pra 154) an order of supersession of a Municipal Corporation made under S. 422 of the Madhya Pradesh Municipal Corporation Act, 1956, was quashed by a writ of certiorari for two defects, viz., (i) that the Corporation was not given a fair opportunity to show cause before the order was made, and (ii) that the reasons for making the order were not stated. In the present case, we are concerned with the view taken by the Division Bench for finding the second defect in the order. One of the requirements of S. 422 of the Madhya Pradesh Municipal Corporation Act, 1956, was that "such order shall be published in the gazette and the reasons for making it shall be stated therein." This requirement of stating reasons in the order not having been complied with, the Division Bench held that the non-compliance was of a mandatory requirement which rendered the order a nullity. Singh, J., speaking for the Division Bench, has discussed the point elaborately with reference to the Supreme Court decisions. With respect, we are in full agreement with the view of that Division Bench of which one of us (A. P. Sen J. as he then was) was a member, on this point.

10. From these authorities, it follows that the impugned notification dated 30-9-1977 (Annexure-C) suffers from the defect of non-compliance with the mandatory requirement of stating reasons as required by the Second Proviso to cl. (d) of sub-sec. (1) of S. 341 of the Act, and it must, therefore, be quashed. However, the learned Government Advocate Shri S. L. Saxena as well as the learned counsel for respondents Nos. 3 to 13 Shri P. C. Pathak contend that a writ of certiorari cannot be issued to quash an administrative act like the present. They rely on two decisions, viz., Idan Dass's case, M. P. No. 905 of 1973, D/- 1-5-1974 (Madh Pra) (supra) and Radeshyam Khare v. State of Madhya Pradesh, AIR 1959 SC 107, we shall presently show that none of these two decisions is of any assistance to the respondents.

11. In Idan Dass's case (supra), as earlier stated, the requirement of "stating the reasons" was found to be complied with, while in the present case admittedly there is a total non-compliance with this mandatory requirement. On this conclusion no further question arose for decision in Idan Dass's case. It may also be mentioned that in Idan Dass's case, it was further held that "the petition deserves to be thrown off on the ground of unexplained delay." That Division Bench referred to the decision of an earlier Division Bench in Suresh Seth's case (AIR 1970 Madh Pra 154) (supra), and their Lordships' decision in Radeshyam Khare's case (supra), Suresh Seth's case was distinguished merely on the ground that it related to supersession of a Municipal Corporation and the second defect found in the impugned order in Suresh Seth's case, to which we have already referred, was not even discussed. An extract from Randeshyam Khare's case was quoted but nothing more was said about the manner in which that decision applied. Later decisions of the Supreme Court and enlargement of the area in which 'certiorari' is available after the decision in Radeshyam Khare's case was not even noticed. It is, therefore, necessary to examine whether in the present case 'certiorari' can be refused merely because the impugned act is administrative and not 'quasi-judicial.'

12. In Radeshyam Khare's case (supra), action was taken by the State Government in exercise of the powers conferred on it by S. 53-A of the C.P. and Berar Municipalities Act, 1922, in issuing a noti-

fication appointing an Executive Officer of the Municipal Committee, Dhamtari, for a period of eighteen months with certain powers mentioned therein. S. 53-A of that Act required, inter alia, "the stating of reasons" while exercising the power. This requirement was admittedly complied with and several reasons which led to the exercise of the power were mentioned in the impugned notification itself. The validity of that notification was challenged on the ground of breach of rules of natural justice in not giving an opportunity to the persons affected before exercise of that power. The challenge to the validity of the notification in that case was not on the ground of absence of reasons obviously because that defect was not present in that notification. In the case before us the challenge is only on the ground of failure to state reasons and not on the ground of breach of rules of natural justice It was, therefore, in that context that their Lordships considered the nature of power exercised by the State Government under Section 53-A of the C. P. and Berar Municipalities Act, 1922 for the purpose of deciding whether a duty was cast on the State Government to give a reasonable opportunity to the persons affected and to follow the rules of natural justice before issuing the impugned notification. The conclusion reached was that the exercise of State Government's power under S. 53-A of the C. P. and Berar Municipalities Act was a purely administrative act and not a quasi-judicial act, more so, when there was another more drastic provision in that Act which was not resorted to, on account of which it could not be challenged on the basis of absence of reasonable opportunity to explain. The distinction is pointed out in Suresh Seth's case (supra). As earlier stated, we are, in the present case, not concerned with this question. Their Lordships in Radeshyam Khare's case (supra) also gave an additional reason stating that "certiorari will not lie to correct the errors of a statutory body which is entrusted with purely administrative function" and that "for the breach of the rules of fair play in taking administrative action a writ of certiorari will not lie" These observations in the judgment of Das, C. J., are relied on by both the learned counsel appearing on behalf of the respondents.

13. In view of a catena of Supreme Court decisions subsequent to Radeshyam Khare's case (supra) in which writ of certiorari was held to be available to quash administrative acts of the State Government or public authorities done in excess of jurisdiction, and that being a common feature now in the High Courts and Supreme Court, it is too late to contend that a writ of certiorari cannot be issued to quash a notification issued by the State Government in exercise of statutory power without complying with a mandatory requirement laid down therein. Radeshyam Khare's case is treated as an authority for the view that "for the breach of the rules of fair play in taking administrative action a writ of certiorari will not lie"(see Seervai's Constitutional Law of India, Second Edition, Volume II, pages 886, 899 and 900). It has also been noticed by Seervai on the basis of subsequent Supreme Court decisions that "contrary to the view expressed by Das, C. J., it has been held that a writ of certiorari will lie." We need not dwell on this point any further and it is sufficient to refer to the decision of the Supreme Court in A. K. Kraipak v. Union of India, AIR 1970 SC 150 on the basis of which such an objection cannot now be sustained. Kraipak's case (supra) took notice of this trend and also held that even in an administrative proceeding, which involved civil consequences, the doctrine of natural justice must be held to be applicable. This has very recently been again reiterated in Mrs. Maneka Gandhi v. Union of India (1978) 1 SCC 248 Paras 8 to 12: (AIR 1978 SC 597) and Mohinder Singh Gill v. Chief Election Commr., New Delhi, (1978) 1 SCC 405 Paras 43 to 53: AIR 1978 SC 851. Thus, the earlier classification of functions as 'judicial' or 'administrative' for applying the doctrine of natural justice only to the former, has long been discarded. Enlargement of the scope of 'certiorari' to quash an administrative act done in excess of jurisdiction, by a public authority, has not been in doubt for several years. The only argument advanced on behalf of the respondents is, therefore, rejected.

14. The result is that we allow this petition and issue a writ in the nature of certiorari and quash the impugned notification No. 590-XVIII-II-77, dated Bhopal the 30th Sep. 1977 (Annexure-C) issued by the State Government. The petitioner shall get his costs from Respondent No. 1. Counsel's fee Rs. 100/-, if certified. The other respondents will bear their own costs. The outstanding amount of security deposit shall be refunded to the petitioner.

Petition allowed.

AIR 1978 MADHYA PRADESH 218

(GWALIOR BENCH)

BACHAWAT, J.

on difference of opinion between

SHIV DAYAL, C. J. AND

S. S. SHARMA, J.

Town Improvement Trust, Gwalior, Petitioner v. Sahajirao Angre and another, Non-petitioners.

Misc. Petn. No. 23 of 1971, D/- 10-8-1977.

(A) Constitution of India, Arts. 226 and 227 — Person aggrieved — Land Acquisition Act (1 of 1894), Ss. 3 (b), 50 — Writ petition by Town Improvement Trust for setting aside award of Land Acquisition Officer — Maintainability — Trust, held, to be "person aggrieved".

The land in question had been acquired by the Government and possession delivered to the petitioner the Town Improvement Trust at the behest of and for the petitioner for housing development scheme i.e., the Scheme falling in S. 39 (g) of the M. B. Town Improvement Act (1956). The possession of the land was delivered to the petitioner far back on 29-11-57 which was divided into and sold in distinct plots to various persons by the petitioner. The Land Acquisition Officer vide his award D/- 27-4-70 determined the compensation. The petitioner-Trust filed the writ petition for issuance of a writ setting aside the award.

Per BACHAWAT, J. (agreeing with Shiv Dayal C. J.):

Held on the facts and circumstances of the case, that the Town Improvement Trust had the locus standi to challenge, by a petition under Art. 226 of the Constitution, the award made by the Land Acquistion Officer, under the Land Acquisition Act. (Para 82)

The petitioner Trust was a "person aggrieved". AIR 1976 SC 578, Applied; 1965 MPLJ 961; AIR 1971 Bom 341; F. A. 94/67 (MP), D/- 19-8-1974 held no longer good law in view of AIR 1976 SC 578. (Para 67)

Even a person who was not a party before the authority is competent to file a writ provided it has a substantial and genuine interest in the subject-matter. According to S. 50 of the Act, the petitioner is not a complete stranger, it has to bear the legal burden of the compensation for acquisition. (Para 69)

It is not correct to say that the limitations regarding the participation in the proceedings under the Act can be superimposed to the proceedings for invoking the extraordinary jurisdiction of this Court under the Constitution. It is trite law that Art. 226 of the Constitution confers jurisdiction on the High Court to issue writs to keep all tribunals including, in appropriate cases, the Government within its bounds. (Para 69)

The definition of "person interested" given in the Act cannot be interpreted to exclude petitioner who also has to bear the burden of the compensation. The party for whose benefit the land is acquired and which has to bear the burden of compensation is a party interested. (Paras 70A & 71)

The petitioner had a legal right to obtain the land by acquisition under the Act against payment of a price determinable according to the provisions contained in S. 23 of the Act. If the view that the petitioner has no right to challenge the award is accepted, it would mean that though the petitioner has a legal right, it has no remedy and it has to suffer a legal wrong or an injury. At this stage, one has to recall to memory the well known maxim ubi remedium ibi jus, i.e. whenever there is a right, there should also be an action for its enforcement. It, therefore, can never be thought of that even when an award is in violation of the statutory provision, it cannot be challenged. (Para 72)

Once it has been found that the petitioner is a person aggrieved, it has a locus standi irrespective of the fact whether it is or is not a local authority. Case law discussed. (Para 74)

Held further that although the award dated 27-4-1970 of the Land Acquisition Officer must be quashed the award could not be substituted in its place by the High Court. The matter was liable to be remitted to the Land Acquisition Officer for redetermining the amount of compensation from the material already on record in the light of the observation made by the High Court. (Paras 81, 82)

Anno: AIR Comm. Const. of India (2nd Edn.), Arts. 226 and 32 N. 22 (D); AIR Manual (3rd Edn.) Land Acquisition Act, S. 3 N. 2, S. 50 N. 1.

(B) Land Acquisition Act (1 of 1894), S. 50 — Constitutionality.

PER SHIV DAYAL, C. J.:

Section 50 of the Act merely enables such local authority or company to take part in the proceedings and also to adduce evidence. There is nothing discriminatory because the person whose land is acquired and the local authority or company for whom the land is acquired are not similarly situate. The Legislature, in its wisdom, has given the right to the former to approach the Court for enhancement of compensation. The acquisition under the Land Acquisition Act is compulsory so that the person whose land is acquired cannot decline to give the land. As soon as it is held that the land is acquired for a public purpose, the declaration is final. He is entitled merely to compensation and solatium. The position of the local authority or company, for whose benefit land is acquired, is different. If it finds that the amount of compensation determined by the Land Acquisition Officer in his award is excessive, it has the option to decline to take the land on payment of that compensation and thus render the acquisition proceeding abortive. Therefore, S. 50 of the Act is not unconstitutional. (Para 18)

Anno: AIR Manual (3rd Edn.), Land Acq. Act, S. 50 N. 1.

Cases Referred: Chronological Paras

AIR 1976 SC 578	21, 23, 26, 56, 67, 70, 73
AIR 1976 Madh Pra 119: 1975 MP LJ 822	7, 24
AIR 1974 Andh Pra 299	71
1974 MP LJ (SN) 106	10
(1974) First Appeal No. 94 of 1967 D/- 19-8-1974 (Madh Pra)	68
AIR 1973 SC 2720	70
AIR 1972 SC 1417	76
AIR 1972 SC 1973	70A, 71
AIR 1972 SC 2112	70
AIR 1971 Bom 341	11, 69
AIR 1970 SC 540	76
AIR 1968 SC 1481	8, 76
(1967) 1 SCA 413	70
AIR 1966 SC 828	70
1966 BLJR 834	76
1965 MPLJ 961	10, 25, 26, 68
AIR 1964 SC 477	7
AIR 1963 SC 404	76
AIR 1962 SC 1044	70
(1961) 2 All ER 504: (1961) 2 WLR 845 Attorney General of Gambia v. N'jie	22
AIR 1959 SC 429	76
AIR 1959 Bom 297	10, 25, 69
AIR 1955 Pat 63	9
AIR 1952 SC 12	70
(1909) 13 Cal WN 116	10, 25, 69

J. S. L. Sinha, for Petitioner; V. K. Sapre, for Non-petitioners.

SHARMA J.:— This is a petition under Articles 226 and 227 of the Constitution of India for issuance of a writ setting aside the Award, dated 27-4-1970, given by Land Acquisition Officer, Gwalior in Land Acquisition Case No. 8/56/23/7 (Annexure-B). The petitioner has also challenged Section 50 of the Land Acquisition Act, 1894 (hereinafter referred to as "the Act") as being unconstitutional.

2. The case of the petitioner, a body corporate constituted under the Town Improvement Trust Act is that in the city of Gwalior near Jinsinala an open piece of land, commonly known as Garud Saheb ka Bada, 3 bigas and 5 biswas in area, was acquired for Housing Development Scheme. The petitioner has referred to the different notifications issued under Sections 4, 6 and 17 of the Act. Tahsildar, Gwalior obtained possession over the land and handed it over to the petitioner on 29-11-1957.

3. Notification under Section 9 was also issued in the proceedings relating to the acquisition. Some persons, as have been named in paragraph 6 of the petition, submitted their objections and claimed compensation. Respondent No. 1 was also one of the claimants and he claimed an amount of Rs. 1,81,473.45 p. as the amount of compensation. The Land Acquisition Officer after an enquiry gave an award of Rs. 1,22,284.10 p. to Respondent No. 1 for his part of the land.

4. The grievance of the petitioner is that the amount of compensation awarded by the Land Acquisition Officer was very much excessive and he did not correctly apply the principles as are laid down in Section 23 of the Act. The petitioner in support of this has furnished documents to show that after acquisition and subsequent development wherein they had to incur expenditure the land could not fetch adequate value. As regards the principles of Section 23 of the Act it was strenuously urged that the Land Acquisition Officer completely ignored the principles and gave an award which on the face of it is arbitrary.

5. It was further urged that since the petitioner at whose costs the land

was acquired has no other remedy, it could challenge the award given by the Land Acquisition Officer, which is an inferior Tribunal, only by way of this petition. At the time of hearing learned counsel for the petitioner did not advance any argument in support of his prayer in the petition that Section 50 of the Act was unconstitutional.

6. Before proceeding further it would be pertinent to refer to the award, a copy of which has been filed. In para. 29 of the award the Land Acquisition Officer has observed that the petitioner Trust did not file any evidence as regards the market value of the land sought to be acquired. The two engineers, examined on behalf of the Trust, even admitted before the Land Acquisition Officer that near-about the land under acquisition there is no land which may have been sold so that the rates could be ascertained on that ground. They, however, mentioned that the rates of the land of the Trust during the erstwhile Gwalior State was 8 annas square ft. and so the land be valued at that rate. This argument was rejected by the Land Acquisition Officer.

7. Learned counsel for the petitioner referred to a number of decisions of this Court as also of other Courts and the Supreme Court to show the principles that have to be followed while determining the amount of compensation of the land acquired under the Act. These principles are quite settled and we need not burden this order by a reference to those decisions. In the present case which is not by way of an appeal we would not scrutinize the evidence ourselves over again. The Land Acquisition Officer has given the award on the basis of the evidence before him. The award further shows that the Land Acquisition Officer was quite alive to the principles to be followed for determining the compensation. He has discussed the relevant evidence also. On going through the award what we find is that the Land Acquisition Officer has considered the relevant factors for determining the market value. The petitioner having failed to adduce the evidence cannot now be permitted to make a grievance about it in the present proceedings. In S. Chandrojirao v. State of M.P. 1975 MP LJ 822: (AIR 1976 Madh Pra 119) it has been held that the High Court in exercise of its supervisory power in issuing a writ of certiorari, acts in exercise of supervisory and not appellate jurisdiction. The High Court does not review or reweigh the evidence upon which the determination of the inferior tribunal purports to be based.

8. Learned counsel for the petitioner has also referred to certain decisions to show that this Court in a petition under Articles 226 and 227 of the Constitution of India has very wide powers. There can be no dispute to those principles and so we would not refer to all those decisions. He was at pains to convince us that a petition under Articles 226 and 227 of the Constitution would lie to quash an award given by the Collector under the Land Acquisition Act on the ground that while giving the award the amount of compensation determined by him was quite excessive. He referred to a decision of their Lordships of the Supreme Court in State of Gujarat v. Vakhatsinghji (AIR 1968 SC 1481) and urged that in a petition the High Court can examine the question of quantum of compensation. This case, as has been cited by the learned counsel, is clearly distinguishable. In Vakhatsinghji's case (supra) their Lordships in para 14 have observed that "The High Court had jurisdiction to revise the decision of the Tribunal where the Tribunal on a misreading of the provisions of Sections 7 and 14 declined to do what was by those provisions of law incumbent on it to do. Tested in this light, it does not appear that the High Court exceeded its jurisdiction under Articles 227 in revising the decision of the Tribunal in respect of the solatium on irrigated bunds, tanks and wells. Numerous cases were pending before the Revenue Tribunal in respect of compensation payable to taluqdars under the Bombay Taluqdari Tenure Abolition Act. To prevent miscarriage of justice it was necessary for the High Court to lay down general principle on which compensation should be assessed so that the Tribunal may act within the limit of their authority." On a perusal of this judgment it appears that the decision of the Tribunal under the Abolition Act was final and conclusive and there was no other remedy. Under the Act there is a provision of reference under Section 18 as also of an appeal though the same is not available to the petitioner for the relief which has been sought in

this petition but that is the scheme of the Act.

9. Learned counsel for the petitioner also referred to a decision in Pannalal Maheshwari v. State of Bihar, AIR 1955 Pat 63 to support the contention that a petition could lie against an award given under the Act by the Land Acquisition Officer. In that case it was held that the Land Acquisition Officer had failed in performance of his duties cast upon him under Sections 11 and 12 of the Act. That case also is clearly distinguishable. We have gone through other decisions also as were referred to by him but they either refer to the principles which are well settled or they are distinguishable. So we need not burden this order by those decisions. In none of those cases a petition filed at the instance of a company or a corporate body for whom the land was acquired, was allowed on the ground that the compensation fixed by the Land Acquisition Officer was excessive. What piece of evidence should have weighed more with the Land Acquisition Officer is not a matter which can be agitated in the present petition.

10. That apart, in Municipal Council, Pipariya v. State of M. P. 1965 MPLJ 961 a Division Bench of this Court has observed as follows:—

"That the applicant was not entitled to demand a reference under Section 18 and has really no locus standi to question the amount of compensation awarded to the Respondent No. 3 is clear from Section 50 of the Act. Sub-Section (2) of Section 50 gives to the local authority or company only the right to appear in any proceeding before the Collector or a Court and adduce evidence for the purpose of determining the amount of compensation. The proviso to that sub-section says that no local authority or company shall be entitled to demand a reference under Section 18. It follows, therefore, that so far as a local authority or a company is concerned the award made by the Land Acquisition Officer is final. See Municipal Corporation of Pabna v. Jogendra Narain, (1909) 13 Cal WN 116 and Nagpur Corporation v. Narendrakumar, AIR 1959 Bom 297."

The same view was followed by another Division Bench of this Court in Jhabua Municipal Council v. State of M. P. 1974 MPLJ (SN) 106.

11. A Division Bench of the Bombay High Court in Himalayan Tile and Marble (Pvt.) Ltd. v. Francis V. Countinho, AIR 1971 Bom 341 after considering the earlier decisions of that Court, Calcutta High Court and the Gujarat High Court, as have been referred to therein, has held as follows:—

"Having heard counsel on this preliminary objection, we are inclined to hold that there is much substance in the objection which is entitled to succeed and it is clear upon the authorities that the party for whom acquisition is being undertaken has no locus standi whatever except as provided in Section 50, sub-section (2) to intermeddle with the acquisition proceedings or to claim to set aside the award under Section 18. Therefore such a party would not be entitled to challenge the same proceedings indirectly in a writ petition."

12. In view of what has been stated above the petitioner is not entitled to any relief in this petition. Consequently, this petition fails and is hereby dismissed. In the circumstances, we shall leave the parties to bear their own costs. The amount of security deposit shall be refunded back to the petitioner.

SHIV DAYAL, C. J.:— 13. I have had the benefit of perusing the order of my learned brother.

14. In the City of Gwalior, near Jinsi Nala, there was an open piece of land which was known as "Garud Saheb-ka-Bada". It comprised of 3 Bighas and 5 Biswas in area. It was acquired for housing development scheme by the Town Improvement Trust, Gwalior. Prior to the acquisition a notice was published in the M. P. Government Gazette dated April 26, 1957, under Section 4 (1) of the Land Acquisition Act. It was followed by another notification under Section 6 of the Act, which was published in the M. P. Gazette dated May 17, 1957. It also contained intimation that the provisions of Section 17 (1) of the Land Acquisition Act would be applicable. The Collector, Gwalior, issued a notification dated October 5, 1957, under Section 9 of the Act, in pursuance of which the Tahsildar, Gwalior, obtained possession of the land and delivered it to the petitioner, Town Improvement Trust on November 29, 1957.

15. The respondent Sahajirao Angre, who was the owner of the land claimed Rs. 1,81,473.45 p. as compensation.

16. The Land Acquisition Officer, Gwalior Collectorate, (non-petitioner No. 2) accepted the claim and finally awarded Rs. 1,22,284.10 p. by his award dated April 27, 1970. Thus, after a long span of about 14 years, the Town Improvement Trust was called upon to pay this huge sum as compensation.

17. In this petition under Article 226 of the Constitution, the petitioner seeks to quash the award of the Land Acquisition Officer. The petitioner's contentions, inter alia, are that the award of the Land Acquisition Officer is not in accordance with the provisions and principles underlying Section 23 of the Land Acquisition Act. He has exercised his jurisdiction illegally by not applying the settled principles for determining compensation, when land is acquired under the Act. The Land Acquisition Officer has misdirected himself in relying on two sale-deeds which are irrelevant as the lands which were sold under them, are neither similarly situate, nor of the same kind. The Land Acquisition Officer ought to have determined the market value of the land as on the date of the publication of notification under Section 4 of the Act, and according to the further amendment in Madhya Pradesh the market value shall be deemed to be the market value according to the disposition of the land at the date of publication of the declaration under Section 6 of the Act. It was also urged by the petitioner that Section 50 of the Act is ultra vires and unconstitutional being discriminatory, as it deprives the petitioner of the remedy contained in Section 18 and also Section 54 of the Act.

18. In my opinion, there is no substance in the petitioner's contention that Section 50 of the Land Acquisition Act is unconstitutional. It is true that to a party whose land is acquired, a right is given to demand a reference to the Civil Court under Section 18 of the Act, when he can claim enhancement in compensation he has also the right to prefer an appeal under Section 54 of the Act, if he is aggrieved by the decision of the Court about the amount of compensation or apportionment of compensation. Both these rights are denied to the local authority or company for whose benefit the land is acquired. Section 50 of the Act merely enables such local authority or company to take part in the proceedings and also to adduce evidence. There is nothing discriminatory because the person whose land is acquired and the local authority or company for whom the land is acquired are not similarly situate. The Legislature, in its wisdom, has given the right to the former to approach the Court for enhancement of compensation. The acquisition under the Land Acquisition Act is compulsory so that the person whose land is acquired cannot decline to give the land. As soon as it is held that the land is acquired for a public purpose, the declaration is final. He is entitled merely to compensation and solatium. The position of the local authority or company, for whose benefit land is acquired, is different. If it finds that the amount of compensation determined by the Land Acquisition Officer in his award is excessive, it has the option to decline to take the land on payment of that compensation and thus render the acquisition proceeding abortive. In my opinion, therefore Section 50 of the Act is not unconstitutional. The petitioner's contention must be rejected. However, the further question that arises is whether such local authority or company cannot take recourse to the remedy under Article 226 of the Constitution. That question I shall deal with presently.

19. A preliminary objection was raised at the hearing that the Improvement Trust has no locus standi inasmuch as in the scheme of the Land Acquisition Act, the person for whom land is acquired has no right of appeal, nor any other remedy against the adjudication of the amount of compensation.

20. In proceedings under the Land Acquisition Act, where land is acquired for the purposes of a local authority or company, such local authority or company may appear and adduce evidence for the purposes of determining the amount of compensation. But such local authority or company has not been given the right to demand a reference under Section 18. It follows that such a local authority or company cannot prefer an appeal under Section 54 of the Act from an order passed by the District Court under Section 18 in case there is a reference to the Court. The reason for this rule is apparently this. Where the amount of compensation is assessed, which is not acceptable to the local au-

thority and is considered to be excessive or for any other reason it does not want to pay the amount of compensation, it is open to it to decline to take the land and thereby make the acquisition proceedings abortive. But such a choice is not available where land was acquired, possession taken and plots out of it were sold to strangers and houses have also been constructed on those plots, many years ago.

21. Provisions contained in Sec. 50 of the Land Acquisition Act do not and cannot take away the right of a party to seek redress in this court under Article 226 of the Constitution. It will, however, have to be seen whether the petitioner has locus standi to make a petition, that is to say, whether it is a "person aggrieved" within the meaning of their Lordships' decision in J. M. Desai v. Roshan Kumar, AIR 1976 SC 578 once such local authority or company is held to be a "person aggrieved" in a particular case, it cannot be deprived of the remedy under Article 226 of the Constitution which right can be taken away only by the Parliament. The settled law is that to invoke certiorari jurisdiction the petitioner should be an aggrieved person.

22. The words "person aggrieved" denote a person whose interest would be prejudiced. In Attorney General of Gambia v. N'Jie, (1961) 2 All ER 504 (511) it has been observed as follows:—

"The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busybody who is interfering in things which do not concern him; but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests."

23. Therefore, judged by the test laid down by their Lordships in J. M. Desai's case (AIR 1976 SC 578) (supra) (sic) (it must be?) held that the Town Improvement Trust is an "aggrieved person' and has locus standi. If there is no other remedy the party has the right to approach this Court for prerogative writ under Art. 226 of the Constitution. That is the residuary remedy for every injustice, unless it is taken away by a specific constitutional provision.

24. The learned counsel for the respondent placed reliance on S. Chandrojirao v. State of M. P., 1975 MPLJ 822: (AIR 1976 Madh Pra 119) Division Bench to which I was a party. In that case it was held that a new plea cannot be allowed to be raised in an appeal when it will require fresh enquiry on a question of fact. In my opinion, that case has no application here.

25. Reliance was then placed on Municipal Council Pipariya v. State of M. P., 1965 MPLJ 961. In that case the Municipal Council, Pipariya, sought for quashing a notification, under Section 6 of the Land Acquisition Act. It was held by the Division Bench that the petitioner could not be allowed to challenge the validity of the notification at that distance of time, to wit, 14 years after the notification. In paragraph 4 of that decision it was held, after referring to Sections 18 and 50 of the Land Acquisition Act, that so far as a local authority or a company is concerned, the award made by the Land Acquisition Officer is final. The Division Bench relied on two decisions— Municipal Corporation of Pabna v. Jogendra Narain, (1909) 13 Cal WN 116 and Nagpur Corporation v. Narendra Kumar, AIR 1959 Bom 297.

26. I have carefully perused both these decisions. In the Calcutta case, an appeal was preferred in proceedings under the Land Acquisition Act, 1894. All that was held was that a company or a local authority has no power to ask for a reference under Sec. 18 of the Act, neither does the Act give it the right of appeal. It was, therefore, held that the appeal of the Corporation could not be allowed. It was not a case under Art. 226 of the Constitution. So also in the Bombay case, it was an application for revision under Section 18 (3) of the Land Acquisition Act, preferred by the Corporation of the City of Nagpur. The learned single Judge dismissed that revision holding that Section 52 (2) of the Land Acquisition Act in terms controls Section 18 and takes away from the local authority the right to demand a reference under Section 18. That was also not a case under Article 226 of the Constitution. It is true that although the Division Bench in Municipal Council Pipariya's case (supra) relied on these two decisions which hold nothing about the right of the Corporation to invoke writ jurisdiction under Article 226 of the Constitution, yet there are some wide observations by the Division Bench. With utmost respect, those observations must be held to be not laying down good law, in view of their Lordships' decision

in J. M. Desai's case, (AIR 1976 SC 758) (supra).

27. I am clearly of the view that on the high authority of the Supreme Court, it will have to be determined in every individual case whether a corporation or local authority has locus standi or not, for a petition under Article 226 of the Constitution. To repeat the words of their Lordships:

"Its scope and meaning depends on diverse, variable factors such as the content and intent of the statute of which contravention is alleged, the specific circumstances of the case, the nature and extent of the petitioner's interest, and the nature and extent of the prejudice or injury suffered by him."

(Underlined by me)

28. In the present case, it will be for the Town Improvement Trust to pay the amount of compensation assessed by the Land Acquisition Officer. The liability is exclusively of the Town Improvement Trust. No one else will be required to pay that amount of compensation. In my opinion, it will be extremely hard and unjust if the Town Improvement Trust cannot be permitted to say that one lac rupees for 2 acres of land is unconscionably excessive, arbitrary and neck-breaking. When the Town Improvement Trust acquires land for housing schemes and allots plots out of that land, fixing the rate of price to be charged from the allottees necessarily depends on the estimated amount of compensation which will be appropriated. If the Corporation wants to urge that formerly the amount of compensation, which was required to be paid was 50 paise or one rupee per square yard, it cannot be denied that opportunity, inasmuch as it is not possible now to retrace the steps and give up the land.

29. On the merits, the petitioner, at the outset, referred to paragraph 32 of the award, where it is observed as follows:—

"Kewal Kramank 1 wa 4 par ankit bikree madon dwara bikrit Bhumi tatha sampadit bhumi ki sthiti men samata hai atah in do bikri madon ko hi sampadit bhumi ke bazar mulya nirdharan hetu Adhar manana upyukta pratit hota hai."

(when rendered into English);

"Only the lands sold under the sale-deeds at serial Nos. 1 and 4 are similarly situate as the lands acquired. Therefore, the assessment of the market value of the acquired land on the basis of these two sale deeds alone appears to be proper."

The Land Acquisition Officer then worked out an average and assessed the value of the land at Rs. 1.50 per sq. ft. and after deducting paise 0.50 per sq. ft. as the costs of development, he awarded compensation at the rate of rupee one per sq. ft. One of the two sale-deeds is in respect of the land situate in Ghadve-ki-Goth and the other in Mahurkar's Bada, Naya Bazar. The petitioner's contention is that the sale deed of the land situate at Gadve-ki-Goth cannot serve as the standard for assessing the market value of the land at Jinsi Nala. The two localities are far away from each other. So also, the other sale-deed is in respect of land situate at Mahurkar's Bada, Naya Bazar, which is also very far away from the land in Jinsi Nala. The respondent did not produce any evidence of sale or market value of land in the vicinity of the land acquired; for instance, in Patankar Bazar or Phalke Bazar, which are adjacent to Jinsi Nala.

30. Learned counsel for the petitioner has also laid stress on the fact that the land acquired is situate about 855 feet away from the main road, whereas the land comprised in the two sale-deeds is hardly 150 feet away from the main road. The Land Acquisition Officer overlooked these considerations, which were very significant.

31. Then, again, learned counsel for the petitioner urged that the land acquired was uneven and undeveloped, whereas the sale-deed in respect of the land situate at Gadve-ki-Goth, shows that it had been developed and there was abadi around it so that the land could be used immediately for construction of house. Likewise, the land comprised in Annexure D is situate in Mahurkar's Bada, which is in Naya Bazar, one of the most prominent and flourishing localities of Gwalior. The distance of the plot from the main road is hardly 150 feet.

32. Furthermore, on one side of the land in question, there was a Nala, to be developed. The land was uneven, about 2 feet below the level, and used for agricultural purposes only. Therefore, the assessment of the market value of the land on the basis of those lands, which comprised in two sale deeds (in

Mahurkar's Bada and Gadve-ki-Goth) was not in accordance with law; and the award of the Land Acquisition Officer is palpably erroneous and contrary to law.

33. Jugul Kishore Saran, who was examined and cross-examined before the Land Acquisition Officer, stated that the land was acquired for a housing scheme. At that time, he was on deputation with the Town Improvement Trust. The land was uneven. The land in front of the Pratap School was about 2 feet lower in level and was adjacent to a Nala. He stated that in the year 1956-57 that land near this Nala was sold at the rate between 0-6-0 to 0-8-0 annas per sq. yard so that when he prepared the scheme, he had assessed it at the rate of 0-8-0 annas per sq. yard. That was in the year 1956-57. Those were the rates prevalent for the Gwalior State Improvement Trust and also for the Gwalior Municipality. He had prepared the entire scheme. The value of trees, well and compound wall was separately assessed. The record was before him at the time of his deposition, before the Land Acquisition Officer. He further stated that the land in Mahurkar's Bada, Naya Bazar, Lashkar was much better located and is only 150 to 200 feet from the main road. The land in Ghadve-ki-Goth was much better. That land had been acquired in the year 1930-31 and then developed.

34. The burden to prove market value of the land under acquisition was on respondent No. 1. It was for him to establish with a certain amount of definiteness that his claim was wholly or partly reasonable when judged according to legal standards. This burden was not discharged by respondent No. 1.

35. For the foregoing reasons the award must be quashed. However, respondent No. 1 must be awarded compensation for his lands. And, compensation must be awarded according to the market value of the land. Now, the peculiar circumstances of the present case are that the land was acquired 19 years ago, that there is no evidence of private sale in that locality. However, fortunately, the petitioner has placed on record a detailed tabular statement (Annexure F) showing the price fetched by it on sale of plots by public auction and also the cost incurred in developing the land (Annex. E).

36. Some reference was made before us to the standards for determining compensation under Section 45 of the Gwalior State Town Improvement Act; prescribed rates were between 0-6-0 to 2-0-0 per sq. yard. It is clear that those rates could not be the basis for awarding compensation inasmuch as the present acquisition is not under the Gwalior State Town Improvement Act, 1937, but under the Indian Land Acquisition Act, 1894.

37. One of the surest standards for determining the market value of a thing is to sell it by public auction and, in the absence of any other cogent evidence which can assist the Court in determining the market value, it should serve as the only standard.

38. The Town Improvement Trust after obtaining possession of the acquired land, developed it and broke it into small plots, which plots were then put to public auction in order to get the highest price. They were accordingly sold to different purchasers who had bid at the public auction. The list of purchasers is Annexure F. The total price fetched was 55,048.09 P. The details of the expenditure incurred on the development of the land are contained in the statement Annexure E, total of which is shown as Rs. 19,035.88 P. Subtracting the latter from the former, the net amount received by the Town Improvement Trust as the value of the land acquired, is arrived at Rupees 36,002.21 P.

39. I, however, notice that per Annexure F, the Improvement Trust sold six plots to the President, Pratap Education Society, Lashkar at the "fixed rate being an Educational Institution." All these six plots (Nos. 1, 2, 15, 16, 17 and 18) were sold at the "fixed rate" of Rupees 6.87 per sq. yard. And, all the other 13 plots (Nos. 3 to 14 and 19) were sold by public auction at different rates, the total of which comes to Rs. 172.61, i.e., the average rate comes to Rs. 13.28 per sq. yard. Subtracting Rs. 6.87 the difference comes to Rs. 6.41 per sq. yard. The total area of the aforesaid plots is 1709.27 sq. yards. When this is multiplied by 6.41, the difference comes to Rs. 10,900 odd. The Town Improvement Trust may have had a special consideration for the educational institution; but while assessing compensation, the petitioner can be awarded this difference of Rs. 10,900 in addition to the above net proceeds Rs. 36,002.21.

40. The conclusions I have reached may now be summed up thus:—

(1) Section 50 of the Land Acquisition Act is not unconstitutional.

(2) The petitioner has locus standi and the remedy under Article 226 of the Constitution is available to him. This Court has jurisdiction to quash the award which is illegal and erroneous on the face of it and in disregard to the settled principles for determining compensation.

(3) As the award is based on irrelevant evidence which could not be the basis for determining the compensation, it must be quashed.

(4) The respondent No. 1 did not discharge his burden. There is no evidence of any private sale of land in that locality at the relevant time. The acquisition took place 19 years ago. The land when acquired was uneven and undeveloped. It was developed by the Improvement Trust and divided into plots which were sold by public auction and the purchasers have constructed houses on those plots. Having regard to these peculiar circumstances, it will be unjust and unnecessary to remit the case to the Land Acquisition Officer. In my opinion it will be quite reasonable and just to award the owner (respondent No. 1), as compensation the entire net amount (sale proceeds minus cost of development) received by the Town Improvement Trust together with the difference between the price calculated at the average rate fetched by auction and the price received at the fixed rate. for which plots were sold to the educational institution.

41. This petition is, therefore, allowed. The award of the Land Acquisition Officer is quashed. The net proceeds fetched by the Town Improvement Trust on sale of the plots, that is Rupees 46,902.21 shall be paid to respondent No. 1 as compensation. Parties shall bear their own costs.

ORDER (Per Shiv Dayal, C. J. and Sharma, J.):— 42. We have differed on the following questions:—

(1) Whether, on the facts and in the circumstances of this case, the Town Improvement Trust, Gwalior, has locus standi to challenge, by a petition under Article 226 of the Constitution, the award made by the Land Acquisition Officer, under the Land Acquisition Act?

(2) Whether the award of the Land Acquisition Officer must be quashed and the net proceeds fetched by the Town Improvement Trust on sale of the plots, that is Rs. 46,902.21 shall be paid to respondent No. 1 as compensation?

43. The papers shall be placed before the Chief Justice for nominating the third Judge to decide the above two questions.

OPINION

BHACHAWAT, J.:— 44. This matter has come up before this Bench, having been referred to under Chap. II, R. 11 of the High Court Rules on account of difference of opinion between Hon. the Chief Justice Shiv Dayal and Hon'ble Sharma, J.

45. The points on which they have differed and referred to this Bench are these:

1. Whether, on the facts and in the circumstances of this case. the Town Improvement Trust, Gwalior has locus standi to challenge, by a petition under Article 226 of the Constitution, the award made by the Land Acquisition Officer, under the Land Acquisition Act?

2. Whether the award of the Land Acquisition Officer must be quashed and the net proceeds fetched by the Town Improvement Trust on sale of the plots. that is, Rs. 46,902.21 shall be paid to respondent No. 1 as compensation?

46. The reference has arisen in the following manner: At the behest of the Town Improvement Trust, Gwalior (hereinafter, for short, referred to as the petitioner), the Madhya Pradesh Government initiated proceedings under the Land Acquisition Act, 1894 (hereinafter referred to as the Act) for the acquisition of an open piece of land situated in the city of Gwalior near Jinsi Nala, known as Garud Saheb Ka Bada, for the petitioner, for its housing development scheme approved by the Government and acquired it. This land is hereinafter referred to as the land in question.

47. A notification under sub-sec. (1) of S. 4 of the Act was published in the M. P. Government gazette dated 26-4-1957. A notification under S. 6 of the Act was published in the M. P. Government Gazette dated 17-5-1957. A notification dated 5-10-1957 was issued by the Collector, Gwalior under S. 9 of the Act and possession of the land in question was obtained by him and delivered to the petitioner on 29-11-1957.

48. In response to the notification under S. 9 of the Act, Shri Shahaji Rao

Angre, respondent No. 1 herein, had preferred a claim for compensation of Rs. 1,81,473.45 before the Land Acquisition Officer, Gwalior (Collector, Gwalior) respondent No. 2 herein (hereinafter referred to as respondent No. 2) and respondent No. 2 vide his award dated 27-4-1970, awarded Rs. 1,22,284.10 resting the determination of the compensation amount on two sale-deeds (1) dated 14-11-1957, which was marked as Ex. P/1 by respondent No. 2 in the proceedings before him, copy whereof is annexed to the petition and marked as Annexure 'C', and sale-deed dated 30-6-1956 which was marked as Ex. P/2 by respondent No. 2 in the proceedings before him, copy whereof is annexed to the petition and marked as Annexure 'D'.

49. Being aggrieved by the award of respondent No. 2. the petitioner filed the present petition under Article 226 of the Constitution of India seeking an appropriate writ for quashing the impugned award and for declaration that as S. 50 of the Act which deprives the petitioner of a remedy of asking for a reference under S. 18 of the Act and also of appeal under S. 54 of the Act is ultra vires and unconstitutional being discriminatory. The grounds urged inter alia, for quashing the impugned award, by the petitioner are that respondent No. 2 acted in contravention of the provisions of S. 23 of the Act in determining the amount of compensation inasmuch as it based it on the two fore-referred sale-deeds which relate to lands which are not in proximity as to time, situation, nature and character of the land is question; that the compensation should have been determined on the basis of the market price of the land in question as the date of the publication of notification under S. 4 of the Act as provided under S. 23 as amended by the State of Madhya Pradesh on the basis of its value according to its disposition on the date of publication of notification under S. 6 of the Act.

50. Respondent No. 1 while controverting the allegations in the petition, inter alia, contended that the question of the market price of the land is a disputed question of fact which cannot be gone into in writ proceedings; the petitioner is bound by the impugned award and has no locus standi to challenge it.

51. The learned Judges constituting the Bench have differed in their decision on the points quoted hereinabove. Hence the reference to this Bench.

52. Now, I proceed to deal with the fore-referred questions ad seriatim and record my opinion.

53. The question No. 1 deals with the locus standi of the petitioner to file the writ petition to challenge the impugned award by respondent No. 2. The contention of the learned counsel for the petitioner was that the land in question was acquired for the petitioner; the petitioner has to pay the amount of compensation awarded under the impugned award and, thus, it is a 'person aggrieved', and therefore competent to file the writ petition because it is not competent to ask for a reference against the impugned award under S. 18 of the Act and there is no other remedy available to it. He argued that the impugned award is in violation of the statutory provisions of the Act and there is nothing in the Act which either expressly or impliedly bars the remedy of writ, the petitioner has the locus standi to file the present petition.

54. The argument in counter of the learned counsel for respondent No. 1 was two-fold. One, the petitioner does not fall within the ken of the expression 'person interested' as defined in Section 3 (b) of the Act and the extent of participation by the petitioner in the land acquisition proceeding being defined and limited by sub-sec. (2) of Section 50, the petitioner has no locus standi to challenge the impugned award. Second, as the petitioner is admittedly not a company and it is also not a local authority, it is not competent to participate in the land acquisition proceedings even to the limited extent provided under sub-sec. (2) of Sec. 50 of the Act and, therefore, also the petitioner has no locus standi.

55. Plethora of authorities have been cited at the Bar on the question as to who can be called a 'person aggrieved' so as to have a locus standi to invoke the writ jurisdiction of the High Court under Art. 226 of the Constitution of India. I do not propose to catalogue all those authorities and shall refer only to those which are material and relevant for the decision of the point in hand.

56. A question about locus standi had arisen before the Supreme Court in J. M. Desai v. Roshan Kumar, AIR 1976 SC 578 wherein on a conspectus of various English decisions and decisions of Supreme Court, it has been held as to

who is a person aggrieved and who has a locus standi to file a writ petition under Art. 226 of the Constitution of India. Both the learned counsel have placed reliance on this decision. The relevant observations of their Lordships are as under (at p. 581).—

"12. ******This takes us to the further question: Who is an 'aggrieved person'? And what are the qualifications requisite for such a status? The expression "aggrieved person" denotes an elastic, and, to an extent, an elusive concept. It cannot be confined within the bounds of a rigid, exact and comprehensive definition. At best, its features can be described in a broad tentative manner. Its scope and meaning depends on diverse, variable factors such as the content and intent of the statute of which contravention is alleged, the specific circumstances of the case, the nature and extent of the petitioner's interest, and the nature and extent of prejudice or injury suffered by him. English Courts have sometimes put a restricted and sometimes a wide construction on the expression 'aggrieved person'. However, some general tests have been devised to ascertain whether an applicant is eligible for this category so as to have the necessary locus standi or 'standing' to invoke certiorari jurisdiction.

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36. It will be seen that in the context of locus standi to apply for a writ of certiorari, an applicant may ordinarily fall in any of these categories: (i) 'person aggrieved'; (ii) 'stranger'; (iii) busybody of meddlesome interloper. Persons in the last category are easily distinguishable from those coming under the first two categories. Such persons interfere in things which do not concern them. They masquerade as crusaders for justice. They pretend to act in the name of Pro Bono Publico, though they have no interest of the public or even of their own to protect. They indulge in the pastime of meddling with the judicial process either by force of habit or from improper motives. Often, they are actuated by a desire to win notoriety or cheap popularity; while the ulterior intent of some applicants in this category, may be no more than spoking the wheels of administration. The High Court should do well to reject the applications of such busybodies at the threshold.

37. The distinction between the first and second categories of applicants, though real, is not always well demarcated. The first category has, as it were, two concentric zones; a solid central zone of certainty, and a grey outer circle of lessening certainty in a sliding centrifugal scale, with an outermost nebulous fringe of uncertainty. Applicants falling within the central zone are those whose legal rights have been infringed. Such applicants undoubtedly, stand in the category of 'persons aggrieved'. In the grey outer circle the bounds which separate the first category from the second, intermix, interfuse and overlap increasingly in a centrifugal direction. All persons in this outer zone may not be 'persons aggrieved.'

38. To distinguish such applicants from 'strangers', among them, some broad tests may be deduced from the conspectus made above. These tests are not absolute and ultimate. Their efficacy varies according to the circumstances of the case, including the statutory context in which the matter falls to be considered. These are: Whether the applicant is a person whose legal right has been infringed? Has he suffered a legal wrong or injury in the sense, that the interest, recognised by law, has been prejudicially and directly affected by the act or omission of the authority, complained of? Is he a person who has suffered a legal grievance, a person "against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused, him something, or wrongfully affected his title to something? Has he a special and substantial grievance of his own beyond some grievance or inconvenience suffered by him in common with the rest of the public? Was he entitled to object and be heard by the authority before it took the impugned action? If so, was he prejudicially affected in the exercise of what right by the act of usurpation of jurisdiction on the part of the authority? Is the statute, in the context of which the scope of the words 'person aggrieved' is being considered, a social welfare measure designed to lay down ethical or professional standards of conduct for the community? Or is it a statute dealing with private rights of particular individuals?"

57. I shall now proceed to consider the case in hand so as to examine whether; applying the test laid down in the fore-quoted decision of their Lordships of the Supreme Court, the petitioner is

the person aggrieved so as to have a locus standi to file the present writ.

58. The land in question formed part of the quondam State of Gwalior wherein the Town Improvement Act, Gwalior State, Samvat 1974 was in force (hereinafter referred to as the Gwalior Act). On the formation of the erstwhile State of Madhya Bharat the quondam State of Gwalior merged in it. The Gwalior Act was repealed and replaced by the M. B. Town Improvement Act, 1956 (hereinafter for short, referred to as the M. B. Act). The M. B. Act was repealed and replaced by the M. P. Town Improvement Trust Act, 1960 (hereinafter referred to as the M. P. Act), vide its S. 2, which deals with repeal and savings, all acts done under the repealed Act were saved; deemed to have been done under it; and all pending matters were to be decided under the repealed Act as if it was not repealed. This position is undisputed.

59. Thus, when the proceedings for the acquisition of the land in question were initiated and it was acquired, the M. B. Act was in force and it was during the pendency of the proceedings, for determining of the compensation, before respondent No. 2 that the M. P. Act came into force. It would, therefore, be relevant to refer to the object and certain provisions of the M. B. Act. The object of the M. B. Act was "an Act to provide for the making and execution of town improvement schemes in Madhya Bharat". Section 22 of this Act provided, inter alia, "a town improvement scheme" may make provision for all or any of the following matters:

"(a) The acquisition by purchase, exchange or otherwise of any property necessary for or affected by the execution of a scheme and the sale, lease or exchange or any property comprised in the scheme."

60. Section 23 of the M. B. Act classified the various schemes to be undertaken by the Improvement Trust and one of them, classified as clause (g) in that section was "a housing accommodation scheme" and Section 55 provides; "the trust may with the previous sanction of the Government acquire land under the provisions of the Land Acquisition Act as modified by the provisions of this Act for carrying out any of the purposes of this Act". (Emphasis supplied by me).

60-A. It is undisputed that the land in question has been acquired by the Government and possession delivered to the petitioner at the behest of and for the petitioner for housing development scheme, i.e., the scheme falling in clause (g) of Section 23 of the M. B. Act quoted hereinabove.

61. The upshot of this discussion is that under Section 55, the petitioner had the right to obtain the land in question for carrying out its scheme and it was to be acquired by the Government for it in accordance with the provisions of the Act, i.e., the Land Acquisition Act and, therefore, the corresponding liability of the petitioner was to pay that amount of compensation which was to be determined according to the provisions contained in Section 23 of the Act. To express it differently, the petitioner cannot be made to pay compensation for the land in question in excess of what is required to be paid in accordance with the provisions of Sec. 23 of the Act.

62. It would be of significant relevance here to state that in the instant case, undisputedly the position is that the possession of the land in question was already delivered to the petitioner far back on 29-11-1957 which was divided into and sold in distinct plots to various persons by the petitioner.

63. Had the position not been as stated in paragraph 20 (paragraph 62 in this report—Ed.) hereinabove and assuming that there is no remedy available to the petitioner to challenge the award, there was either of the two courses left open to the petitioner on finding that the compensation awarded by respondent No. 2 is excessive and not in Sec. 23 of the Act (sic). One was not to make the payment of the compensation awarded and not to obtain the land in question; thus making the acquisition proceedings abortive and also suffering the non-fulfilment of its scheme or (2) to obtain the land in question on paying the excess amount of compensation in excess of what it was bound to pay and suffer loss of its funds. On adopting either of the courses, the petitioner would have suffered violation of its legal rights. The exercise of the first alternative would have resulted in depriving the petitioner of carrying out its statutory function of carrying out the schemes for improvement of the town. The exercise of the second alternative would have prejudicially affected its funds inasmuch as it

would have been required to pay more than what it was legally liable to pay.

64. In the facts of the instant case, the first alternative is not available to the petitioner. The only alternative available—if it is assumed that there is no remedy open to the petitioner—is to pay an amount of compensation which is not in accordance with Section 23 of the Act and is excessive and, thus, to suffer loss of its funds.

65. In the light of the aforesaid discussion contained in paragraphs 15 to 22, (paragraphs 58 to 64 in this report—Ed.) it can well be said that assuming that the situation was not as stated in paragraph 20 (paragraph 62 in this report—Ed.) hereinabove and the petitioner was in a position to exercise either of the two alternatives then on the exercise of the first alternative, its legal right to acquire the land against a price to be determined as per the statutory norms and to carry out its statutory function would have been infringed. In the event of the exercise of the second alternative, i.e., of making a payment of amount in excess of the amount, which it was liable to pay under the statute, i.e., the Act, its funds would have suffered. In other words, it would have suffered a legal wrong or injury prejudicially affecting its funds.

66. In the facts as they are in the instant case, it exercised the second alternative, it suffered a legal wrong or injury resulting in affectations of its funds.

67. In this view of the matter, it can well be said that the petitioner completely stands the test laid down in paragraph 38 of the decision of their Lordships of the Supreme Court in J. M. Desai v. Roshan Kumar (AIR 1976 SC 578) (supra) and is, thus a 'person aggrieved'. The aforesaid discussion is only for the limited question of locus standi based on the premises — without going into the merits of the allegation of the contention that the amount of compensation awarded is allegedly in violation of the provisions contained in Section 23 of the Act.

68. I shall now presently discuss the various decisions on which the learned counsel for respondent No. 1 placed much reliance and strenuously argued that the content and intent of the Act (i.e., the Land Acquisition Act) is that a local authority or company for whose benefit a land is acquired is not entitled to be impleaded as party to the proceedings under the Act; challenge an award made thereunder even by way of writ and, therefore, the petitioner has no locus standi to file the present writ.

Bhawanjibhai v. State of Madhya Pradesh (First Appeal No. 94 of 1967) Interlocutory order D/- 19-8-1974 (by a Division Bench of this Court):

In this case, in an appeal by the claimant against the award of District Court on reference under Sec. 18 of the Act, an application was filed by the Vidisha Education Society for whose benefit the land was acquired that the appeal was incompetent as the Society was not joined a party. This Court, on considering the provision of Ss. 3 (b), 18, 20 and 50 (2) of the Act, repelled the objection. The relevant observations are as under;

"12. In the light of the aforesaid provisions of the Land Acquisition Act and the decisions referred to above, the Society cannot contend that these two appeals are liable to be dismissed on the ground raised in the aforesaid two applications. However, in the light of the provisions of sub-section (2) of Sec. 50 of the Act, we permit the society to be heard in these appeals not as necessary party but because of the provisions contained in sub-section (2) of S. 50."

This case cannot be pressed into service as the question in hand was not involved in that case. The only question was whether it was necessary to implead the Society for whose benefit the land was acquired as a party to the appeal relating to award of compensation. Municipal Council, Pipariya v. State of M. P., 1965 MPLJ 961.

The Municipal Council for whose benefit the proceedings for the acquisition of the land were initiated under the Act, filed a writ seeking the relief of quashing the notice under S. 6 of the Act and also for seeking a direction, against the Land Acquisition Officer, commanding him to make a reference, under Sec. 18 of the Act, as was demanded by the Municipal Council.

The Division Bench dismissed the petition, holding that the validity of the notice could not be challenged 14 years after the issuance of the notice, and on the question of reference relying on the provisions of sub-sec. (2) of Sec. 50, it was held that in view of the specific bar of reference on the request of a local authority or company, no direction for making a reference can be given. In this decision it was observed:

"That the applicant was not entitled to demand a reference under S. 18 and has really no locus standi to question the amount of compensation awarded to the respondent No. 3 is clear from S. 50 of the Act. Sub-sec. (2) of S. 50 gives to the local authority or company only the right to appear in any proceeding before the Collector of a Court and adduce evidence for the purpose of determining the amount of compensation. The proviso to that sub-section says that no local authority or company shall be entitled to demand a reference under Section 18. It follows, therefore, that so far as a local authority or a company is concerned the award made by the Land Acquisition Officer is final. (See Municipal Corporation of Pabna v. Jogendra Narain ((1909) 13 Cal WN 116) and Nagpur Corporation v. Narendrakumar 1957 Nag LJ 547 : (AIR 1959 Bom 297).

69. The predominant question in this case was regarding the right of the local authority to ask for a reference under S. 18 of the Act and from no part of the discussion in the judgment, it appears that at any stage the question of locus standi for filing the writ under Art. 226 by a local authority on the ground that the compensation has been determined in violation of the principles laid down under S. 23 of the Act. In view of this, the observation regarding the locus standi contained in paragraph 4 of the judgment reproduced hereinabove cannot be understood to mean that the Division Bench intended to extend the net of this observation so as even to include the proceedings under Article 226.

Himalayan Tile and Marble (Pvt.) Ltd. v. Francis V. Countinho, AIR 1971 Bom 341. In this case, the appellant Company (which was respondent No. 3 in the petition out of which this appeal had arisen) for whose benefit the land was acquired, had filed the appeal against the decision of the single Judge whereby the petition of the persons challenging the proceedings for the acquisition of their land as also the award was allowed. In this appeal, an objection regarding the locus standi of the appellant Company to file the appeal was raised. This objection was allowed, holding, on the strength of provisions contained in S. 3 (b), Sections 50 and 54 of the Act that the appellant, as it did not fall within the ken of the definition of 'person interested', had no right to intermeddle with the proceedings for determination of the amount of compensation except to the extent of appearing and adducing evidence and had, therefore, no right; to ask for reference; for being impleaded as a party in the proceeding; and to appeal against the award of compensation and as a consequence of these limitations on the right of a local authority or a company under the special law, it cannot have a locus standi to challenge the award by proceedings under Art. 226 of the Constitution; more so, when the appellant being a party in the petition did not contest the proceedings and remained ex parte. The relevant observations of this case are reproduced hereinbelow (at p. 343):

"9. *** we are inclined to hold that there is much substance in the objection which is entitled to succeed and it is clear upon the authorities that the party for whom acquisition is being undertaken has no locus standi whatever except as provided in Section 50, sub-section (2) to intermeddle with the acquisition proceedings or to claim to set aside the award under Sec. 18. Therefore, such a party would not be entitled to challenge the same proceedings indirectly in a writ petition.

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13. If then such is the position of the party for whom acquisition proceedings are undertaken, under the terms of the Special Law dealing with acquisitions a question arises, can the selfsame party be permitted to challenge or meet the challenge to an award in the proceedings taken under our constitutional powers but virtually challenging the acquisition proceedings and the award? We think that we would be doing violence to the provisions of the Land Acquisition Act if we were to permit the self-same party to challenge an award, in the proceedings under Art. 226 of the Constitution, which would virtually amount to challenging the acquisition proceedings and the award, for though no doubt these proceedings taken under our constitutional powers are independent proceedings, nonetheless it is an accepted principle that such proceedings must be determined in accordance with the law and especially so is the case where there is a special Act making special provisions upon a special subject such as land acquisition.

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20. We may also say that there are other strong reasons why the 3rd respondent would have no right to file and pursue the present appeal. As we have already said they took no part in the writ petition at all. They were made a party though they were not a necessary party probably because they were given the right to adduce evidence and assist the Government under Sec. 50 (2). Thus they certainly had an opportunity to contest these proceedings but they did not do so and remained ex parte.

The real party and upon the authorities the only party who is interested in the land acquisition proceedings namely the Government does not choose to file an appeal. In fact counsel on their behalf categorically stated before us that they did not wish to urge anything in appeal and would abide by the orders of the Court. That was their attitude also before the learned single Judge, and for a very good reason. They had realised that the acquisition and the award must be set aside having regard to the second Arora case. The petitioners in the petition were substantially challenging the notices and the notifications under S. 4, S. 6 and S. 12 of the Act. None of these notices were served upon the 3rd respondents nor were they at all connected with them. In the petition itself no relief has been asked for against the 3rd respondents. Whatever reliefs have been asked for are against the 1st and the 2nd respondents. We cannot, therefore, understand how under these circumstances the 3rd respondents can claim that they have a right of appeal. They are taking advantage of the fact that they have been made a party to the petition, to prefer this appeal. Under the circumstances, we hold that the appellants have no right of appeal and no locus standi to prefer the appeal."

70. It is clear from the aforesaid observations that the predominant reason that prevailed with the Judges in the aforesaid decision was that the Act is a special Act wherein the extent of participation by a local authority for a company has been defined in S. 50 of the Act according to which as it is not entitled to be impleaded as a party, it cannot be permitted to challenge the proceedings and the award. Here, it would be pertinent to quote with advantage the following observations from the decision in J. M. Desai v. Roshan Kumar (AIR 1976 SC 578) (supra):

"33. This Court has laid down in a number of decisions that in order to have the locus standi to invoke the extraordinary jurisdiction under Art. 226, an applicant should ordinarily be one who has a personal or individual right is the subject-matter of the application, though in the case of some of the writs like habeas corpus or quo warranto this rule is relaxed or modified. In other words, as a general rule, infringement of some legal right or prejudice to some legal interest inhering in the petitioner is necesary to give him a locus standi in the matter— (See State of Orissa v. Madan Gopal, 1952 SCR 28 : (AIR 1952 SC 12); Calcutta Gas Co. v. State of West Bengal, (1962) Supp 3 SCR 1 : (AIR 1962 SC 1044); Rani Umeshwari Suthoo v. Member, Board of Revenue, Orissa, (1967) 1 SCR 413, Gadda Venkateshwara Rao v. Govt. of Andhra Pradesh, AIR 1966 SC 828; State of Orissa v. Rajasaheb Chandanmall, AIR 1972 SC 2112; Dr. Satyanarayana Sinha v. M/s. S. Lal & Co. (P) Ltd. AIR 1973 SC 2720).

34. The expression 'ordinarily' indicates that this is not a cast iron rule. It is flexible enough to take in those cases where the applicant has been prejudicially affected by an act or omission of an authority, even though he has no proprietary or even a fiduciary interest in the subject-matter. That apart, in exceptional cases even a stranger or a person who was not a party to the proceedings before the authority, but has a substantial and genuine interest in the subject-matter of the proceedings will be covered by this rule. The principles enunciated in the English cases noticed above, are not inconsistent with it." (Underlining mine).

From the aforesaid observations, it is evident that even a person who was not a party before the authority is competent to file a writ provided it has a substantial and genuine interest in the subject-matter. According to S. 50 of the Act, the petitioner is not a complete stranger, it has to bear the legal burden of the compensation for acquisition.

It would also be of significant relevance to point out that when their Lordships of the Bombay High Court have observed that the proceedings taken under constitutional powers are independent proceedings, I must say with due respect, I am unable to persuade myself to subscribe to the view that the limita-

tions regarding the participation in the proceedings under the Act can be superimposed to the proceedings for invoking the extraordinary jurisdiction of this Court under the Constitution. It is trite law that Art. 226 of the Constitution confers jurisdiction on the High Court to issue writs to keep all tribunals, including, in inappropriate cases, the Government within its bounds. It would also be significant relevance to state here that when the Act was enacted, Constitution was not in force. Hence, it is difficult to comprehend that the content and intent of the Act was to deprive the local authority of the extraordinary remedy under Art. 226 also.

70-A. The definitions of the words given in S. 3 of the Act are prefaced by the expression " in this Act, unless there is something repugnant in the subject or context" indicates that prima facie that definition governs wherever that words are used in the body of the Statute and that too subject to the qualification that there is nothing repugnant in the subject or context. Further, the expression 'person interested' defined in S. 3 (b) of the Act having been declared to include such person, it has to be construed as comprehending the persons declared by the definition in addition to persons signifiable by its nature and import. In other words, the interpretation of the expression 'person interested' in the Act is not the whole of the meaning of the words 'persons interested'. In view of this, the definition of 'person interested' given in the Act cannot be interpreted to exclude petitioner who also has to bear the burden of the compensation. Support for this view can be drawn from a decision of their Lordships of the Supreme Court in Punjabi University v. A. S. Ganesh (AIR 1972 SC 1973). In this case, the land was acquired for the Punjabi University and an appeal, against the enhanced compensation by the Court on reference under S. 18, was filed by the Punjabi University and the State Government of Punjab. The appeal was filed beyond time and a prayer for condonation of delay in filing the appeal was made on the ground that the Registrar of the University had committed a bona fide mistake in calculating the period. The prayer for condonation was opposed on the ground that the mistake in calculation of the period by the Registrar of the University could not be a ground for condonation of delay as the University had no right to file the appeal. Primarily, the State Government has the right to file the appeal. The High Court accepted the objection and refused to condone the delay. The Supreme Court in special appeal condoned the delay holding as under (at 1975):

"It may be noted that the party which was essentially interested in filing the appeal was the Punjabi University. It had to pay the compensation for the lands acquired. Therefore, there was nothing surprising if the Government had left the matters in the hands of the Punjabi University. The Punjab Government was only fighting the case for the benefit of Punjabi University.

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5. It was urged on behalf of the respondent that the Punjab Government cannot take advantage of the mistake committed by Mr. Atma Ram.

It has not given any explanation of its own for not filing the appeal within time. This contention does not appeal to us. As mentioned earlier, Punjab Government had evidently left the matters in the hands of the Punjabi University which was the party really interested. It depended entirely on the Punjabi University. We see no reason why that course should be found to be improper." (Emphasis mine).

71. The learned counsel for respondent No. 1 relying on the following observations of the decision of the High Court of Andhra Pradesh in Andhra Pradesh Agricultural University v. B. Gangaram, AIR 1974 Andh Pra 299 (at p. 302):

"6. Sri P. Babulu Reddy, learned counsel for the Agricultural University, relied on the decision of the Supreme Court in Punjabi University v. A. S. Ganesh, AIR 1972 SC 1973. That was a case in which an appeal was filed against an award of the Court jointly by the Punjab Government and the Punjabi University. There was some delay in filing the appeal. The delay was sought to be explained on the ground that there was some miscalculation by the Registrar of the Punjabi University. The Punjab High Court held that right to file the appeal was primarily that of the Punjab Government and since the miscalculation was by the Registrar of the University there was no sufficient reason for condoning the delay in filing the appeal. The Supreme Court observed

that since the land was acquired for the benefit of the Punjabi University and since it was the University that was nothing surprising if the Government had left the matters in the hands of the Registrar of the University. The miscalculation made by the Registrar was, therefore, sufficient ground to condone the delay. I do not see how this case would possibly help Mr. P. Babulu Reddy. The learned Judges were merly considering the question whether there was sufficient reasons to condone the delay in the filing of the appeal by the Punjab Government. To the extent that it goes the decision is against Mr. Babulu Reddy. The Supreme Court did not say that the Punjabi University had the right to appeal and, therefore, the miscalculation made by the Registrar was sufficient reason to condone the delay. What they said was that the Punjab Government was justified in placing the matter in the hands of the Registrar of the Punjabi University and in that view, there was sufficient reason to condone the delay."

contended that the decision of the Supreme Court in Punjabi University v. A. S. Ganesh (supra) is distinguishable. The distinction made by the High Court of Andhra Pradesh is of no consequence for the present case. The Andhra Pradesh High Court was essentially considering the question of right of appeal by the local authority or a Company and it did not consider the important observation: "The party which was essentially interested in filing the appeal was the Punjabi University. It had to pay the compensation for the land acquired" of the Supreme Court which has a material bearing on the decision of the point in controversy in the instant case. The ratio of the Supreme Court decision is that the party for whose benefit the land is acquired and which has to bear the burden of compensation is a party interested.

72. It is undisputable that the local authority, for whose benefit the land is acquired has no right to ask for a reference under S. 18 against the award given by the Collector and there is no other remedy provided in the Act for the local authority to prevent a tribunal or an authority under the Act from exceeding bounds of statute or to get redress against its acts done in violation of or exceeding the bounds of the statute. As already discussed hereinabove, the petitioner had a legal right to obtain the land by acquisition under the Act against payment of a price determinable according to the provisions contained in Section 23 of the Act. If the view canvassed by the learned counsel for respondent No. 1 that the petitioner has no right to challenge the award is accepted, it would mean that though the petitioner has a legal right, it has no remedy and it has to suffer a legal wrong or an injury. At this stage, one has to recall to memory the well known maxim ubi remedium ibi jus, i.e. whenever there is a right, there should also be an action for its enforcement. It, therefore, can never be thought of that even when an award is in violation of the statutory provision, it cannot be challenged.

73. Apart from the discussion made hereinabove, distinguishing the authorities referred to in paragraphs 26 and 27 (paragraphs 68 and 69 in this report — Ed.) relied upon by the learned counsel for respondent No. 1, those authorities, with utmost respect, I may say, do not hold the field on the question of locus standi in view of the decision of their Lordships of the Supreme Court in J. M. Desai v. Roshankumar (AIR 1976 SC 578) (supra).

74. Now turning to the second aspect of the argument of the learned counsel for the respondent on the question of locus standi which was that the petitioner is neither a local authority nor a company and as such, it has not even a right to participate in the proceeding even to the extent provided in sub-sec. (2) of S. 50 of the Act. It would suffice to say that without going into the question whether the petitioner is a local authority or not, for the reasons already stated hereinabove in detail in the foregoing paragraphs of my opinion, when it has been found that the petitioner is a person aggrieved, it has a locus standi irrespective of the fact whether it is or is not a local authority. Further on the perusal of the respective orders of both the Hon'ble Judges, it appears that the case was argued on the premises that the petitioner is a body covered under S. 50 of the Act.

75. Now, I turn to the question whether in the instant case, there is a violation of the statutory requirements under Ss. 23 and 24 of the Act regarding the determination of amount of compensation. This part of discussion is relevant answer to question No. 1 as well as to question No. 2.

76. Section 15 of the Act enjoins upon the Collector Land Acquisition Officer to be guided by the provisions contained in Secs. 23 and 24 of the Act in determining the amount of compensation. Sections 23 and 24 lay down the principle as to how the compensation has to be determined. The principle for determining the market price has been discussed and interpreted in various decisions of their Lordships of the Supreme Court. It is not necessary to catalogue all those authorities. I would prefer to refer to two of the authorities of the Supreme Court (i) State of Gujarat v. Vakhatsinghji (AIR 1968 SC 1481), (ii) Tribeni Devi v. Collector, Ranchi (AIR 1972 SC 1417). The principles laid down in these two decisions are summed in the respective head notes which are reproduced hereinbelow:

AIR 1968 SC 1481 (at pp. 1487-1488):

"In the case of land the market value is generally ascertained on a consideration of the prices obtained by sale of adjacent lands with similar advantages. Where there are no sales of comparable lands, the value must be found in some other way. One method is to take the annual income which the owner is expected to obtain from the land and to capitalise it by a number of years purchase. The capitalised value is then taken as the market value which a willing vendor might reasonably expect to obtain from a willing buyer. In some special cases awards have been given on the reinstatement value which is assessed according to the cost of acquiring an equally convenient land or premises. This method should not be adopted where the market value deduced from the income derived from the lands would fairly compensate the owner and in no case can reinstatement value be given unless reinstatement in some other place is bona fide intended."

AIR 1972 SC 1417:

"The compensation payable to the owner of the land is the market value which is determined by reference to the price which a seller might reasonably expect to obtain from a willing purchaser, but as this may not be possible to ascertain with any amount of precision, the authority charged with the duty to award compensation is bound to make an estimate judged by an objective standard, the land acquired has therefore, to be valued not only with reference to its condition at the time of the declaration under S. 4 of the Act but its potential value also must be taken into account. The sale deeds of the lands situated in the vicinity and the comparable benefits and advantages which they have, furnish a rough and ready method of computing the market value. This, however, is not the only method. The rent which an owner was actually receiving at the relevant point of time or the rent which the neighbouring lands of similar nature are fetching can be taken into account by capitalising the rent which according to the present prevailing rate of interest is 20 times the annual rent. But this also is not a conclusive method. The methods of valuation to be adopted in ascertaining the market value of the land on the date of the notification under S. 4 (1) are: (i) opinion of experts, (ii) the price paid within a reasonable time in bona fide transaction of purchase of the lands acquired or the lands adjacent to the lands acquired and possessing similar advantages, (iii) a number of years' purchase of the actual or immediately prospective profits of the lands acquired. These methods, however, do not preclude the Court from taking any other special circumstances into consideration, the requirement being always to arrive as near as possible at an estimate of the market value. In arriving at a reasonably correct market value, it may be necessary to take even two or all of those methods into account inasmuch as the exact valuation is not always possible as no two lands may be the same either in respect of the situation or the extent or the potentiality nor is it possible in all cases to have reliable material from which that valuation can be accurately determined. AIR 1959 SC 429, Followed.

Held on facts that the High Court was not justified in adopting the registered sale-deed of a land which is further away not only from the land acquired but from the town. Held further that High Court was not justified in giving 10% towards potential value because that element was inherent in the fixation of the market value of the land and could not be assessed separately. It was also held that the High Court was not justified in disallowing 5% as compensation for severance merely because there was an entrance to the land. When a portion of the land is acquired

and a large portion left out there would be a diminution in the value of the land that is left out for which some compensation has to be allowed. 1966 BLJR 834, Reversed on facts."

It may be mentioned here that the learned counsel for the petitioner conceded that the amended provision of S. 23 of the Act as amended by the State of Madhya Pradesh does not apply to the instant case. In the instant case, respondent No. 2 has rested his determination of compensation on Annexures 'C' and 'D' (Exs. P/1 and P/2) treating them to be the land adjacent to the land in question and having same advantages. To quote:

"Kewal Kramank Do aur Char par ankit bikri patro dwara vikrit Bhumi tatha sampadit Bhumi ki sthiti me samanata hai. Atah in Do Bikri Patro ko is sampadit Bhumi ke Bajar Mulya Nirdharan hetu adhar manana pratit hota hai.....

..... Uper diya nirnaya ke anusar in prakaron me nirdharan hetu Ex P1 wa P2 Bikri Patroko hi adhar mana ja sakta hai."

But, as would be apparent from the discussion contained in the opinion recorded by the Hon'ble the Chief Justice especially paragraphs 16 to 21 (paragraphs 28 to 33 in this report—Ed.) of his opinion, which is duly supported by the material on record, the lands covered in these two sale-deeds, namely (Annexures 'C' and 'D' Exs. P/1 and P/2) are not only adjacent to the land in question, but are also not comparable with regard to the advantages. This being the situation, it can unhesitatingly be said that respondent No. 2 has acted in violation of the provisions contained in Ss. 23 and 24 of the Act in giving the impugned award. It is true that in a writ jurisdiction, this Court does not interfere in a finding of fact recorded by a Tribunal. But, law is trite on the point that if a finding of fact is based on no evidence, that would be regaderd as an error of law which can be corrected by a writ of certiorari. If any case law is needed on this question, reference can be made to State of Orissa v. Murlidhar (AIR 1963 SC 404), Syed Yakoob v. Radhakrishnan (AIR 1964 SC 477) and Tribhuban Parkash v. Union of India (AIR 1970 SC 540).

77. The cumulative effect of the foregoing discussion is that the petitioner has a locus standi to file the present writ petition challenging the impugned award (Annexure 'B').

78. I would now revert to the consideration of question No. 2.

79. The question No. 2, for convenience has to be split in two parts as below: (a) whether the award of the Land Acquisition Officer must be quashed, and (b) whether net proceeds fetched by the Town Improvement Trust on sale of the plots i.e. Rs. 46,902.21 shall be paid to respondent No. 1 as compensation. I would proceed to discuss these two parts ad seriatim.

80. The answer to the first part need not detain me much as in the light of the discussion while considering question No. 1, the considered answer is that the impugned award (Annexure 'B') by the Land Acquisition Officer should be quashed. I now revert to the consideration of the second part. The answer to this part involves the power of this Court in its writ jurisdiction to quash the award of respondent No. 2 and to substitute it by its award. In the light of the view that I am taking, it is not necessary to go into this question of the competency of this Court.

81. Under S. 18 of the Act, the claimant whose land is acquired, if he feels that the amount awarded is inadequate, has a right not to accept it and demand a reference to Court for enhancement. The claimant, has a further right of appeal to this Court if he is aggrieved by the award of the Court also. In case this Court, while quashing the award of respondent No. 2, substitutes its own, a very anomalous situation would arise. The question would be whether after the award by this Court, though in its writ jurisdiction, a reference would lay. This apart, at any rate, even assuming that the award of this Court in these proceedings would not bar the right of reference, still the referee Court which is certainly subordinate to this Court would be in an embarrassing position, in view of the substitution of the award by this Court, and the possibility of its not giving its independent judgment cannot be eradicated. This would result in great injustice to respondent No. 1. In this view of the matter, this Court cannot, while quashing the award by respondent No. 2, substitute its own award and the matter should be remitted back to respondent No. 2 to redetermine the amount of compensation from the material on record bearing in mind

the principles laid down by their Lordships of the Supreme Court referred to hereinabove, for determining the market value under S. 23 of the Act. It may be that the price obtained by the petitioner at an auction sale of the plots of lands in question, may be a good means of ascertaining what the thing is worth, viz., its fair market price, because auction is a proceeding at which people are invited to compete for the purchase of a property by successive offers; but this is a matter for respondent No. 2 to consider and arrive at his own independent judgment.

82. In the result, my answers to the questions referred to me are as under:—

Question: Whether, on the facts and in the circumstances of this case, the Town Improvement Trust, Gwalior has locus standi to challenge, by a petition under Article 226 of the Constitution, the award made by the Land Acquisition Officer under the Land Acquisition Act?

Answer: In the facts and circumstances of this case, the Town Improvement Trust, Gwalior has the locus standi to challenge, by a petition under Article 226 of the Constitution, the award made by the Land Acquisition Officer, under the Land Acquisition Act.

Question: Whether the award of the Land Acquisition Officer must be quashed and the net proceeds fetched by the Town Improvement Trust on sale of the plots, that is, Rs. 46,902.21 shall be paid to respondent No. 1 as compensation?

Answer: The award dated 27-4-1970 of the Land Acquisition Officer must be quashed; the award of Rs. 46,902.21 should not be substituted in its place by this Court, but the matter should be remitted to the Land Acquisition Officer for redetermining the amount of compensation from the material already on record in the light of the observations made in this opinion.

83. In the result, the case be returned back to the referring Division Bench with my aforesaid opinion for its final decision according to clause 26 of the Letters Patent.

FINAL ORDER (Per Shiv Dayal C. J. and Sharma, J.):— 84. In accordance with the opinion of the third Judge, the petition is allowed. The award dated April 27, 1970, of the Land Acquisition Officer is quashed. The matter shall be remitted to the Land Acquisition Officer for redetermining the amount of compensation on the material already on record, in the light of the observation made in the opinion of the third Judge. Parties shall bear their own costs. The amount of security shall be refunded to the petitioner.

Petition allowed.

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A. P. SEN, C. J. AND K. K. DUBEY, J.

Ramaniwas Singh and others, Appellants v. Sheomangal Prasad, Respondent.

Letters Patent Appeal No. 9 of 1971, D/- 6-5-1978.*

(A) Vindhya Pradesh Abolition of Jagirs and Land Reforms Act (11 of 1952), S. 22 — Scheme of section indicated.

The scheme underlying S. 22 is that the Jagirdar should first be allotted all sir and khudkasht land wihich he had been personally cultivating for a continuous period of three years before resumption. This allotment is not subject to any restriction of area. If, however, there is no such land or not enough land of this category, then under sub-sec. (2), the Jagirdar is entitled to be allotted "any other sir or khudkasht land in his personal cultivation at the date of resumption". The allotment under this sub-section is subject to the ceiling placed in the Explanation. (Para 15)

(B) Vindhya Pradesh Abolition of Jagirs and Land Reforms Act (11 of 1952), S. 22 (1) — Interpretation of — Expression "which he was cultivating personally" qualifies both Sir and Khudkasht land and not only Khudkasht land after which it occurs in S. 22 (1) — M. P. No. 288 of 1958, D/- 16-10-1959 (Madh Pra) and AIR 1956 Vindh Pra 12. Foll. (Para 16)

(C) Vindhya Pradesh Abolition of Jagirs and Land Reforms Act (11 of 1952), Ss. 2 (f), 6 (1) (g) and 22 (1) — Expression 'personal cultivation' in Section 22 (1) — Interpretation of — M. P. Government Order No. 2086/28/XXVIII-58, D/- 3-4-1958 — Administrative instruction under if ultra vires State Government under S. 22 (1).

*(Against judgment of Bishambhar Dayal. C. J. in Second Appeal No. 115 of 1966, D/- 14-4-1971.)

GV/HV/D55/78/KSB

It is wrong to assume that the expression 'personal cultivation' in S. 22 (1) can bear no other meaning than the one given in Sec. 2 (f) in all circumstances overlooking the opening words of S. 2 'unless the context otherwise requires'. In case of a mortgage with possession, which by virtue of S. 6 (1) (g). is substituted by a simple mortgage, the cultivation by the mortgagee in possession must, in law, be regarded as personal cultivation by the mortgagor. The Act is silent with respect to this and. therefore, there was nothing wrong in the Government taking a policy decision in the matter. AIR 1967 SC 1910. Ref. to. (Para 18)

The Legislature while enacting the law, obviously overlooked the fact that some part of the home-farm of the Jagirdar may not be in his actual cultivation but be with a mortgagee with possession. It is true that the Government cannot by an executive order enlarge the meaning of the expression 'land under personal cultivation' as defined in S. 2 (f) of the Act. Nevertheless, it necessarily has the power to issue necessary directions in that behalf, if the expression 'personal cultivation' as defined in S. 2 (f) cannot have that meaning in the context of a usufructuary mortgage, i.e.. if the context otherwise requires. AIR 1971 SC 77, Rel. on. (Para 19)

(D) Vindhya Pradesh Abolition of Jagirs and Land Reforms Act (11 of 1952), Ss. 37 (2) and 22 — Bar to jurisdiction of Civil Court — Order of allotment under S. 22 in favour of plaintiff — Not open to collateral attack by a plea in defence. S. A. No. 115 of 1966. D/- 14-4-1971 (Madh Pra), Reversed. (Civil P. C. (1908). S. 9).

The bar created by S. 37 (2) of the Act does not apply to an order which is a nullity. But when the order of allotment passed by the Tahsildar under S. 22 (1) of the Act is not a nullity, the bar under S. 37 is attracted and an order of such a nature is not even open to a collateral attack by a plea in defence. S. A. No. 115 of 1966, D/- 14-4-1971 (Madh Pra), Reversed; AIR 1970 Madh Pra 91. Rel. on; AIR 1968 SC 169 and AIR 1969 SC 78, Ref. to. (Paras 23, 24)

Anno: AIR Comm. C.P.C. (1976), (9th Edn.), S. 9 Notes 51 and 53.

Cases Referred: Chronological Paras

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(1959) M. P. No. 288 of 1958, D/- 16-10-1959 (Madh Pra) 16
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B. C. Verma with S. S. Jha, for Appellants; R. P. Pande, for Respondent.

A. P. SEN, C. J.:— This appeal under Cl. X of the Letters Patent by the plaintiff is directed against a judgment of Bishambhar Dayal, C. J., dated 14-4-1971, affirming the judgment and decree of the 2nd Addl. District Judge, Satna, dated 11-11-1965, setting aside the judgment and decree of the Civil Judge, Class II, Satna, dated 17-4-1961, and dismissing the plaintiff's suit based on title for possession, of sir lands bearing khasra No. 332, area 11-64 acres, and khasra No. 551, area 0.60 acre, total area 12.24 acres, situate in village Dengrahat.

2. The plaintiff, Lal Rangnath Singh was the ex-Jagirdar of Dengrahat in the erstwhile State of Vindhya Pradesh. He created a usufructuary mortgage of the suit lands by executing a registered mortgage-deed, dated 10-5-1951, in favour of the defendant, Sheo Mangal Prasad, to secure a loan of Rs. 1.800. The Jagir was resumed by the then State Government of Vindhya Pradesh under the provisions of the Vindhya Pradesh Abolition of Jagirs and Land Reforms Act, 1952, w.e.f. 1-1-1954. By virtue of S. 6 (1) (a) of the Act, as from the date of resumption. the right, title and interest of the plaintiff in the Jagir lands stood resumed to the State Government free from all encumbrances. Under cl. (g) thereof. the usufructuary mortgage was substituted by a simple mortgage and the defendant who was a mortgagee in possession ceased to have any right to possess the land. On 6-4-1958, the defendant consequently brought a suit for recovery of Rs. 2,074 on the basis of the registered mortgage-deed, being the amount due towards the principal amount and interest thereon.

While this suit was pending, the plaintiff on 2-8-1958 made an application for allotment of the disputed sir lands under S. 22 of the Act.

3. The State Government in the Land Reforms Department by its order. dated 3-4-1958. issued the following direction:

"GOVT. OF MADHYA PRADESH
LAND REFORMS DEPARTMENT

No. 2086/28/XXVIII-58 Bhopal,
dated 3-4-58,

To

The Director of Land Reforms,
Madhya Pradesh, Rewa.

Subject:— Settlement of mortgaged Jagir land in the possession of mortgagee.

Ref:— Your Memo No. 964/62 dated the 25th May. 57.

Under S. 6 (g) (i) of the Vindhya Pradesh Abolition of Jagirs and Land Reforms Act. 1952, a mortgagee in possession of a Jagir, such land or part thereof ceases to have any right to possess such land or part thereof, and such mortgage with possession shall to the extent of the amount of security on the Jagir land and part thereof be deemed to have been substituted by simple mortgage. Government have decided that the said land should be settled with the Jagirdar as if it was under his cultivation.

By order of the Governor
Madhya Pradesh
Sd/- M. P. Singh,
Under Secretary to Govt. M. P.
Land Reforms Deptt. Bhopal."

4. Pursuant to the orders of the Government, the Tahsildar. Raghuraj Nagar, by his order dated 28-4-1958 allotted the sir lands to the plaintiff. In appeal, the Collector, Satna. by his order dated 30-3-1959, upheld the order of allotment. Thereupon, on 18-7-1959 the defendant moved this Court under Art. 226 of the Constitution challenging the order of allotment being Miscellaneous Petition No. 159 of 1959, Sheo Mangal Prasad v. Lal Rang Nath Singh. The allotment was challenged on the ground that the plaintiff not being in personal cultivation of the disputed lands on the date of resumption of Jagir, i.e., on 1-1-1954, within the meaning of the expression 'personal cultivation' as defined in S. 2 (f), he could not derive any right of allotment under S. 22 of the Act. The order of allotment was also assailed on the ground that the Government could not by its order override the provisions of S. 22; nor could the Government in the guise of interpretation provide that cultivation by a usufructuary mortgagee should be deemed to be personal cultivation by the Jagirdar. It was, therefore, urged that the Government order was a nullity in all respects and, therefore. the Tahsildar and the Collector, acting under the said Government order, could not have made the allotment in question and their orders were not only contrary to law but also without jurisdiction. The writ petition was fully argued and the case was closed for judgment. The Court, however, permitted the defendant to withdraw the petition. by its order, dated 13-1-1960, stating that the prayer for withdrawal came while the judgment was about to be delivered.

5. The Additional District Judge, Satna. by his judgment in Civil Appeal No. 18-B of 1960, dated 23-11-1960, decreed the defendant's claim for recovery of Rs. 2,074 on the foot of the mortgage.

6. It is common ground that the plaintiff Lal Rangnath Singh. ex-Jagirdar of Dengrahat, was not actually cultivating the sir lands in dispute on the date of resumption. It is also not in dispute that the defendant who was a mortgagee in possession, ceased to have any right or interest in the suit lands mortgaged on resumption of the Jagir. It is further accepted that S. 28 of the Act does not entitle the defendant with any right to allotment of the land and he is, therefore, nothing but a trespasser. It is also not denied that the plaintiff has redeemed the mortgage by paying off Rs. 2,074 in execution of the decree passed by the Additional District Judge, Satna. in Civil Appeal No. 18-B of 1960, dated 23-11-1960.

7. The learned trial Judge in the course of his well-written judgment held that the defendant ceased to have any right to possess the suit lands from the date of resumption under the Act. The consequences of resumption of Jagir lands mentioned in S. 6 (1) (g) are with the rider 'save as otherwise provided in this Act', but according to him there is no 'otherwise' provision so far as the right of the mortgagee to possess the land is concerned. Relying upon the decision of the High Court in Yeshwant Singh v. Rajendra Bahadur. M. P. No. 278 of 1959, D/- 16-12-1960 (Madh Pra), he further held that usufructuary mort-

gage being substituted by simple mortgage under S. 6 (1) (g) of the Act, the mortgagor binds himself to pay to the mortgagee the mortgage money and, in default, the mortgagee has a right to get the motrgagor's property sold and proceeds of the sale applied towards payment of the mortgage debt. Hence the result is that the mortgagee's position is that of a creditor and so the outgoing proprietor must be deemed to be in possession of the mortgaged property, unless the land is otherwise liable to vest in the State.

He further observed, stating—

"The plaintiff is entitled to get back the suit bandh as the defendant had got decree for the principal mortgage money and interest thereon amounting to Rupees 2,074 against the plaintiff vide Ex. P-6. This he can now recover any time. Hence now the defendant cannot get both the bandh and the mortgage money. As the defendant has got the mortgage money so he cannot get the bandh. Hence the plaintiff is entitled to get back the suit bandh."

The learned trial Judge was of the view that S. 28 (4) of the Act does not help the defendant. Lastly, he was of the view that the matter of allotment of sir lands to the plaintiff under S. 22 was required to be dealt with and decided under the Act by the Tahsildar and in appeal, by the Collector and, therefore, the jurisdiction of the Civil Court was barred under S. 37.

8. In appeal, the learned Additional District Judge tried to distinguish the decision of the High Court in Yeshwant Singh v. Rajendra Bahadur (supra) and held that the plaintiff not being in personal cultivation of the sir lands in dispute for a continuous period of three years immediately preceding the date of resumption, the lands could not be allotted to him under Section 22 and, therefore, the bar of S. 37 would not apply.

9. The learned Chief Justice construing the two sub-sections of S. 22, held that the requirement of personal cultivation of sub-sec. (1) of S. 22 qualify both 'sir and khudkasht' and that the expression 'any other sir land' in sub-sec. (2) means other than those sir lands mentioned in sub-sec. (1), viz., not in personal cultivation of the Jagirdar. He, therefore, negatived the contention that the words 'all sir' occurring in S. 22 (1) were independent of and do not depend on the adjectival clause 'which he was cultivating personally etc.'. He also rejected the contention that if that meaning was taken to be correct, then S. 26 is absolutely redundant. Inasmuch as it deals with sir land which is under cultivation of a tenant and when allotted to a Jagirdar, has the effect of conferring on the tenant the status of a sub-tenant. In his view, such land can be allotted in favour of a Jagirdar under cl. (c) of sub-sec. (2) to make up the minimum area and consequently it does not appear that S. 26 is redundant.

10. The learned Chief Justice, accordingly, held that the allotment of the sir lands in dispute in favour of the plaintiff was invalid since he was not cultivating the same personally for a continuous period of three years, preceding the date of resumption. He further held that when the Tahsildar was given power only to allot land of a particular description, and he allots land other than covered by the provisions of sub-sec. (1) of S. 22, but under the direction issued by the State Government, he assumes jurisdiction by wrongly deciding a jurisdictional fact and the order of allotment being a nullity the bar of S. 37 of the Act did not apply.

11. Shri B. C. Verma, appearing for the appellant, has advanced a two-fold contention. The first submission is that the words 'which he was cultivating personally etc.' in sub-sec. (1) of S. 22 qualify only 'khudkasht lands' and not 'sir lands'. In other words, it is said that sir lands can be allotted to the Jagirdar under S. 22 (1) irrespective of the fact whether it was being cultivated personally by him or not. The second submission is that once an allotment was made in favour of the plaintiff under S. 22 (1) of the Act, the order of allotment was not open to collateral attack. It was urged that the jurisdiction of the Civil Court was barred under S. 37 and the defendant being nothing but a rank trespasser was not entitled to set up a plea of jus tertii.

12. Shri Ramayan Prasad Pandey, learned counsel for the respondent, on the other hand, contends that the words 'which he was cultivating personally' qualify both 'sir and khudkasht' and it was necessary that both types of land should be in personal cultivation of the Jagirdar before they could be allotted. He further contends that the allotment

of the land in favour of the plaintiff under S. 22 (1) of the Act was not an allotment under the Act but under the executive instructions of the Government. This was ultra vires the State Government because they could not enlarge the meaning of the expression 'personal cultivation' as defined in S. 2 (f) of the Act. He contended that an allotment of sir or khudkasht land must be in conformity with S. 22. In the instant case, it is not so on the face of it and, therefore, the order of allotment was a nullity. It is not sanctioned by law and was in excess of jurisdiction and can always be shown to be so. According to him, the bar of S. 37 of the Act is, therefore, not attracted. He further urged that even though the defendant was not entitled to an allotment of the land under S. 28. he became a gair haqdar tenant under S. 57 of the Rewa Land Revenue and Tenancy Code, 1935 and, therefore, could not be evicted except under S. 132 (c) of the Code. In support of the contention, he relies upon the definition of 'tenant' as contained in S. 4 of the Code. He further contends that S. 134 thereof has no application because it deals with a Kothar tenant, viz., a tenant of the Darbar.

13. In Guru Narayanprasad v. Pt. Kedarnath Vishweshwarprasadji, AIR 1961 Madh Pra 216. T. P. Naik and T. C. Shrivastava, JJ. held that by virtue of cl. (a) of sub-sec. (1) of S. 6 of the Act, all Jagir lands stand resumed free from all encumbrances, and therefore, the State Government is not liable for payment of the mortgage debt. They further held that the effect of clause (g) of sub-section (1) of S. 6 is that by legal fiction a mortgage with possession of Jagir lands after resumption is deemed to be substituted by a simple mortgage. The implication of substituting a mortgage with possession by a simple mortgage is to bring into existence the personal liability of the mortgagor under a simple mortgage as defined by S. 58 of the T. P. Act. Consequently, the ex-Jagirdar becomes personally liable for the debt. Thus, the mortgagee has a right to sue for recovery of the amount from the Jagirdar. In the light of these principles, there can be no denial of the fact that the substitution of a simple mortgage in place of a mortgage with possession under S. 6 (1) (g) of the Act brought into existence a personal liability of the plaintiff to pay the debt. As already stated, the plaintiff has redeemed the mortgage by paying off Rs. 2,074 in satisfaction of the decree passed by the Additional District Judge, Satna, in Civil Appeal No. 18-B of 1960, decreeing the defendant's suit for recovery of the amount due on the mortgage towards the principal and interest thereon. It is also conceded that the defendant was not entitled to an allotment of the land under S. 28. It is, therefore, clear that the defendant is nothing but a rank trespasser.

14. The crux of the matter is whether, on a proper construction of sub-sec. (1) of S. 22 of the Act, cultivation by a usufructuary mortgagee should not be deemed to be personal cultivation by the Jagirdar. The answer to the question whether the disputed land could be allotted to the plaintiff or not under Section 22 (1) depends on a proper construction to be placed on the expression 'all sir and khudkasht lands which he was cultivating personally etc.' appearing in S. 22 (1), which reads:

"S. 22. Allotment of sir or khudkasht land.— (1) A jagirdar shall be allotted all sir and khudkasht land which he was cultivating personally for a continuous period of three years immediately preceding the date of resumption.

(2) A Jagirdar whose Jagir lands have been resumed under this Act—

(a) who is not allotted any sir or khudkasht land under sub-sec. (1), or

(b) who had been allotted any such land which is less than the minimum area, may if he applies in this behalf, be allotted any other sir or khudkasht land in his personal cultivation at the date of resumption or where there is no such land or sufficient area of such land any unoccupied cultivable waste land in the Jagir-land subject to availability of such land, so that—

(1) in a case falling under Cl. (a), the total area allotted to him under this sub-section is equal to the minimum area, and

(ii) in a case falling under Cl. (b), the area allotted to him under this sub-section, together with the area allotted under sub-sec. (1) equal to the minimum area.

Explanation.— In this sub-section, the expression "minimum" means ten per cent of the total cultivated land in the Jagir-land at the date of resumption, or 30 acres whichever is greater:

Provided that in no case the minimum area shall exceed 250 acres."

15. The scheme underlying the section is that the Jagirdar should first be allotted all sir and khudkasht land which he had been personally cultivating for a continuous period of three years before resumption. This allotment is not subject to any restriction of area. If, however, there is no such land or not enough land of this category, then under sub-sec. (2), the Jagirdar is entitled to be allotted "any other sir or khudkasht land in his personal cultivation at the date of resumption." The allotment under this sub-section is subject to the ceiling placed in the Explanation.

16. There is no substance in the contention that the words "which he was cultivating personally etc." occurring in sub-sec. (1) of S. 22, qualify only 'khudkasht land' and thus sir land could be allotted to the Jagirdar irrespective of the fact whether it was being cultivated personally by him or not. The expression qualifies both 'sir and khudkasht'. In Lal Mordhwaj Singh v. Collector, Rewa, M. P. No. 288 of 1958, D/- 16-10-1959 (Madh. Pra) T. C. Shrivastava, J. while delivering the judgment of a Division Bench, in agreement with the view expressed in Bhondu Singh v. Visheshwar Prasad, AIR 1956 Vindh Pra 12 stated:

"In sub-s. (1) of S. 22 of the Act there can be little doubt that the adjectival clause "which he was cultivating personally etc." qualifies both sir and khudkasht land. If this construction is not put on that clause, then sir lands will all be disposed of under Cl. (1). Sub-section (2) would become meaningless, so far as sir lands are concerned, because none would be left to be dealt with under sub-sec. (2). It is pertinent to observe that the Jagirdar has no right automatically to continue in possession of all his sir and khudkasht lands. That depends upon allotment by the Talsildar. Section 20 clearly shows that the land which is allotted to the Jagirdar is "for personal cultivation." If that is the intention, there would be no meaning in allotting to him lands which are not in his personal cultivation."

The learned Judge then observed:

"The qualifying expression "in his personal cultivation" occurs in proximity of the word 'land' which goes equally with 'sir or khudkasht'. In other words, the relevant clause can be extended thus: 'any other sir land or other khudkasht land in his personal cultivation'. Thus, there is no question of the expression 'in his personal cultivation' going with khudkasht alone. The word 'land' which is common to both sir and khudkasht makes all the difference in the interpretation. This is further borne out with the use of the word 'other' which qualifies both sir and khudkasht and is in juxtaposition with 'all sir and khudkasht land' which has been dealt with under sub-sec. (1). Sub-sec. (2) provides for allotment of only that sir or khudkasht land which does not satisfy the requirements of sub-sec (1) and could not therefore be allotted under that subsection. If the expression 'in his personal cultivation' were to go with khudkasht land alone, I may also add that it would be meaningless; for as defined in S. 2 (1) (e) of the Act 'khudkasht' means any land cultivated personally by a jagirdar. Nothing can be khudkasht which is not cultivated personally and therefore to say that again that the khudkasht land mentioned in Cl. (b) should satisfy this qualification is unnecessary. It appears to me obvious that the qualifying expression must go with sir also."

We are in respectful agreement with these observations.

17. The real point in controversy is as to what is meant by "personal cultivation". The expression "land cultivated personally" has been defined in S. 2 (f) as under:—

"S. 2. Definitions.— (1) In this Act, unless the context otherwise requires,—

xxx xxx xxx

(f) 'land cultivated personally' means land cultivated on one's own account—

(i) by one's own labour; or

(ii) by the labour of any member of one's family; or

(iii) by servants on wages payable in cash or kind (but not in a share of the crops) or by hired labour under one's personal supervision or under supervision of any member of one's family:

Provided that in the case of a person who is a widow or a minor or is subject to any physical or mental disability or who is in service as a member of the armed forces of the Union, land shall be deemed to be cultivated personally even without such personal supervision;"

18. With due respect, we are afraid, the learned Chief Justice wrongly assumed that expression "personal cultiva-

tion" in S. 22 (1) can bear no other meaning than the one given in S. 2 (f), in all circumstances. He appears to have overlooked the opening words of Sec. 2 "unless the context otherwise requires." In case of a mortgage with possession, which by virtue of S. 6 (1) (g), is substituted by a simple mortgage, the cultivation by the mortgagee in possession must, in law, be regarded as personal cultivation by the mortgagor. The Act is silent with respect to this and, therefore, there was nothing wrong in the Government taking a policy decision in the matter. In Sant Ram Sharma v. State of Rajasthan, AIR 1967 SC 1910, their Lordships while dealing with the question of promotion to Selection Grade Posts on the basis of ranking in Gradation List under the Indian Police Service (Pay) Rules, 1954, observed (at p. 1914):

"It is true that there is no specific provision in the Rules laying down the principle of promotion of junior or senior grade officers to selection grade posts. But that does not mean that till statutory rules are framed in this behalf the Government cannot issue administrative instructions regarding the principle to be followed in promotions of the officers concerned to selection grade posts. It is true that Government cannot amend or supersede statutory Rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed."

The Act provided for resumption of all Jagir lands in the State. The consequence of resumption as set forth in cl. (a) of sub-sec. (1) of Sec. 6 is that, as from the date of resumption, notwithstanding anything contained in any contract, grant or document or in any other law, rule, regulation or order for the time being in force, the right, title and interest of every Jagirdar and of every other person claiming through him in his Jagir lands stand resumed to the State 'free from all encumbrances'. S. 20 of the Act then provided allotment of land to the Jagirdar for personal cultivation. On an application being made under S. 20, the Tahsildar has to hold an enquiry under S. 21. After making the enquiry referred to in sub-sec. (1) of S. 21, the Tahsildar may pass an order making an allotment to the Jagirdar of such land for personal cultivation as may be specified, having regard to the provisions contained in Chap. IV. Sec. 22 provides for allotment of sir or khudkasht lands.

19. The Legislature while enacting the law, obviously overlooked the fact that some part of the home-farm of the Jagirdar may not be in his actual cultivation but be with a mortgagee with possession. It is true that the Government cannot by an executive order, enlarge the meaning of the expression "land under personal cultivation" as defined in S. 2 (f) of the Act. Nevertheless, it necessarily has the power to issue necessary directions in that behalf, if the expression personal cultivation" as defined in S. 2 (f) cannot have that meaning in the context of a usufructuary mortgage, i. e., if the context otherwise requires.

20. In Yeshwantsingh v. Rajendra Bahadursingh, M. P. No. 278 of 1958, D/-16-12-1960 (Madh Pra) Dixit, C. J. and Pandey, J. rejected a similar contention raised by mortgagees in possession of sir and khudkasht lands challenging an order of allotment of such lands in favour of the Pawaidars under Sec. 22 (1) of the Act, saying that they have no locus standi to challenge the allotment inasmuch as they had right to allotment of the land under S. 28. The attention of the learned Chief Justice was not drawn to this decision though the learned trial Judge had referred to it.

21. In Meharban Singh v. Naresh Singh, AIR 1971 SC 77 their Lordships while dealing with the provisions of the Madhya Bharat Zamindari Abolition Act, 1951, reversed the decision of this Court holding that the plaintiffs who were ex-Zamindars, were entitled to redeem the mortgage by paying the mortgage money but disentitled to get possession of the mortgaged land. The expression "khudkasht" as defined in S. 2 (c) in that Act, as here, meant land cultivated by the Zamindar himself or through employees or hired labourers and includes sir land. While remanding the appeal, for a reconsideration of the nature and character of the mortgagee's possession, their Lordships held that this Court was in error in dismissing the plaintiffs' suit for possession on the authority of Haji Sk. Subhan v. Madhorao, AIR 1962 SC 1230 which turned on the definition of "khudkasht" contained in S. 2 (g) of the M. P. Abolition of Proprietary Rights Act, 1950. While under the M. P. Abo-

lition of Proprietary Rights Act, the record was the basis, under the Madhya Bharat Zamindari Abolition Act, the emphasis is laid on personal cultivation: Khumansingh Sandersingh v. Dhansingh, 1971 MPLJ 750.

22. That takes us to the question whether the learned Chief Justice was right in his construction of S. 37 of the Act, which runs thus:

37. Bar of Jurisdiction of Civil Courts. —(1) No Civil Court shall have jurisdiction to settle, decide, or deal with any question which is, by or under this Act, required to be settled, decided or dealt with by the Talsildar, the Deputy Commissioner, the Land Reform Commissioner, or the Board of Revenue.

(2) Except as otherwise provided in this Act, no order of a Tahsildar, a Deputy Commissioner, the Land Reform Commissioner, or the Board of Revenue under this Act shall be called in question in any court."

23. In Rao Bhupendra Singh v. Smt. Gopal Kunwar Umath, AIR 1970 Madh Pra 91, T. P. Naik and G. P. Singh, JJ. while interpreting S. 39 of the Bhopal Abolition of Jagirs and Land Reforms Act, 1953, which is in pari materia with S. 37 of the Vindhya Pradesh Abolition of Jagirs and Land Reforms Act, 1952, held that the bar created by sub-s. (2) of S. 39 of that Act does not apply to an order which is a nullity. G. P. Singh J. delivering the Judgment of the Court, observed (at p. 95):

"The language employed in Sec. 39 is thus apparently quite comprehensive. But statutory provisions like S. 39 of the Act, which oust the jurisdiction of the ordinary Courts in spite of their apparent wide language, have certain inherent limitations. Thus the second sub-section which prevents the calling in question in any Court of an 'order of the State Govt. etc. under this Act' will have no application if the order that is called in question, is really not an order under the Act but a nullity. In other words, if a purported order is no order at all, the immunity conferred by sub-sec. (2) will not protect such an order from being challenged in a Civil Court. The question whether an order of the State Government, Tahsildar etc. is a nullity is also not one which is required to be settled, decided or dealt with by these authorities under the Act and, therefore, the bar of sub-sec. (1) will not prevent such a question being tried by a Civil Court."

Learned counsel for the appellant, however, urged that a distinction must be drawn between a case where a collateral fact is to be decided before a tribunal of limited jurisdiction assumes jurisdiction, and a case where the tribunal has to decide the whole matter itself, and there is no question of the decision of any collateral fact as a condition precedent to assumption of jurisdiction. In support of the contention, reliance is placed on the decisions of their Lordships in Custodian, Evacuee Property, Punjab v. Jafran Begum, AIR 1968 SC 169 and Dhulabhai v. State of Madhya Pradesh, AIR 1969 SC 78. In Custodian of Evacuee Property, Punjab v. Jafran Begum (supra), their Lordships, after examining the scheme of the Administration of Evacuee Property Act, 1950, held that S. 46 is a complete bar to the jurisdiction of civil or revenue courts in any matter which can be decided under Section 7. In Dhulabhai v. State of Madhya Pradesh (supra), their Lordships examined various authorities on the point, and observed that the legal position that emerges may be summarised thus (at p. 89):

"(1) Where the statute gives a finality to the orders of the special tribunals the civil court's jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court."

In the view we have taken, viz., the order of allotment passed by the Tahsildar under S. 22 of the Act in favour of the plaintiff was not a nullity, it is needless for us to enter into the question.

24. It is well settled that an order of allotment of this nature is not open to a collateral attack by a plea in defence. The question has frequently arisen in cases relating to settlement of 'home-

farm' under S. 39 (1) of the Madhya Pradesh Abolition of Proprietary Right Act, 1950 or settlement of land not included in the 'home-farm' under S. 54. In Harishchandra Behra v. Garbhoo Singh, 1961 MPLJ 501, it was held by a Division Bench that cultivation by a trespasser would be deemed to be personal cultivation by the proprietor. In dealing with the question, it was observed :

"Personal cultivation" in S. 54 indicates not merely bodily possession of the land but constructive possession and also the right to possess against a trespasser. If a wrong-doer takes possession of the property, steps to exclude him from possession can certainly be taken and the cultivation of the wrong-doer in these circumstances cannot clothe him with any rights. His cultivation has to be deemed on behalf of the rightful owner. The Abolition Act does not aim at the extinguishment of the title of the rightful possessor by mere act of trespass. Nowhere has it been said so. The initial condition under Section 54 of the Abolition Act was fulfilled to the satisfaction of the officer concerned in this case. The patta was issued by him on 26-2-1952. This patta does not admit of a collateral attack."

In Guruprasad Matadin Shukla v. Pritam Madhosingh, 1961 MPLJ 530 it was observed :

"In the instant case, the Deputy Commissioner was the only authority who could pass an order under S. 39 (1) of the Act. Without such an order or in disregard of an order passed by the Deputy Commissioner thereunder, neither the defendant thekadar nor the civil Court could, in a collateral proceeding, treat the entire home-farm land as reserved to the thekadar. If the civil Court were to purport so to do, it would amount to an unwarranted usurpation of jurisdiction which it did not possess." In Dayaram Bodhram v. Maheshwar Danardan, 1961 MPLJ 837 a Division Bench held that cultivation by a wrong-doer must be treated as personal cultivation by the proprietor. In Mannalal v. Mst. Radhabai Misc. (First) Appeal No. 120 of 1943, D/- 15-9-1955 (Nag). R. Kaushalendra Rao and B. K. Choudhuri, JJ. held that sir and khudkasht lands under cultivation of the judgment-debtors could not become the malik-makbuza of the judgment-debtors under S. 38 of the Act, observing—

"The judgment-debtors having secured the stay order cannot be permitted to urge that the rights which they have acquired during the pendency of the appeal should operate to their advantage and to the detriment of the persons finally held entitled to the mauzas as a result of the appeal. The judgment-debtors must in justice be regarded as holding in trust for the decree-holders whatever rights might have been acquired by them during the pendency of the appeal by virtue of a title now found never to have been with them."

25. The result, therefore, is that the appeal succeeds and is allowed. The judgment of the learned Chief Justice upholding the judgment and decree of the Additional District Judge is set aside, and those of the learned trial Judge decreeing the plaintiff's suit are restored with costs throughout. Hearing fee Rs. 200/-, if certified.

Appeal allowed.

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A. P. SEN, C. J., AND
J. S. VERMA, J.

Kantibai, Appellant v. Kamal Singh Thakur, Respondent.

First Appeal No. 33 of 1978, D/- 2-5-1978.

Hindu Marriage Act (25 of 1955) (as amended by Marriages Laws (Amendment) Act (1976)), S. 28 — Limitation Act (1963), Ss. 5 and 29 (2) — Appeals under S. 28 of Hindu Marriage Act — Applicability of S. 5 of Limitation Act not excluded.

The applicability of S. 5 of the Limitation Act, 1963, to appeals filed under S. 28 of the Hindu Marriage Act, 1955, is not excluded since there is no such exclusion as contemplated by sub-s. (2) of S. 29 of the Limitation Act, 1963. However, the question whether delay in filing such an appeal should be condoned under S. 5 of the Limitation Act is one of fact in each case, to be decided on the facts and in the circumstances thereof. Case law discussed. (Para 10)

Merely because a different limitation is prescribed by a special or local law, that by itself is not a sufficient reason to exclude the application of S. 5 of the Limitation Act by virtue of S. 29 (2) of

the Limitation Act, 1963. The nature of right of appeal under S. 28 of the Hindu Marriage or the scheme of the special law are in no way inconsistent with the applicability of S. 5 of the Limitation Act, 1963. (Para 7)

Anno: (1) AIR Manual (3rd Edn.), Hindu Marriage Act, S. 28, N. 6; (2) AIR Comm. Lim. Act (5th Edn.), S. 5, N. 3; S. 29, N. 4A, 5.

Cases Referred: Chronological Paras

AIR 1976 SC 105 : 1976 Cri LJ 179 2, 4, 7, 8
AIR 1974 SC 480 2, 5, 6, 7, 8
AIR 1973 SC 2464 6
AIR 1970 SC 1477 5
AIR 1964 SC 260 : 1964 (1) Cri LJ 152 4
AIR 1964 SC 1099 5

A. K. Khaskalam, for Appellant; V. S. Shroti, For Respondent.

VERMA, J.:— By our order dated 13-4-1978, we have allowed the application made by the appellant under S. 5 of the Limitation Act, 1963, for condonation of the delay in filing this appeal. While doing so, in that order we had stated that the reasons for holding that Section 5 of the Limitation Act, 1963 applies also to appeals filed under Section 28 of the Hindu Marriage Act, 1955 as amended by the Marriage Laws (Amendment) Act, 1976 (Act No. 68 of 1976), will be given later. Accordingly, we are now stating the reasons for taking this view.

2. Shri V. S. Shroti, learned counsel for the respondent, placing reliance on Hukumdev Narain v. Lalit Narain, AIR 1974 SC 480 contended that the different limitation of thirty days prescribed in sub-sec. (4) of S. 28 of the Hindu Marriage Act, 1955, as a result of the Amendment Act No. 68 of 1976, excluded the applicability of S. 5 of the Limitation Act, 1963 to appeals filed under S. 28 of the Hindu Marriage Act, 1955, by virtue of sub-sec. (2) of section 29 of the Limitation Act, 1963. In reply, Shri A. K. Khaskalam, learned counsel for the appellant, placed reliance on Mangu Ram v. Delhi Municipality, AIR 1976 SC 105 to contend that S. 5 of the Limitation Act applies to such appeals, because provisions contained in Ss. 4 to 24 (inclusive) of the Limitation Act, 1963, are made expressly applicable by sub-s. (2) of S. 29 of the Limitation Act, 1963, and that there is no express exclusion of the applicability of S. 5 of the Limitation Act, 1963, by the special Act, viz. Hindu Marriage Act, 1955 as amended by Act No. 68 of 1976.

3. Under the Limitation Act of 1908, S. 29 thereof did not expressly apply S. 5 of that Act as it did S. 4, Ss. 9 to 18 and S. 22 of that Act unless they were expressly excluded by any special or local law, to a case where a different limitation was prescribed by any special or local law and it was also stated that the remaining provisions of that Act shall not apply to such cases. On the contrary, S. 29 of the Limitation Act, 1963 expressly applies Ss. 4 to 24 (inclusive) in all such cases unless their application is expressly excluded by any such special or local law. The departure is clear and unequivocal inasmuch as S. 5 of the Limitation Act, 1963, is now ordinarily applicable to all such cases, unless there is express exclusion of its application in such cases by the special or local law. The scope of S. 5 as enacted in Limitation Act, 1963, is also wider than the corresponding provision in the Limitation Act of 1908. The result is that ordinarily S. 5 of the Limitation Act, 1963, must be held applicable even where Sec. 29 of the Act is attracted, there being a different limitation prescribed by any special or local law and the applicability of S. 5 can be excluded in such cases only when it is found that it has been expressly excluded by such special or local law. The conclusion would depend on the result of an enquiry made in this manner. Before examining the provisions of the Hindu Marriage Act, 1955, as amended by the Amendment Act No. 68 of 1976, we may refer to the principles laid down in the two decisions relied on from both sides.

4. In Mangu Ram v. Delhi Municipality (AIR 1976 SC 105) (supra) the question was whether S. 5 of the Limitation Act, 1963 applied to an application for special leave made under S. 417 (3) of the Cr. P. C. 1898, in view of the imperative language used while prescribing a different limitation of sixty days in sub-sec. (4) of S. 417, Cr. P. C. Their Lordships, after examining the scheme of Section 29 of the Limitation Act of 1963, held that even though S. 29 (2) was attracted to that case and the language in sub-sec. (4) of S. 417 of the Cr. P. C., 1898 was mandatory and compulsive, yet S. 5 of the Limitation Act must apply to that case. Their Lordships, in taking that view, stated as under (at p. 108):—

"There is an important departure made by the Limitation Act, 1963 in so far as the provision contained in Sec. 29, sub-sec. (2) is concerned. Whereas under the Indian Limitation Act, 1908, Sec. 29, sub-sec. (2), Cl. (b) provided that for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law the provisions of the Indian Limitation Act, 1908, other than those contained in Ss. 4, 9 to 18 and 22, shall not apply and, therefore, the applicability of S. 5 was in clear and specific terms excluded. Section 29, sub-sec. (2) of the Limitation Act, 1963 enacts in so many terms that for the purpose of determining the period of limitation prescribed for any suit, appeal or application by any special or local law the provisions contained in Ss. 4 to 24, which would include S. 5, shall apply in so far as and to the extent to which they are not expressly excluded by such special or local law. S. 29, sub-s. (2), Cl. (b) of the Indian Limitation Act, 1908 specifically excluded the applicability of S. 5, while S. 29, sub-sec. (2) of the Limitation Act, 1963 in clear and unambiguous terms provided for the applicability of S. 5. Since under the Limitation Act, 1963, S. 5 is specifically made applicable by S. 29 sub-sec. (2), it can be availed of for the purpose of extending the period of limitation prescribed by a special or local law if the applicant can show that he had sufficient cause for not presenting the application within the period of limitation. It is only if the special or local law expressly excludes the applicability of S. 5, that it would stand displaced. Here, as pointed out by this Court in Kaushalya Rani's case AIR 1964 SC 260 : (1964) 1 Cri LJ 152 the time limit of sixty days laid down in sub-sec. (4) of S. 417 is a special law of limitation and we do not find anything in this special law which expressly excludes the applicability of S. 5. It is true that the language of sub-sec. (4) of S. 417 is mandatory and compulsive, in that it provides in no uncertain terms that no application for grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of sixty days from the date of that order of acquittal. But that would be the language of every provision prescribing a period of limitation. It is because a bar against entertainment of an application beyond the period of limitation is created by a special or local law that it becomes necessary to invoke the aid of S. 5 in order that the application may be entertained despite such bar. Mere provision of a period of limitation in howsoever peremptory or imperative language is not sufficient to displace the applicability of S. 5."

Thus, it was clearly held that mere peremptory or imperative language of the provision in the special law prescribing a different limitation, does not exclude the applicability of S. 5 of the Limitation Act, 1963, without anything more expressly excluding its applicability.

5. In Hukumdev Narain Yadav v. Lalit Narain Mishra (AIR 1974 SC 480) (supra) their Lordships were dealing with the applicability of S. 5 of the Limitation Act, 1963 to an election petition filed under the Representation of the People Act, 1951. Their Lordships reiterated the view taken earlier in Vidyacharan Shukla v. Khubchand Baghel, AIR 1964 SC 1099 : (1964) 6 SCR 129) and D. P. Mishra v. Kamal Narayan Sharma, AIR 1970 SC 1477. In Vidyacharan's case, it was held that S. 12 of the Limitation Act, 1908, applied to an election appeal filed under S. 116-A of the Representation of the People Act, 1951. In D. P. Mishra's case, it was held that S. 12 of the Limitation Act, 1963, applied to an election appeal filed under S. 116-A of the Representation of the People Act. Their Lordships in Hukumdev's case (supra) summarised the ratio of these two decisions as under (at p. 1480) :—

"Following the decision in Vidyacharan Shukla's case this Court held that Ss. 4 and 12 of the Limitation Act would apply, because

'There is no provision in the Representation of the People Act, 1951, which excludes the application of S. 4 of the Limitation Act' ".

Thus, applicability of Ss. 4 and 12 of the Limitation Act, both old as well as new, to an appeal filed under S. 116-A of the Representation of the People Act, 1951, was reiterated by their Lordships and they then proceeded to examine whether S. 5 of the Limitation Act would apply to an election petition filed under S. 81 of the Representation of the People Act, 1951, in view of the nature of right and the scheme of the Repre-

sentation of the People Act, 1951. In this connection, their Lordships examined the scope of S. 5 and S. 29 (2) of the Limitation Act, both old as well as new, and pointed out that the new S. 5 is now of wider applicability. On an examination of the scheme of the Representation of the People Act, 1951, it was held that the Act was a self-contained Code and the provisions thereof read harmoniously, clearly indicated that the applicability of S. 5 of the Limitation Act, 1963, to an election petition was 'necessarily excluded.' Reliance was placed by their Lordships, inter alia, on S. 86 of the Representation of the People Act, 1951, which contains peremptory command to the High Court to dismiss an election petition which does not comply with the provisions of Ss. 81, 82 or 117. It was also pointed out that sub-sec. (5) of S. 86 while giving latitude to the petitioner to amend the particulars of any corrupt practice alleged in the petition, also laid down that the High Court shall not allow a new corrupt practice to be pleaded by amendment after expiry of the limitation prescribed for filing an election petition. It was, therefore, in the scheme of the Representation of the People Act, 1951, which was held to be a self-contained Code conferring the right itself to file an election petition and regulating the exercise of that right that it was held that the applicability of S. 5 was necessarily excluded by the provisions of the Representation of the People Act, 1951, read as a whole. It was pointed out that the right to file an election petition being itself conferred by the statute and the same not being a common law right, the statute itself must give the discretion to condone the delay. The ratio of that decision only is that even if the special law does not contain express words of exclusion, the nature of right and scheme of the special law must be examined to find out if they are inconsistent with these provisions of the Limitation Act, so that the latter are 'necessarily excluded', and if that conclusion is reached, then the particular provision of the Limitation Act which is so inconsistent, must be held to be excluded by virtue of S. 29 (2) of the Limitation Act, 1963.

6. Some relevant extracts from their Lordships' decision in Hukumdev's case (AIR 1974 SC 480) (supra) are as follows:—

"No doubt Sec. 5 would now apply where S. 29 (2) is applicable to even applications and petitions, unless they are expressly excluded. Even assuming that the Limitation Act applies to election petitions under the Act, what has to be seen is whether S. 5 is excluded from application to such petitions (at p. 488)."

"..... But what we have to see is whether the scheme of the special law, that is, in this case the Act, and the nature of the remedy provided therein are such that the Legislature intended it to be a complete code by itself which alone should govern the several matters provided by it. If on an examination of the relevant provisions it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act. In our view, even in a case where the special law does not exclude the provisions of Ss. 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the Court to examine whether and to what extent the nature of those provisions or the nature of the subject matter and scheme of the special law exclude their operation..... S. 86 of the Act which gives a peremptory command that the High Court shall dismiss an election petition which does not comply with the provisions of Ss. 81, 82 or 117. It will be seen that S. 81 is not the only section mentioned in Section 86, and if the Limitation Act were to apply to an election petition under Section 81 it should equally apply to Sections 82 and 117 because under S. 86 the High Court cannot say that by an application of S. 5 of the Limitation Act, S. 81 is complied with while no such benefit is available in dismissing an application for non-compliance with the provisions of Ss. 82 and 117 of the Act, or alternatively if the provisions of the Limitation Act do not apply to S. 82 and S. 117 of the Act, it cannot be said that they apply to S. 81.

xx xx xx

But this is not what S. 29 (2) of the Limitation Act says, because it provides that Ss. 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which they are not expressly excluded by such special or local law. If none of them are excluded, all of them would become applicable. Whether those sections are applicable is not determined

by the terms of those sections, but by their applicability or inapplicability to the proceedings under the special or local law..... The applicability of these provisions has, therefore, to be judged not from the terms of the Limitation Act but by the provisions of the Act relating to the filing of election petitions and their trial to ascertain whether it is a complete code in itself which does not admit of the application of any of the provisions of the Limitation Act mentioned in S. 29 (2) of that Act. (At p. 490)

In Charan Lal v. Nandkishore Bhatt, (1973) 2 SCC 530 : (AIR 1973 SC 2464), it was held that there is no question of any common law right to challenge an election as such any discretion to condone the delay in presentation of the petition or to absolve the petitioner from payment of security for costs can only be provided under the statute governing election disputes. It was observed that if no discretion was conferred in respect of any of these matters, none can be exercised under any general law or on any principles of equity. If for non-compliance with the provisions of Ss. 82 and 117 which are mandatory, the election petition has to be dismissed under S. 86 (1) the presentation of election petition within the period prescribed in S. 81 would be equally mandatory, the non-compliance with which visits the penalty of the petition being dismissed." (At p. 493)

7. The decision in Hukumdev's case (AIR 1974 SC 480) (supra) relied on by Shri Shroti, learned counsel for the respondent, cannot, therefore, be understood as laying down that merely because a different limitation is prescribed by a special or local law, that by itself is a sufficient reason to exclude the application of S. 5 of the Limitation Act, by virtue of S. 29 (2) of the Limitation Act, 1963. Sub-sec. (4) of S. 28 of the Hindu Marriage Act, as introduced by Amendment Act No. 68 of 1976, reads as under:—

"28. Appeal from decrees and orders—

xx xx xx

(4) Every appeal under this section shall be preferred within a period of thirty days from the date of the decree or order."

This is the only provision which is relied on by Shri Shroti to contend that Section 5 does not apply to appeals filed under S. 28 of the Hindu Marriage Act. No other provision in the Hindu Marriage Act or the Amendment Act No. 68 of 1976 has been pointed out in support of this argument. In our opinion, the decision in Mangu Ram's case (AIR 1976 SC 105) (supra) is a complete answer to the argument of Shri Shroti inasmuch as it lays down that the "mere provision of a period of limitation in howsoever peremptory or imperative language is not sufficient to displace the applicability of Section 5." The language of Section 417 (4) of the Cr. P. C. which was construed in Mangu Ram's case, was far more strong and peremptory than S. 28 (4) of the Hindu Marriage Act with which we are concerned. The conclusion reached in Mangu Ram's case is, therefore, even more justified in the present case. The nature of right of appeal under Section 28 of the Hindu Marriage Act or the scheme of the special law are in no way inconsistent with the applicability of S. 5 of the Limitation Act, 1963.

8. As already pointed out, Hukumdev's case (AIR 1974 SC 480) (supra) does not in any way conflict with the view taken in Mangu Ram's case (AIR 1976 SC 105). It is reasonable to assume that in deciding Mangu Ram's case, their Lordships did not intend to lay down law inconsistent with that contained in their earlier decision in Hukumdev's case (supra).

9. Shri Shroti also urged that by its very nature, such proceedings must end expeditiously and certain amendments, including curtailment of the period prescribed for appeal, have been made by the Marriage Laws (Amendment) Act, 1976 (Act No. 68 of 1976), with that end in view. That it is so, is beyond dispute. However, that does not mean that the Court's discretion to condone delay in filing an appeal is inconsistent either with the nature of right or the scheme of the special law, so that applicability of S. 5 of the Limitation Act, 1963 is 'necessarily excluded.' It only means that the Court has to keep this end in view while exercising its power. We are unable to hold that the express exclusion contemplated by S. 29 (2) of the Limitation Act, 1963, has been made in this manner.

10. Our conclusion, therefore, is that the applicability of S. 5 of the Limita-

tion Act, 1963, to appeals filed under Section 28 of the Hindu Marriage Act, 1955, is not excluded since there is no such exclusion as contemplated by sub-sec. (2) of S. 29 of the Limitation Act, 1963. However, the question whether delay in filing such an appeal should be condoned under S. 5 of the Limitation Act is one of fact in each case, to be decided on the facts and in the circumstances thereof.

Order accordingly.

AIR 1978 MADHYA PRADESH 250

(GWALIOR BENCH)

H. G. MISHRA, J.

Ved Prakash Gupta, Applicant v. Chotelal and others, Opposite Parties.

Civil Revn. No. 6 of 1978, D/- 8-2-1978.*

(A) M. P. Accommodation Control Act (41 of 1961), Ss. 13 (2) and 12 (1) (a) — Time barred rent — Not recoverable.

The landlord has a right to demand and file a suit for recovery of only those arrears of rent which are legally recoverable in view of the provisions of Section 12 (1) (a) of the Act. In Sec. 13 (1) of the Act, it is provided that on a suit or proceeding being instituted by the landlord "on any of the grounds referred to in S. 12", the tenant shall deposit in the court an amount calculated at the rate of rent etc. By incorporating the words "on any of the grounds under S. 12", the restriction imposed on the landlord's right to file a suit for ejectment is projected into Sec. 13 (1) and consequently, the liability of the tenant has also to be treated as conterminous with the right of the landlord to demand the arrears. AIR 1978 SC 287, Disting.; AIR 1978 Madh Pra 54 (FB), Rel. on. (Para 10)

(B) T. P. Act (4 of 1882), S. 109 First proviso — Effect of partition — Plaintiff becoming sole landlord on partition — Rent prior to partition does not transform into debt. AIR 1955 Raj 167, 1968 Jab LJ 337, AIR 1965 Madh Pra 1 and AIR 1976 Madh Pra 55, Disting. (Para 15)

Anno: AIR Comm. T. P. Act (4th Edn.), S. 109, N. 9.

*(Against order of S. K. Jain, 3rd Civil J. Class 2, Gwalior, D/- 23-9-1977).

(C) M. P. Accommodation Control Act (41 of 1961), S. 13 (3) — Persons to whom rent is payable — Decree for partition according to which plaintiff had become the sole landlord, on record — On the basis of such decree, Court had juristion to pass order in favour of landlord u/s. 13 (3) — Direction under S. 13 (3) not necessary — No particular mode of enquiry under S. 13 (3) is prescribed. (Para 16)

Cases Referred: Chronological Paras

AIR 1978 SC 287 : (1978) 1 SCC 44 : 1978 All LJ 7 8
AIR 1978 Madh Pra 54 : 1978 Jab LJ 6 (FB) 10
AIR 1976 Madh Pra 55 15
AIR 1975 Pat 283 (FB) 11
1968 Jab LJ 337 13
AIR 1965 Madh Pra 1 13
AIR 1959 Punj 328 11
AIR 1958 SC 328 11
AIR 1955 Raj 167 12, 13, 14
(1889) 42 Ch D 424 : 62 LT 278, Curwen v. Milburn 11

M. G. Khedkar, for Applicant; V. G. Vishwaroop, for Opposite Party No. 1.

ORDER:— This is a revision petition directed against order passed by the Third Civil Judge Class II, Gwalior, in Civil Suit No. 108-A/1977 dated 23-9-1977, whereby the defendant-applicant herein has been ordered to deposit rent under S. 13 (2) read with S. 13 (3) of the M. P. Accommodation Control Act, 1961 (hereinafter referred to as the 'Act').

2. The facts essential for appreciating the controversy in the revision are that the defendant-applicant was inducted as a tenant by Harishchand, father of the plaintiff-non-applicant No. 1 in the suit-premises. Harishchand died on 29-11-72. In the lifetime of Harishchand a suit for partition (C. S. No. 6-A/1968) was instituted and the same was pending at the time of death of Harishchand in the Court of Third Additional District Judge, Gwalior. In this suit a compromise was effected between the parties on 16-7-1975, whereby, inter alia, the suit-property was allotted to the plaintiff-non-applicant No. 1. Thereafter, after giving demand-cum-quit notice, the plaintiff-non-applicant No. 1 instituted the present suit for ejectment and recovery of arrears of rent on 11-5-1977.

3. In this suit the plaintiff stated that the defendant-applicant is in arrears of rent with effect from 22-11-1972. The

suit is based on various grounds including the ground under S. 12 (1) (a) of the Act.

4. After service of the writ of summons on the defendant-applicant, on 22-6-1977, the defendant put in appearance and submitted an application under Section 13 (2) and 13 (3) of the Act on 11-7-1977, and filed written statement on 24-8-1977. The defendant-applicant raised the following contentions :—

(i) That he is not liable to deposit time-barred rent under S. 13 (2) of the Act;

(ii) that the character or the amount claimed by the plaintiff prior to the date of partition, i.e., 16-7-1975, is legally that of debt and not that of arrears of rent; and

(iii) that the plaintiff is not the sole landlord, since the decree of partition in absence of registration and proper stamp is ineffective to clothe the plaintiff with the status of sole landlord, vis-a-vis, the defendant-applicant, therefore, in absence of a direction under S. 13 (3) the provisions of S. 13 (1) of the Act remain suspended.

5. These contentions were also raised by the defendant-applicant in the application dated 11-7-1977 mentioned above. This application was opposed by the plaintiff-landlord. But by the impugned order the defendant-applicant has been ordered to deposit the entire rent with effect from 22-11-1972 (including even time-barred rent).

6. Aggrieved by this order the present revision has been filed.

7. Shri M. G. Khedkar, learned counsel appearing on behalf of the applicant has reiterated the objections condensed above in para. 4.

8. Shri V. G. Vishwaroop, appearing on behalf of the plaintiff-non-applicant No. 1 supported the impugned order and relied on Khadi Gram Udyog Trust v. Ram Chandraji Virajman Mandir (1978 1 SCC 44) : (AIR 1978 SC 287). He contended that it was obligatory on the defendant-applicant to deposit the entire rent. He further argued that the dispute whether the amount claimed prior to 16-7-1975 by the plaintiff-landlord got transformed into debt or retained the character of rent is beyond the ken of S. 13 (2) of the Act. It was also argued that the defendant-applicant has not denied that the plaintiff is the landlord. In substance, the plea is that the plaintiff is one of the landlords and because the other landlords have not joined in the suit, therefore, the entire rent is not payable to the plaintiff. Such a plea does not fall under S. 13 (3) of the Act. The further argument advanced is that in compliance of the order, the defendant-applicant has deposited the entire rent, and therefore, he should not be heard in the matter and should be deemed to have waived his right to challenge the order.

9. After having heard learned counsel of both the parties, I am of the opinion that the revision deserves to be allowed, partly.

10. Now taking up the first contention of the learned counsel for the applicant, reliance is placed on the Full Bench case of Mankunwarbai v. Sunderlal Jain (1978 Jab LJ 6) : (AIR 1978 Madh Pra 54). The contention appears to be well-founded. The plaintiff has right to demand and file suit for recovery of only those arrears of rent which are legally recoverable in view of the provisions of Section 12 (1) (a) of the Act. In S. 13 (1) of the Act, it is provided that on a suit or proceeding being instituted by the landlord "On any of the grounds referred to in S. 12", the tenant shall deposit in the Court to pay to the landlord an amount calculated at the rate of rent etc. By incorporating the words "on any of the grounds under S. 12", the restriction imposed on the plaintiff's right to file a suit for ejectment is projected into S. 13 (1) and consequently, the liability of the defendant has also to be treated as conterminous with the right of the plaintiff to demand the arrears.

11. Learned counsel for the plaintiff-non-applicant places reliance on the case of (AIR 1978 SC 287) and contends that although the remedy of the plaintiff may be barred, yet the liability of the defendant to pay the time-barred rent is not extinguished. Therefore, it was and is obligatory on the defendant to deposit the entire amount of rent. I am afraid, the dictum of the aforesaid Supreme Court case cannot be pressed into service by the plaintiff-non-applicant in view of the fact that Khadi Gram Udyog Trust case (AIR 1978 SC 287) (supra) is based on the construction of S. 20 (2) and (4) of U. P. Buildings (Regulation of Letting, Rent and Eviction) Act, 1972. In S. 20 (2) of the said Act, the right of the landlord is not confined to claiming legally recoverable arrears

of rent. Similarly, in sub-sec. (4) of S. 20 thereof, the obligation cast on the tenant is not confined to legally recoverable amount only, but extends to "deposit of entire amount of rent." This will be clear from a reference to paras. 3 and 4 of the aforesaid judgment of the Hon'ble the Supreme Court which are reproduced hereunder:—

"3. The only contention raised in this appeal is that the appellant having complied with the requirement of S. 20 (4) of the Act and deposited the entire amount of rent due, the Court ought to have passed an order relieving the tenant against his liability for eviction on that ground. Chapter IC of the U. P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act XIII of 1972 prescribes the procedure for eviction of a tenant. While S. 20 (1) bars institution of suit for eviction of a tenant from a building notwithstanding the determination of his tenancy by efflux of time or on the expiration of a notice to quit or in any other manner. Sub-sec. (2) enables the landlord to file a suit on any one or more of the grounds mentioned in sub-sec. (2). We are concerned with sub-cl. (a) of sub-sec. (2) which provides that a suit for eviction of a tenant from a building may be instituted on the ground that the tenant is in arrears of rent for not less than four months and has failed to pay the same to the landlord within one month from the date of service upon him of a notice of demand. It is not disputed that several notices were served on the appellant and that he failed to pay the rent within one month from the date of the service of the notice of demand on him. Another opportunity for payment of rent is provided to the tenant under S. 20 (4) which provides that "In any suit for eviction on the ground mentioned in Cl. (a) of sub-sec. (2), if at the first hearing of the suit the tenant unconditionally pays or tenders to the landlord or deposits in court the entire amount of rent and damages for use and occupation of the building due from him together with interest thereon at the rate of 9% per annum and the landlord's costs of the suit in respect thereof, after deducting any amount already deposited by the tenant under sub-sec. (1) of S. 30, the court may, in lieu of passing a decree for eviction on that ground, pass an order relieving the tenant against his liability for eviction on the ground. Under this sub-section, therefore, though the tenant has not complied with the requirement of sub-sec. (2) of S. 20, if he pays at the first hearing of the suit unconditionally the entire amount of rent the court may pass an order relieving the tenant against his liability for eviction. In this case the appellant deposited on Feb. 13, 1975 a sum of Rs. 5972.43 being the amount of rent and damages for the period May 1, 1973 to Feb. 28, 1975 together with interest etc. The contention of the appellant is that "entire amount of rent due" would be the rent that is recoverable and would not include the rent, the recovery for which is barred by time. According to the appellant the payment of entire amount of rent due would not include the rent for the period January 1, 1960 to Dec. 31, 1970 as the claim is barred by time. The district Judge who tried the suit was of the view that the tenant ought to have deposited the time-barred arrears of rent also in order to claim benefit under S. 20 (4). The trial Court proceeded with the trial of the suit and found that the landlord had proved that tenant was in arrears of rent for not less than four months and had failed to pay the same to the landlord within one month from the date of service upon him of a notice of demand and as such satisfied the requirement of sub-sec. (2) of S. 20 and is entitled for order of eviction. In the revision the High Court affirmed the view taken by the trial Court and dismissed the appeal.

4. It will be seen that under S. 20 (2) of the Act, the landlord gets a cause of action for evicting the tenant who is in arrears of rent for not less than four months, and has failed to pay the same to the landlord within one month from the date of service upon him of a notice of demand. If the tenant pays the entire arrears of rent due at the first hearing of the suit the court may relieve the tenant against eviction even though he had not complied with S. 20 (2). The tenant can take advantage of the benefit conferred by S. 20 (4) only when he pays the entire amount of rent due as required under S. 20 (4). The question that arises for consideration in this appeal is whether the entire amount of rent due would include even rent which cannot be recovered as having been time-barred. There is ample authority for the proposition that though a debt is time-barred, it will be a debt

due though not recoverable, the relief being barred by limitation. In Halsbury's Laws of England (Third Edn.) Vol. 24 at p. 205, Art. 369 it is stated "except in the cases previously mentioned, the Limitation Act, 1939 only takes away the remedies by action or by set-off; it leaves the right otherwise untouched and if a creditor whose debt is statute-barred has any means of enforcing his claim other than by action or set-off, the Act does not prevent him from recovering by those means "The Court of Appeal in Curwen v. Milburn, (1889-42 Ch D 424), Coton L. J. said:

"Statute-barred debts are dues, though payment of them cannot be enforced by action the same view was expressed by the Supreme Court in Bombay Dyeing and Manufacturing Co. Ltd. v. The State of Bombay (AIR 1958 SC 328) where it held that the statute limitation only bars the remedy but does not extinguish the debt except in cases provided for by S. 28 of the Limitation Act, which does not apply to a debt. Under S. 25 (3) of the Contract Act a barred debt is good consideration for a fresh promise to pay the amount. Sec. 60 of the Contract Act provides that when a debtor makes a payment without any direction as to how it is to be appropriated, the creditor has the right to appropriate it towards a barred debt. In a Full Bench decision of the Patna High Court Ram Nandan Sharma v. Mt. Maya Devi (AIR 1975 Pat 283) Untwalia, C. J. as he then was, has stated "There is a catena of decisions in support of what has been said by Tek Chand, J. in First National Bank v. Sant Lal (AIR 1959 Punj 328) that the Limitation Act with regard to personal actions, bars the remedy without extinguishing the right." The law is well settled that though the remedy is barred the debt is not extinguished. On consideration of the scheme of the Act, it is clear that the statute has conferred a benefit on the tenant to avoid a decree for eviction by complying with the requirement of S. 20 (4). If he fails to avail himself of the opportunity and has not paid the rent for not less than four months and within one month from the date of service upon him of a notice of demand the landlord under S. 20 (2) would be entitled to an order of eviction. Still the tenant can avail himself of the protection by complying with the requirements of S. 20 (4). As he has not deposited the entire amount due the protection is no more available. We agree with the view taken by the trial Court and the High Court of Allahabad that the words "entire amount of rent due" would include rent which has become time-barred."

In this view of the matter, the ratio of the Supreme Court case, relied on by the learned counsel for the plaintiff-non-applicant, is not applicable to the present case. Consequently, the trial Court had no jurisdiction to order deposit of rent which was time-barred on the date of institution of the suit.

12. The second contention of the learned counsel for the applicant is that the character of the amount payable prior to the date of the passing of the decree for partition on 16-7-1975 appears to be that of rent and got transformed into debt. Learned counsel places reliance on the First proviso to S. 109 of the Transfer of Property Act and AIR 1955 Raj 167. It is urged on the strength of these cases that the amount due prior to the passing of the partition decree did not retain character of rent, therefore, the trial Judge had no jurisdiction to order deposit thereof, under S. 13 (2) of the Act.

13. So far as 1968 Jab LJ 337 is concerned, it is a case of sale in favour of the plaintiff by former landlord and the question which fell for consideration in that case was whether arrears of rent prior to the date of sale in favour of the plaintiff got transformed into debt, or retained the character of rent. The plaintiff's claim was based on the theory of assignment of claim. It was not a case of partition, therefore, will not govern the present situation. So far as the case reported in AIR 1965 Madh Pra 1 is concerned, the ratio of the case is that partition can be treated as a transfer for purposes of S. 109 of the T. P. Act. So that the person to whom the property let out has been allotted becomes sole landlord; but it is not a case on the effect of the First Proviso to S. 109, T. P. Act. In the Rajasthan case reported in AIR 1955 Raj 167 in para. 31 thereof it has been held,

"It is true that according to Sec. 109, T. P. Act, the transferee is not entitled to arrears of rent due before the transfer but in the present case the arrears of rent could be due only at end of the year because the tenancy was for a fix-

ed term of one year. The plaintiff's father Ram Narayan had given to the appellant a clear notice that the plaintiff alone was entitled to rent from the beginning of the tenancy. The appellant has not taken the plea that he had paid the rent for the said period of one month and seven days to the plaintiff's father. Under the circumstances, the plaintiff could claim rent even for that period from the defendant and the Courts below have not committed any mistake in passing the decree for the entire sum of Rs. 60/- for the first year."

14. So far as the facts of the present case are concerned, they are different. The original landlord was even on the case set up by the defendant-applicant, Harishchand, father of the plaintiff-non-applicant No. 1, Harishchand had four sons including the plaintiff. Thus, the plaintiff was entitled to a share of the rent and after the decree for partition dated 16-7-1975. On and after 16-7-1975 by virtue of the partition decree, he became exclusively entitled to the suit-shop and became entitled to the entire rent including the rent payable to his other three brothers. As to the rent of the period prior to 16-7-1975, it is alleged that the plaintiff will be entitled to recover the same. The ratio of the Rajasthan case (AIR 1955 Raj 167) cannot be pressed into service in the present case in view of this factual position.

15. At any rate the theory of transformation of the amount due prior to 16-7-1975 cannot be available to the defendant-applicant specially in view of the fact that the present plaintiff-non-applicant was prior to the date of the decree of partition, one of the landlords and thereafter he became the sole landlord of the suit shop having been allotted to him exclusively in partition. Fractional transformation of an amount into debt, the remaining amount retaining the character of rent, is not conceivable. The case reported in AIR 1976 Madh Pra 55 is also not on the point. What it lays down is that S. 109 of the T. P. Act creates a statutory attornment substituting, but retaining the same effect of a contractual attornment. The title of an assignee is complete on execution of the deed of assignment and is not postponed till the notice of the assignment. It is not a case on the point which is in controversy in the instant. Therefore, the second contention is rejected as devoid of force. The trial Court had jurisdiction under S. 13 (2) of the Act to order deposit of the amount payable prior to the date of passing of the decree of partition on 16-7-1975. Of course, the liability of this amount due from the defendant-applicant will not travel beyond the period of limitation.

16. The third contention of the learned counsel for the defendant-applicant is that in absence of a direction under S. 13 (3) of the Act after enquiry on the point as to persons to whom rent is payable, the impugned order could not be passed. The decree for partition is admitted to be on record of the trial Court and on the basis thereof the Court had jurisdiction to pass order under Section 13 (3) of the Act. The impugned order discloses that the trial Court, had actually passed it on the basis of the decree passed in the partition suit. No particular mode of enquiry under S. 13 (3) of the Act is prescribed. The order could be passed and had been rightly passed on the basis of the decree of partition, and it had been rightly held for purposes of S. 13 (3) of the Act that the plaintiff had become the sole landlord. Therefore the third contention is also devoid of any force.

17. This brings me to the last contention which was raised by the learned counsel for the plaintiff-non-applicant No. 1 to the effect that having deposited rent in compliance of the impugned order, the defendant-applicant should be deemed to have waived the right to object the legality thereof. Firstly, there can be no estoppel against a statute. Secondly, in the instant case the defendant-applicant had taken precaution to deposit the rent subject to the right to object in appeal. Though the word 'appeal' has been used in the application made for the purpose of depositing the rent, yet it cannot be said that it was a voluntary deposit and cannot be construed to be an act of disentitling the defendant from challenging the impugned order by way of revision. Thirdly, compliance of an order which is illegal and without jurisdiction is no compliance in the eye of law and the principle of waiver cannot be the basis of such an order even if acted upon.

18. In view of the aforesaid discussion, the revision is partly allowed and

the impugned order is set aside only to the extent it directs deposit of time-barred rent. The remaining part of the order is upheld. In view of the facts and circumstances of the case I, make no order as to costs of this revision.

Revision partly allowed.

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A. P. SEN, C. J. AND J. S. VERMA, J.

Satyapal Bus Service, Sagar and another, Petitioners v. Secretary, Regional Transport Authority, Sagar and another, Respondents.

Misc. Petn. No. 183 of 1978, D/- 15-4-1978.*

Motor Vehicles Act (4 of 1939), Ss. 62 (1), 44 (5) — M. P. Motor Vehicles Rules (1974), R. 70 (1) (vi) — Temporary permit — Delegate from R.T.A. can attach conditions to the permit.

The authority granting permits, must necessarily have the power to attach conditions to such permits. Where a time-table is attached to a permit and it is further provided therein that the time-table must be adhered to without any deviation, the running of a stage carriage, according to the time-table, will be a condition of the permit.

Held, the Secretary, R.T.A., by virtue of the delegation of powers to grant temporary permits under sub-sec. (1) of S. 62 of the Motor Vehicles Act, 1939, under the resolution passed by the Regional Transport Authority, read with R. 70 (1) (vi) of the M. P. Motor Vehicles Rules, 1974, and S. 44 (5) of the Act, necessarily had the power to attach one or more conditions to the permit, including the timings, for the purpose of making the grant of such a permit effective. AIR 1961 Madh Pra 367 and M. P. No. 645 of 1975, D/- 12-11-1975 (Madh Pra), Foll. (Para 6)

Anno: AIR Comm. M. V. Act (1st Edn.), S. 62 N. 2; S. 44 N. 7.

Cases Referred: Chronological Paras

(1975) M. P. No. 645 of 1975, D/- 12-11-1975 (Madh Pra) 6

AIR 1961 Madh Pra 367 6

S. Q. Hasan, for Petitioners; A. G. Dhanda, for Respondents.

*(To quash order of Secy., Regional Transport Authority, Sagar, D/- 20-3-1978.)

FV/GV/C535/78/DLD/VBB

A. P. SEN, C. J.:— These five writ petitions raise a common question and, therefore, they are disposed of by this common order.

2. The short question for consideration is whether the Secretary, R.T.A., is competent to grant timings to a temporary permit issued under cls. (a) to (d) of sub-sec. (1) of S. 62 of the Motor Vehicles Act, 1939, by virtue of the delegation of powers to him under Section 44 (5) of the Act, and R. 70 (1) (vi) of the M. P. Motor Vehicles Rules, 1974, which reads:—

"70. Delegation of powers by Regional Transport Authority.— (1) A R.T.A. may by general or special resolution recorded in its proceedings and subject to such restrictions, limitations and conditions as may be specified, delegate to the Secretary and/or Assistant Secretary of the Authority all or any of its following powers:—

(vi) the power to grant a temporary permit under S. 62 and under sub-sections (4) and (6) of S. 63 of the Act."

The R.T.A. in each of these cases, has, more or less, passed a resolution to the following effect:—

"In exercise of its powers vested in it under S. 44 (5) of the Motor Vehicles Act, 1939, read with R. 70 of the M. P. Motor Vehicles Rules, 1974, R.T.A., Sagar, delegate to its Secretary (R.T.O., Sagar), the following of its powers exercisable under the M. V. Act, 1939 and the M. P. M. V. Rules, 1974:—

VI. The power to grant a temporary permit under S. 62 and under sub-section (4) of S. 63."

3. The matter turns on the construction of sub-sec. (1) of S. 62 of the Act, which reads:—

"62. Temporary permits.— (1) A R.T.A. may, without following the procedure laid down in S. 57, grant permits, to be effective for a limited period not in any case to exceed four months, to authorise the use of a transport vehicle temporarily—

(a) for the conveyance of passengers on special occasions such as to and from fairs and religious gatherings, or

(b) for the purposes of a seasonal business, or

(c) to meet a particular temporary need, or

(d) pending decision on an application for renewal of a permit;

and may attach to any such permit any condition it thinks fit."

4. It is urged by Shri Hasan, learned counsel for some of the petitioners and Shri B. K. Rawal and Shri P. C. Naik, learned counsel appearing for the other petitioners, that sub-sec. (1) of S. 62 deals with two subjects, namely, (1) the grant of a temporary permit, and (2) imposition of conditions. It is urged by the learned counsel that though it is settled law that fixing of timings tantamounts to attaching a condition to the permit, the delegation of powers, under R. 70 (1) (vi) of the M. P. Motor Vehicles Rules, 1974, does not, in terms, give to the Secretary the power to fix timings, i.e., attaching any condition to the permit, although he has been delegated the power to grant a temporary permit under sub-sec. (1) of S. 62 of the Act. We are afraid, we are unable to appreciate this line of argument at all.

5. It is common ground that the time-table attached to a permit, is a condition of the permit. If that be so, the Secretary, R.T.A. having been delegated the power to grant a permit under sub-sec. (1) of S. 62 of the Act, such delegation of power necessarily carries with it the power to attach conditions to the permit. Shri Hasan, learned counsel for the petitioners, however, strenuously urges that the words "and may attach to any such permit any condition it thinks fit" in S. 62 (1) of the Act, must be read distinct and separate from the opening word 'may', without following the procedure laid down in Section 57, grant permits, to be effective for a limited period not in any case to exceed four months, to authorise the use of a transport vehicle temporarily'. We are afraid, the section cannot be read disjunctively. The word 'and', occurring in the section, makes both the parts conjunctive.

6. There is a fallacy in the argument of the learned counsel appearing for the petitioners. The authority granting permits must necessarily have the power to attach conditions to such permits. Where a time-table is attached to a permit and it is further provided therein that the time-table must be adhered to without any deviation, the running of a stage carriage, according to the time-table, will be a condition of the permit. In New Jabalpur Transport (Pvt.) Ltd. v. State Transport Appellate Authority, M. P., AIR 1961 Madh Pra 367, it was held by a Division Bench of this Court that time-table constitutes a condition attached to a permit. The same view was followed by another Division Bench in Phoolchand v. Regional Transport Authority, Indore, M. P. No. 645 of 1975, D/- 12-11-1975 (Madh Pra). Though this was in the context as to whether a person aggrieved by the fixing of timings, is a person who can appeal under S. 64 of the Act, the underlying principle remains the same. There is some conflict of views between different High Courts as to whether the time-table itself is a condtion of a permit, but learned counsel for both the parties accept before us that it has been the consistent view of this Court that the time-table is a condition of the permit. That being so, the Secretary, Regional Transport Authority, by virtue of the delegation of powers to grant temporary permits under sub-sec. (1) of S. 62 of the Motor Vehicles Act, 1939, under the resolution passed by the R.T.A. read with R. 70 (1) (vi) of the M. P. Motor Vehicles Rules, 1974, and S. 44 (5) of the Act, necessarily has the power to attach one or more conditions to the permit, including the timings attached to the permit, for the purpose of making the grant of such a permit effective.

7. The result, therefore, is that the writ petitions must fail and are dismissed. There shall be no order as to costs. The security amount shall be refunded to the petitioners.

Petition dismissed.

END

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MADRAS HIGH COURT

1978

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CORRECTION

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In the headnote *For* 'O. 33, R. 5' *Read* 'O. 33, R. 15'

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THE

All India Reporter

1978

Madras High Court

AIR 1978 MADRAS 1
= 1977 TAX. L. R. 2384
FULL BENCH
P. S. KAILASAM, C. J.
V. RAMASWAMI AND
BALASUBRAHMANYAN, JJ.*

M/s. Traders and Traders, Importers & Exporters & Manufacturers, Representatives Madras, Petitioners v. State of Tamil Nadu, Respondent.

Tax Case No. 142 of 1972, D/- 16-12-1976.

Tamil Nadu General Sales Tax Act (1 of 1959) S. 13 (5) (as introduced in 1964 and prior to amendment in 1972) — Scope and effect of — Tamil Nadu General Sales Tax Rules (1959), R. 5A (b) (i) — Rule if confers a different right — 1976 Tax LR 1533 (Mad) Overruled, (1962) 13 S.T.C. 847 (Andh Pra) Diss. from.

The dealer assessee sold medicine worth Rs. 696.40 by invoice No. 42688 on 3-3-1966 to the customer. The customer returned the goods on 2-9-1966 and it was brought to account on the same day. A credit note was also issued. On 25-10-1966 the assessee claimed refund in his monthly return for September 1966. On 25-1-1969, the assessing authority rejected the claim. On appeal by the assessee, the Appellate Assistant Commissioner also rejected the claim on the ground that the claim was made beyond six months, as provided for under S. 13 (5). The Tribunal also dismissed the appeal of the assessee. On revision by the assessee.

Per Majority (V. Ramaswamy, J. Contra)

Held that in view of S. 13 (5), on no ground, the assessee would be entitled to claim any adjustment, or refund of the tax, after the expiry of six months from the date of sale. After the final assessment had been completed, he could ask under S. 13 (5) for a refund of the tax in respect of the sale of such articles, but only within six months from the date of sale. This right to get an adjustment in the assessment would not be available after six months from the date of sale.

(Paras 4, 7, 8)

It cannot be said that R. 5-A (b) (i) confers a different right that is the right to exclude the amount refunded in the subsequent year's return, even though the refund was not within a period of six months from the date of sale. Read in the context of S. 2 (r) and Explanation (2), the purport of the rule is clear in that it only enables the refunded amount to be excluded from the turnover of the year. The wording of R. 5-A (b) (i) is significant in that it talks of the refunded amount to be excluded from the total turnover, which would mean that the refunded amount shall not be treated as part of the total turnover and that the refund must be relatable to the transaction which took place in that year. Thus, an adjustment of refund cannot be obtained after six months from the date of sale and rule 5-A (b) (i) cannot be read in a manner which is inconsistent with this

*(Note: In this case, the judges of the Full Bench differ in their views. The majority view is taken by P. S. Kailasam C. J. and Balasubrahmanyan J. and the minority, by V. Ramaswamy J. The judgments in the case are, however, printed in the order in which they are given in the certified copy. — Ed.)

rule. 1976 Tax LR 1533 (Mad) Overruled, (1962) 13 S.T.C. 847 (Andh Pra) Diss. from; (1961) 12 S.T.C. 274 (Mad) Distinguished. (Paras 9, 12, 13, 26, 35)

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K. Mani for V. Ramachandran and V. Narayanaswami, for Petitioner; The Addl. Govt. Pleader, for Respondent.

P. S. KAILASAM, C. J. (Majority View) :— This case is referred to a Full Bench by Ismail and Sethuraman JJ., for determination as to the scope of S. 13 (5) of the Tamil Nadu General Sales-tax Act, 1959.

2. The petitioner-assessee sold medicine (Metol) worth Rs. 69640 by invoice No. 42688 on 3-3-1966 to the customer. The customer returned the goods on 2-9-1966 and it was brought to account on the same day. A credit note was also issued. On 25-10-1966 the assessee claimed refund in his monthly return for September 1966. On 25-1-1969, the assessing authority rejected the claim. On appeal by the assessee, the Appellate Assistant Commissioner also rejected the claim on the ground that the claim was made beyond six months, as provided for under S. 13 (5) of the Tamil Nadu General Sales Tax Act, 1959, hereinafter referred to as the Act. The Tribunal also dismissed the appeal of the assessee. Hence the revision by the assessee against the order of the Tribunal.

3. The sale was on 3-3-1966 and the return of the goods by the customer was on 2-9-1966. In the monthly return for the month of September filed on 25-10-1966, in relation to assessment year 1966-67, an adjustment of tax was claimed. S. 13 (5) of the Act, introduced by the Tamil Nadu Act 15 of 1964, before its amendment by Tamil Nadu Act 31 of 1972, ran as follows:

"Where a dealer has refunded the price of articles returned by customers together with the tax collected from such customers in respect of the sale of such articles and where the amount representing the price refunded by the dealer is included in his turnover, the dealer shall be entitled to claim deduction of the tax levied in respect of such sale, within a period of six months from the date of sale by adjustment in the assessment and the final assessment shall be completed accordingly, but such dealer shall not be entitled to claim any adjustment or refund of tax in respect of the sale of such articles after the expiry of the said period of six months."

This sub-section was further amended by the Tamil Nadu Act 31 of 1972, whereby for the words 'within a period of six months from the date of sale', the words 'within such period as may be prescribed and for the words 'the said period of six months', the words 'the period so prescribed' were substituted. The amendment by Act 31 of 1972 is not relevant for our discussion and need not be taken any further note of.

4. If the case is to be decided on a reading of S. 13 (5) alone, the dealer shall be entitled to claim deduction of the tax only within a period of six months from the date of sale. The deduction of the tax levied may be by adjustment in the assessment and the final assessment may be completed accordingly. But the dealer shall not be entitled to claim any adjustment or refund in respect of sale of articles after the expiry of the period of six months. On the ground of failure to satisfy this condition, the claim for deduction has to be dismissed. From the sub-section it is also clear that the claim for deduction may be by adjustment in the assessment and the final assessment shall be completed accordingly. This would mean that the return had been submitted, but the final assessment had not been made. But, on no ground, the dealer will be entitled to claim any adjustment, or refund of the tax, after the expiry of six months from the date of sale. As the section in very positive terms denies any claim for deduction after six months from the date of sale and emphasises that no adjustment or refund of tax can be made after the expiry of a period of six months from the date of sale, in the concluding portion of the sub-section, no refund is allowable in the present case.

5. But the reference to a Full Bench is necessitated as a Bench of this court in Madras Radiators and Pressings v. State of Tamil Nadu 37 S.T.C. 123 : (1976 Tax LR 1533 (Mad)), after referring to the provisions of the Act and the scope of R. 5-A (b) (i) of the Tamil Nadu General Sales tax Rules 1959, hereinafter referred to as the Rules, observed as follows (at p. 1537 of Tax LR).

"Thus S. 13 (5) and R. 5-A (b) (i) deal with different rights of a dealer".

One of the learned Judges who heard the revision felt that because of the express provisions of S. 13 (5), the view that the two provisions, S. 13 (5) and R. 5-A (b) (i) referred to different rights of the dealer might not be correct. The learned Judge was also of the view that the restriction of a period of six months could not be got rid of by reference to a rule and that in the event of there being a conflict, the rule being a subordinate legislation, would have to yield to the statutory provisions itself.

6. We will now proceed to refer to the necessary provisions in the Act and the Rules and the decision in Madras Radiators and Pressing v. State of Tamil Nadu 37 STC 123 : (1976 Tax LR 1533 (Mad)). Section 2 (p) defines taxable turnover. Section 2 (q) defines total turnover and S. 2 (r) defines turnover. S. 3 is the charging section. It provides for levy of tax on sales or purchase of goods. Explanation 2 (iii) to S. 2 (r) provides that:

"Subject to such conditions and restrictions, if any as may be prescribed in this behalf any cash or other discount on the price allowed in respect of any sale and any amount refunded in respect of articles returned by customers shall not be included in the turnover".

The rule as prescribed under Explanation (ii) to S. 2 (r) is R. 5-A of the Rules. That rule provides that the amount specified in the clauses in the rule shall not be included in the total turnover of the dealer. Rule 5-A (b) (i) provides that all amounts refunded to purchasers in respect of goods returned by them to the dealer when the goods are taxable on the amount for which they have been sold shall be excluded in the total turnover of a dealer provided that the accounts show the date on which the goods were returned and the date on which the the amount for which refund was made or credit was allowed to the purchaser.

7. Section 3 refers to total turnover for a year of a dealer and a casual trader, whatever be his turnover for the year, shall pay tax for each year. The year is defined in S. 2 (t) as meaning the financial year. Therefore, when a total turnover, or turnover, or tax is mentioned, it is only for the financial year. In calculating the turnover, Explanation 1-A to S. 2(r) provides that any amount collected by a dealer by way of tax under the Act shall not be included in the turnover. Under Explanation 2 (iii) any amount refunded in respect of articles returned by customers shall not be included in the turnover. So in arriving at the turnover for the year, under Explanation 2 (iii) the amount refunded shall not be included. If the sale and the refund are in the same year, in computing the turnover, the amount refunded is not included, that is, the amount for which the property was originally sold, is excluded. As the sale has proved to be abortive, the sale as well as the refund is excluded in the turnover for the year. Explanation 2 (iii) is subject to rule prescribed in this behalf. The rule prescribed is R. 5-A. That rule states that "in pursuance of Explanation (2) to S. 2 (r) of the Act, the amounts specified in the following clauses shall not, subject to the conditions specified therein, be included in the total turnover of a dealer." Amongst the amounts that are not to be included in the total turnover is one contained in R. 5-A (b) (i) which states:

"all amounts refunded to purchasers in respect of goods returned by them to the dealer when the goods are taxable on the amount for which they have been sold, provided that the accounts show the date on which the goods were returned and the date on which and amount for which refund was made or credit was allowed to the purchaser."

The rule which is in pursuance of Explanation (2) to S. 2 (r) enables a dealer not to include the amounts refunded to the purchasers. As the turnover for the purpose of taxation under S. 3 is to be for the year, the non-inclusion is for the year. That is, S. 2 (r), Explanation (2) (iii) and R. 5-A (b) (i) all relate to the turnover for the year. If both the transactions are not in the same year, that is, if the refund is in the subsequent year the refund cannot be included in the turnover for the year. As it was felt that the dealer should not be deprived of the refund of tax which he had paid for the sale, the Legislature intervened and introduced S. 13 (5). That section was added by Act 15 of 1964. The objects and reasons for introducing S. 13 (5) are stated as follows:

"Under Explanation (2) to the definition of 'turnover' in S. 2 (r), any amount refunded in respect of articles returned by customers shall not be included in the turnover of a dealer. But when such articles are sold by a dealer at the close of a financial year and customers return those articles and obtain refund of the

price from the dealer some time after the close of that year, the dealer is unable to exclude the amount of price so refunded by him from his turnover before he furnishes his return for that year. It is considered necessary that he should be enabled to claim deduction of the tax included in his assessment in respect of the sale of such articles. It is not however considered necessary that a dealer should have the benefit of claiming such deduction of tax or refund of such tax for any indefinite period. It is accordingly proposed to amend S. 13 of the said Act, to allow adjustment of the amount of such tax in the assessment only if the dealer makes his claim within a period of six months from the date of sale".

The objects and reasons above extracted clearly show that as Explanation (2) to S. 2 (r) and the rules framed thereunder would not enable a dealer to exclude the amount refunded by him after the close of that year, it was considered necessary that he should be enabled to claim deduction of the tax included in the assessment. Six months' time was granted under S. 13 (5). He could claim deduction of tax levied in respect of such sale within a period of six months from the date of sale. This can be done by adjustment in the assessment and the final assessment can be completed accordingly. After the final assessment had been completed, he could ask for a refund of the tax in respect of the sale of such articles, but only within six months from the date of sale. This right to get an adjustment in the assessment will not be available after six months from the date of sale.

8. Whatever doubts there might have been before the enactment of S. 13 (5) in 1964, the introduction of this sub-section made it clear that after its introduction reliance could not be placed on the rules to achieve the end of obtaining a tax deduction so far as the amount refunded was concerned. On this ground alone, it is safe to state that the dealer is not entitled to a refund of tax on the price refunded by him.

9. We will now proceed to examine the purport of R. 5-A (b) (i) which a Bench of this court in Madras Radiators and Pressings v. State of Tamil Nadu 37 STC 123 : (1976 Tax LR 1533 (Mad)) held dealt with different rights of a dealer than S. 13 (5). The rule is framed, as already stated, in pursuance of Explanation (2) of S. 2 (r) and deals with the contents of a turnover and permits a dealer to exclude from his turnover any amount refunded. The turnover, we are of the opinion, is for the purpose of levy of tax under S. 3 and it is for the financial year. Normally, it could not be understood as enabling a dealer to exclude the amount in the subsequent year. The rule does not advance the contention that it confers a different right. The rule enables a dealer not to include in his total turnover the amount refunded to purchasers. Not included in the total turnover would necessarily mean the turnover submitted for the year. This was realised by the Legislature and S. 13 (5) was enacted to remedy this defect and not for conferring any separate right. We do not see any reason for holding that R. 5-A (b) (i) confers a different right that is the right to exclude the amount refunded in the subsequent year's return though the refund was not within a period of six months from the date of sale.

10. Two decisions were relied on by the Bench in Madras Radiators and Pressings v. State of Tamil Nadu 37 STC 123: (1976 Tax LR 1533 (Mad)), for coming to the conclusion that different rights were conferred on the dealer. It may at once be stated that both the decisions were rendered when S. 13 (5) had not been introduced. In Devi Films (P) Ltd. v. State of Madras, (1961) 12 STC 274 (Mad), a Bench of this Court was dealing with a sale under a hire purchase agreement. The machinery was sold to four purchasers for Rs. 68275 by assessee under a hire purchase agreement. The sales were in 1949, 1950 and 1951. The aggregate amount due under each of those agreements were taken into account in computing the taxable turnover of the assessee in the year of transaction. The transactions being in the form of hire purchase agreements the sale price was payable in instalments. The agreements provided that in default of payment of the instalments due, the assessee was entitled to a return of the goods.

It was further provided that when the goods were returned to the assessee, the liability of the purchaser to pay the remaining instalments ceased. In the assessment year 1955-56 four of the purchasers defaulted payment. The aggregate of the unpaid instalments on all these four transactions was Rs. 21191-1-6. The assessee claimed that the entire amount of Rs. 68275 which had suffered tax in the previous years should be deducted from its gross turnover in the assessment year 1955-56 during which the agreements

were terminated and the goods were returned to the assessee. The Court held on a construction of R. 5 (1) (b) of the Turnover and Assessment Rules, which provided that in determining the net turnover, all amounts allowed to purchasers in respect of goods returned by them to the dealer shall be deducted, that if an allowance is made against the goods returned, the deduction can be claimed only in the year in which that allowance has been made and to the real extent of that allowance independent of the date of the sale. The court also held that the date of the sale decides the inclusion in the assessee's assessable turnover and the date of allowance determines the exclusion from the gross turnover under R. 5 (1) (b).

It may be noted that what had been really allowed to purchasers in that case was the amount of the unpaid instalments of the sale price. The court held that the assessee is not entitled to claim that the entire sale price has been allowed within the meaning of R. 5 (1) (b). The court proceeded to explain that in the case of a transaction of a sale in the form of a hire purchase agreement, where the goods themselves are returned to the seller and the unpaid instalments of the purchase money ceased to be payable under the terms of the agreement, the seller is entitled to claim under R. 5 (1) (b) the total of the unpaid instalments as an allowance made within the meaning of R. 5 (1) (b). In the circumstances of that case, the amount was included as an allowance. The facts disclose that the unpaid instalments cannot be included in the sale at all. Further as we observed at the outset, this decision was rendered before S. 13 (5) was enacted and therefore it cannot be treated an authority for the proposition with which we are dealing.

11. The next case that was referred to is the decision of the Andhra Pradesh High Court in State of Andhra Pradesh v. Vauhini Pictures (P) Ltd., (1962) 13 STC 847 (Andh Pra). Construing R. 6 (1) (b) (i) of the Andhra Pradesh General Sales Tax Rules, 1957, the court observed that the rule does not state that the deduction claimed for refund of price in regard to the return of goods should be confined only to a particular period and held that a refund in the assessment year in respect of sales effected in the year previous to the assessment year would also be within the purview of that rule. This decision was rendered in the absence of S. 13 (5). We are unable to agree with this view.

12. In Madras Radiators and Pressings v State of Tamil Nadu, 37 STC 123 : (1976 Tax LR 1533 (Mad)), the Bench has taken the view that there is no reason to restrict the operation of R. 5-A (b) (i) to a case of refund within the assessment year itself, as the rule does not state that the amounts refunded shall be excluded from the total turnover of the year in which the sale took place. We are unable to accept this view as the turnover is required to be submitted for the financial year according to the charging section, Section 3. Read in the context of S. 2 (r) and Explanation (2), the purport of the rule is clear in that it only enables the refunded amount to be excluded from the turnover of the year. This was how the definition S. 2 (r), Explanation (2) to the definition and the rules were understood and the Legislature came forward with the amendment enabling the refund of the tax paid within a period of six months from the date of sale. The wording of R. 5-A (b) (i) is significant in that it talks of the refunded amount to be excluded from the total turnover, which would mean that the refunded amount shall not be treated as part of the total turnover and that the refund must be relatable to the transaction which took place in that year. Though R. 5-B was introduced by a subsequent amendment in the year 1973, it also makes the position clear that no claim for adjustment or refund of the tax under sub-sec. (5) of S. 13 be entertained, if it is not made within a period of six months from the date of sale. This should clearly mean that an adjustment of refund cannot be obtained after six months from the date of sale and R. 5-A (b) (i) cannot be read in a manner which is inconsistent with this rule.

13. We are satisfied that the decision in Madras Radiators and Pressing v. State of Tamil Nadu 37 STC 123 : (1976 Tax LR 1533 (Mad)) is erroneous. In any event, after the introduction of Section 13 (5), the construction put forward by the Bench in the above decision is unsupportable.

V. RAMASWAMI, J. (Minority View) :—

14. I have had the advantage of reading the judgment of my Lord, the Chief Justice. Having given my careful and anxious consideration, I regret my inability to agree with the conclusion reached by the learned Chief Justice.

15. The assessee is a dealer who has opted for assessment under R. 18 of the Tamil Nadu General Sales Tax Rules, 1959 (hereinafter called the Rules). He had sold under bill No. 4268 dated 3-3-1966 medicine (Methol) for Rs. 69640. This sale was included in the taxable turnover in the monthly return for the month of March 1966 relating to the assessment year 1965-66 and the tax of Rs. 1741 relating to the said sale was also remitted along with the return for the month. The goods sold under this invoice were returned to the assessee on 2-9-1966 and the assessee refunded the entire value of Rs. 69640 plus sales tax of Rs. 1741. In the monthly return relating to September 1966, which was filed in time on 25-10-1966, the assessee claimed adjustment of the tax paid on this sale. The assessing officer, however, in the final assessment under R. 18 (6) relating to the assessment year 1966-67 rejected this claim for adjustment on the ground that under S. 13 (5) of the Tamil Nadu General Sales-tax Act 1959 (hereinafter called the Act), the assessee would not be entitled to claim any adjustment of refund of the tax in respect of the sale of such articles after the expiry of the period of six months from the date of sale and that the assessee had claimed the adiustment only in the monthly return filed on 25-10-1966 in respect of the turnover relating to September 1966 and that therefore the adjustment was not made within six months from the date of sale, namely, 3-3-1966. This order of the assessing authority was confirmed in appeal by the Appellate Assistant Commissioner and the Sales-tax Appellate Tribunal also agreed with this view.

16. Under R. 15, every dealer who is liable to submit a return unless he has elected to be assessed under R. 18, shall on or before the 1st day of May every year submit to the assessing authority a return in form A. 1, showing the actual total and taxable turnover in respect of the previous year. Under the Sales-tax Act the assessment year is the financial year, that is the year ending with 31st March. On receipt of such return, the assessing authority, if he is satisfied that the return is correct and complete, finally assesses on the basis of the return and determines the tax payable. In cases where he considers the return to be incorrect or incomplete he makes assessments according to 'best judgment' basis. In cases where the assessee had opted to be assessed by the method described in R. 18, the assessee had to submit a return in form A-2, on or before the 25th of every month in respect of the turnover for the preceding month. It may be seen from Form A. 2 and the relevant rules that the return should specify the total turnover, the turnover on which exemption is claimed, the taxable turnover, the tax due on the taxable turnover, the amount actually collected by way of tax and the tax paid. Along with this return, the assessee shall also send a cheque or postal order for the amount of tax due as per his return or a receipt for payment of the tax in a Government treasury.

The return so filed for each month is provisionally accepted under Cl. 3 of R. 18. For the monthly return so submitted without a treasury receipt or cheque for the full amount of tax payable, the assessing authority shall provisionally assess tax payable for the month on the basis of the return and shall serve upon the dealer a notice in Form B-2, and the dealer shall pay the sum demanded therein. After the close of the year in which the said monthly provisional assessment has been made, the assessing authority shall, after such scrutiny, as he considers necessary and satisfying himself that the monthly returns filed are correct and complete, finally assess under a single order on the basis of the returns and determine the tax or taxes payable under the Act for the year to which the returns relate. The provisions relating to the refund of any amount in respect of goods returned by customers will have to be understood with reference to this scheme of assessment.

17. Prior to the introduction of S. 13 (5) in the Act, the legal position as per the provisions of the Act and the rules and as understood by this court in respect of the amount refunded for articles returned by the customers may now be noticed. Under S. 3 of the Act every dealer shall pay tax for each year at a certain percentage of his taxable turnover. Turnover means the aggregate amount for which the goods are bought and sold and the taxable turnover means the turnover on which the dealer shall be liable to pay tax as determined by the provisions of the Act and the rules. Taxable event is the sale and the levy of tax is on the 'amount' for which the goods are bought or sold. Once a sale takes place the amount for which the goods are sold becomes thus taxable. But the Act provided for certain relief in cases

where the dealer had to refund any amount in respect of articles returned by the customers. Explanation (2) (iii) to the definition of 'turnover' in S. 2 (r) of the Act provides that, subject to such conditions and restrictions, if any, as may be prescribed in this behalf, any amount refunded in respect of articles returned by customers shall not be included in the turnover. In pursuance of this Explanation, R. 5-A specifies the conditions and restrictions.

The relevant portion relating to refund is R. 5-A (b) (i). Under this provision, all amounts refunded to purchasers in respect of goods returned by them to the dealer when the goods are taxable on the amount for which they have been sold shall not be included in the total turnover provided that the accounts show the date on which the goods were returned and the date on which and the amount for which refund was made or credit was allowed to the purchaser. Neither the Explanation to S. 2 (r) nor R. 5-A (b) made the sale of the article which was the subject matter of the return later on not a taxable sale by reason of such return only. Nor the definition of 'sale' in S. 2 (n) excluded such sales. Therefore, once a sale takes place the entire amount paid or payable in respect of the same is liable to be included in the turnover. Under the Explanation read with R. 5-A (b), the amount refunded in respect of articles returned by customers 'shall not be included' in the turnover.

18. In cases where the assessee has opted to be assessed under R. 18, as already stated, he has to submit a return in form A-2 for every month on or before the 25th of the succeeding month and has also to remit the tax payable as per the return. Thus, when a sale takes place in any particular month, he had to include that sale in the taxable turnover in the monthly return and pay tax on it. If the return of the article was in any period subsequent to the sale but within the same assessment year the assessee would be entitled to deduct the same from the total turnover on which he is finally assessed under a single order for the assessment year under R. 18 (6), irrespective of the fact that the return was within six months or beyond the period of six months from the date of sale. No question of excluding the sale itself from the original monthly return could arise. In respect of an assessment under R. 18, the words 'shall not be included in the turnover' in Explanation (2) to S. 2 (r) and R. 5-A will, therefore, have to be understood only as a deduction from the total turnover.

19. In cases where the sale and return were in the same assessment year, when a dealer submits his return under R. 15, the amount for which it was sold is included in the turnover and the amount refunded is deducted from the same before arriving at the total turnover of the dealer because the sale is still a taxable sale in spite of the refund made on return of the article. In such a case, it is also immaterial whether the return of the article and the refund of the money was within a period of six months from the date of sale. Thus, even in respect of the assessment under R. 15, the words 'shall not be included in the turnover' will have to be understood only as a deduction from the total turnover.

20. As already stated under S. 3 of the Act, every dealer shall pay tax at a certain percentage of his taxable turnover. Turnover is the amount for which goods are sold or purchased and taxable turnover is determined after certain deductions from the total turnover as per the rules. The amount refunded is excluded not because of the sale and return took place in the same year but because Section 2 (r) Explanation (2) allowed the amount refunded in respect of any goods returned to be deducted from the turnover of that year. The deduction from the turnover was not conditioned upon the inclusion of the amount for which the goods were sold in the turnover, but conditioned upon factual refund made on return of the goods and to the extent of amount refunded. Thus, what was relevant under Explanation (2) to S. 2 (r) and R. 5-A (b) is the date of return of the article and refund of the money and not the date of sale. It may also be noted that the amount that is to be deducted from the turnover is not the entire price which the dealer receives on the sale from the customer, but it is only so much of the amount that was refunded by him when the articles were returned by the customer. The two amounts may differ, but so far as the assessment is concerned, only that amount that was refunded had to be deducted.

21. Thus in terms of the provision of the Act and the rules, the amount refunded has to be deducted only from the turnover of the year in which the refund was effected and it is immaterial when the sale took place and whether the price for which the goods were originally sold

was included in the turnover or not. Thus, in cases where the sale and the return of the article were in two different assessment years, the assessee, as the provisions stood then, could claim a deduction of the amount refunded only in the assessment year in which the amount was refunded. He was not enabled to claim a deduction of the same in such a case in the assessment year in which the sale itself took place.

22. Let us now consider the decisions rendered with reference to the provisions then existing prior to the introduction of S. 13 (5) of the Act. In Devi Films (P) Ltd. v. State of Madras, 12 STC 274 (Mad), a Division Bench of this Court had to consider a similar question. The facts in that case are as follows.—The assessee in that case sold some cinema machinery and apparatus under hire purchase agreements. The aggregate of the amount due under these agreements was Rs. 68275. In computing the taxable turnover of the assessee the aggregate amount was included in the year of the transaction and was assessed to sales tax. This was for the reason that the hire purchase agreements were considered to be sales and the tax is payable on the aggregate amount for which the goods were sold, even though the consideration for the same was payable in future. When the purchaser defaulted in payment of the instalments, the assessee got a return of the goods. This default and return of the goods was in the assessment year 1955-56 long subsequent to the year of the transaction. The aggregate of the unpaid instalments in respect of these transactions was Rupees 21,191-1-6.

The assessee claimed that since there was a return of the article and default in payment of the further instalments the entire amount of Rs. 68275 which had suffered tax in the previous year should be deducted from its gross turnover in the assessment year 1955-56, during which period the agreements were terminated and the goods returned to the assessee. In support of this contention, the assessee relied on R. 5 (1) (b) of the then Turnover and Assessment Rules, which was in pari materia with R. 5 A (b) of the present rules. It may be mentioned that explanation 2 (iii) of S. 2 (r) was also in the statute book at that time. It was held by this court that the assessee was entitled only to that amount which represented the unpaid sale price and not the aggregate amount of Rupees 68275 because it was only the unpaid sale price that would be the amount for which credit was allowed to the purchaser and the remaining consideration had already been received and not repaid by the dealer. It was also held that it was the year in which the refund was made or credit was allowed for which relief could be obtained and not in the year of sale. In so holding, a Division Bench of this court observed —

"The goods sold by the assessee were returned to the seller. It is true there was a considerable interval between the sale and the return of the goods, but the length of the interval is, in our opinion, not a relevant factor at all in deciding whether the requirements of the rule have been satisfied by a given assessee. If an allowance is made against the goods returned the deduction can be claimed only in the year in which that allowance has been made and to the real extent of that allowance, independent of the date of the sale. The rule itself makes that clear. The date of the sale decides the inclusion in the assessee's assessable turnover. The date of the allowance determines the exclusion from the gross turnover under R. 5 (1) (b)."

23. A similar view was also taken by the Andhra Pradesh High Court in State of Andhra Pradesh v. Vauhini Pictures (P) Ltd., (1962) 13 STC 847 (Andh Pra), with regard to the effect of R. 6 (1) (b) (i) of the Andhra Pradesh General Sales-tax Rules 1957, which also contained a provision similar to R. 5-A (1) (b) of the Tamil Nadu General Sales-tax Rules. In that case also some publicity materials were sold to the exhibitors in the assessment year 1957-58, but they were returned in the assessment year 1958-59 and the sale price was refunded by the assessee to the purchasers. Relying on the rule, the assessee claimed a deduction of the amount refunded in the assessment year 1958-59. A Division Bench of the Andhra Pradesh High Court allowed the claim and held:

"We find that R. 6 (1) (b) (i) discreetly omits to mention that the deduction claimed for refund of price in regard to the return of goods should be confined only to a particular period. All that rule mentions is that when goods are taxable on sales, the amounts allowed to purchasers in respect of the goods returned by the purchasers to the dealer is an allowable item. Further on, the condition laid down in that rule (despite repetition)

says 'provided the accounts show the date on which the goods were returned and the date on which and the amount for which refund was made.' It looks to us that the mention of the date is not with a view to find out when the claim for deduction has arisen, but only to make it feasible for the taxing authority to verify when the goods were got by the seller and how refunds were made in respect of them. Therefore, to have to read into this fact that the date of the return of the goods is to be specified by the assessee and that a revaluation in respect of the time of the transactions is also implied with a view to restrict deductions in the year of assessment, is not warranted by the language of this rule. Nor can it be said that this rule was contemplating the taking into account of the return of the goods only in the asessment year and not in regard to goods sold out previously but were returned in the assessment year."

The resultant position is, when a sale takes place the amount for which it is sold or purchased will have to be included in the turnover in the year in which the sale took place. By reason only of the return of the article subsequently and refunding of any amount in respect of such return, the sale itself does not cease to be a taxable sale nor the amount for which it was sold ceased to be a turnover of the assessee. In the case of refund in respect of articles returned by the customers, that portion of the amount that was refunded will have to be deducted from the turnover of the year in which the amount was refunded. It was not permissible for an assessee when the sale and return were in different assessment years, to claim deduction and relief in the year of sale itself. When such was the position S. 13 (5) of the Act was introduced by Madras Act 15 of 1964. That sub-section as originally introduced reads thus —

"(5) Where a dealer has refunded the price of articles returned by customers together with the tax collected from such customers in respect of the sale of such articles and where the amount representing the price refunded by the dealer is included in his turnover, the dealer shall be entitled to claim deduction of the tax levied in respect of such sale, within a period of six months from the date of sale by adjustment in the assessment and the final assessment shall be completed accordingly but such dealer shall not be entitled to claim any adjustment or refund of the tax in respect of the sale of such articles after the expiry of the said period of six months."

As Craies on Statute Law puts it, the most firmly established rules for construing an amending enactment are those laid down by the Barons of the Exchequer in Heydon's case 1584-3 Co-Rep. 7a, which have been continuously cited with approval and acted upon in a number of cases. They are as follows:

1. What was the law before the making of the Act; 2. What was the mischief and defect for which the existing law did not provide; 3. What remedy the Legislature had resolved to cure; and 4. The true reason of the remedy. The reason for the addition of sub-sec. (5) of S. 13 of the Act is explained in the Statement of Objects and Reasons to the amending bill and it reads as follows:

"Under Explanation 2 to the definition of 'turnover' in S. 2 (r), any amount refunded in respect of articles returned by customers shall not be included in the turnover of a dealer. But when such articles are sold by a dealer at the close of a financial year, and customers return those articles and obtain refund of the price from the dealer sometime after the close of that year, the dealer is unable to exclude the amount of the price so refunded by him from his turnover before he furnishes his return for that year. It is considered necessary that he should be enabled to claim deduction of the tax included in his assessment in respect of the sale of such articles. It is not, however, considered necessary that a dealer should have the benefit of claiming such deduction of tax or refund of such tax for any indefinite period. It is accordingly proposed to amend S. 13 of the said Act to allow adjustment of the amount of such tax in the assessment only if the dealer makes his claim within a period of six months from the date of sale".

It is seen from this that the Legislature intended to provide for that which was not found in the earlier enactment, that is to permit an assessee to claim a deduction of any amount refunded from the turnover of the assessment year in which the sale took place even though the refund was made in subsequent financial year. The provision in S. 13 (5) also shows that it applies only to a case where the assessee wants to claim a deduction of the amount refunded from the turnover of the year in which the sale took place, even though the refund was in the subse-

quent year. The words 'the amount representing the price refunded by the dealer is included in his turnover" in S. 13 (5) clearly show that the turnover referred to therein is the turnover of the year in which the sale took place. The relief under S. 13 (5) could be claimed by the dealer only if the claim for deduction of the tax levied in respect of such sale is made within a period of six months from the date of sale. A curious result flowed from this provision, as seen below. Even if the sale and the return were made in the same assessment year, in the case of a person who had opted to be assessed under R. 18, he was deprived of the relief found in Explanation (2) to S. 2 (r), because if the sale was in April it would have been included in the monthly return filed in the subsequent month and on that basis it would have been provisionally assessed.

Though the return and refund itself might be within six months, that is, in October, since the monthly return in respect of October is to be submitted in November, the assessee, on a strict interpretation of S. 13 (5) was not entitled to claim deduction of the tax by adjustment. In the case of an annual return under R. 15 also the assessee would not be entitled to claim deduction though the sale and return were in the same year since S. 13 (5), as it was originally enacted, required the claim for deduction or adjustment to be made within a period of six months from the date of sale. In all cases where the sale took place during the period from the 1st April and 30th September of any particular year, the assessee was not able to invoke S. 13 (5) as the return for the year had to be filed after the end of the year and before the 1st of May. It is to get over this difficulty, S. 13 (5) was again amended by Tamil Nadu General Sales-tax (Second Amendment) Act, 1972, by substituting the words 'within such period as may be prescribed' for the words 'within a period of six months from the date of sale' and R. 5-B was also introduced in the rules. Under R. 5-B such claim for adjustment or refund of tax could be made within a period of six months from the date of sale or before the date of final assessment whichever is later. Under the provisions of S. 13 (5) and R. 5-B, as they stand now, if the sale and the return take place in different assessment years, the assessee could claim a deduction of the amount refunded from turnover of the year in which the sale took place before the date of final assessment for that year.

Even if the assessment had been completed, he could ask for an adjustment or reopening of the assessment or rectification of the assessment if he makes a claim for such adjustment or rectification within a period of six months from the date of sale itself. This is the position both in regard to assessment under R. 15 or an assessment under R. 18. Thus, Section 13 (5) is not intended to cover a case where the assessee claims a deduction of the amount refunded in the year in which he refunded the money. It is intended to cover a case when the assessee claims deductions of the amount refunded from the turnover of the year in which the sale took place. The previous provision enabling the assessee to claim deduction under S. 2 (r), Explanation 2 (iii) read with R. 5-A (b) in the year in which the refund was effected is thus not affected either by express provision or by implication. It may also be pointed out that it is not correct to state that it is R. 5-A (b) that enables an assessee to deduct the amount from the turnover. It is provided for in S. 2 (r) Explanation itself and R. 5-A only prescribes the condition under which such deductions could be claimed, as Explanation 2 itself states that the deduction could be made only subject to such conditions and restrictions as may be prescribed.

24. Before parting with this case, I may also add that, assuming that the view of the learned Chief Justice is also possible, under the well-known principle where two interpretations are possible that interpretation which is beneficial to the assessee will have to be adopted in construing a taxing statute. Even under this rule, I am of the view that decision in Madras Radiators and Pressings v. State of Tamil Nadu 37 S.T.C. 123 : (1976 Tax LR 1533) (Mad) does not require any reconsideration.

25. I am therefore unable to share the view that the earlier decision of this Court in Madras Radiators and Pressings v. State of Tamil Nadu 37 S.T.C. 123 : (1976 Tax LR 1533) (Mad) is erroneous or unsupportable on the provisions of the Act.

BALASUBRAHMANYAN, J. (Majority View):— **26.** I have had the advantage of perusing the judgments of my Lord the Chief Justice and of my learned brother V. Ramaswami J. They have expressed diametrically opposite views on the scope and effect of

S. 13 (5) of the Tamil Nadu General Sales-tax Act, 1959. I agree with the former view and disagree with the latter. In these events, I propose to say a few words myself on the question, explaining why I prefer the one view to the other.

27. Section 13 (5) deals with the tax treatment of a sales return for purpose of assessment. The Act imposes a tax on sales of goods. The charge to tax, in terms of legislative competence as well as in terms of some of the provisions in the Act itself, attaches the moment the sale is effected. This idea is sometimes put differently by saying that in sales tax the taxable event is the sale. But the Act has also to look to the process of assessment and collection of this tax. Hence it adopts the principles of aggregation familiar to fiscal measures and makes the assessment to tax a yearly assessment by aggregating all sales that a tax payer makes in the course of that year. The aggregate of the sales in the fiscal period of one year is called the turnover. This is the reason why sales-tax also goes by the other appellation, turnover tax. It would be correct to say that the tax is at once a tax on the sales and a tax on turnover. There are sections in the Act which are oriented towards the one conception of aggregation; there are other sections which are founded on the other idea of severalty of transactions. It is unnecessary for me to refer to all the relevant sections that illustrate the scheme of the Act which I have outlined. Section 13 (5) is one of those provisions in the Act which takes up for special treatment an individual sale, which forms part of the aggregate of sales called turnover.

Any transaction which is sale and is part of the taxable turnover of a year, gets taxed, and must get taxed, in the assessment for that year. The legislature, however, as a popular legislative body took note of the realities of commercial dealings, because the tax imposed under the Act is not a tax on sales of all and sundry people, but only a tax on the turnover of a dealer, all non-dealer's sales being excluded from the ambit of the charge, by definition. It often happens in the business world that a customer who has purchased a commodity from a dealer might wish to return it for some reason, and the dealer may also be agreeable to that course and be willing to refund the price. If both the parties act according to their second thoughts in the manner aforesaid, what happens is a sales return, as it is described in the fiscal jargon. But this does not abrogate the sale, or render it retrospectively, a nullity. On the contrary, it takes note of the circumstances that the earlier sale is an accomplished fact. Only, the parties agree to put themselves in the former position, the status quo ante, by consensual overt acts—the one returning the goods and the other refunding the price.

Technically, therefore, on the theory that sales tax attaches at the moment of sale, there is no call for making any provision in the taxing Act for giving any relief to the dealer whose sale, which is subject to a subsequent return, chargeable to tax. But, as I said, since the Legislature felt it expedient to take note of commercial realities even while enacting a strictly fiscal measure, it made provision for excluding from the taxable turnover the amount refunded by the dealer to the customer as respects a sales return. Sales return, as such, has thus no place in the scheme of taxation excepting that it can be traced to the particular sale of which it is a return. Section 13 (5) makes this clear by enacting that where a dealer has refunded the price of articles returned by customers and where the price refunded by the dealer is included in his turnover, the dealer shall be entitled to claim deduction of the tax levied in respect of such sale. The words of the section are not capable of being misunderstood. They hitch the deduction of tax to the sale in question. There can be no question of considering a sales return all by itself, as if that, per se, were the subject of special tax treatment. The other provision in the section, which is very important to the present case, is that which imposes a strict time limit for the making of any claim by the tax payer for deduction of the tax referable to the sale in question. While the Act permits the dealer to get a deduction of tax in respect of the sales return, it insists that the claim for such deduction should be made within six months from the date of the sale.

If, by then, the assessment of the turnover in which the sale is included, is not completed, then an adjustment will be made in the computation of the taxable turnover by removing the amount covering the sales return from the figure of turnover, and the year's tax will be calculated on the net figure after exclusion of the amount of sales return from the turnover. The section having provided

the six months time limit for deduction of tax in respect of sales return, logically makes provision for cases where, even during the subsistence of the six months' time limit, the final assessment happens to have been already completed. In such cases, the section entitles the dealer to obtain relief by way of refund of the tax levied in the already completed assessment, but always insisting that the claim for deduction of tax must be filed before the assessing authority within six months of the sale.

28. I do not think the scheme and structure of the section admit of any doubt. I further feel that in the matter of the tax treatment of sales returns this provision must be taken as a complete code in itself. This conclusion must be derived not only because there is no other section in the Act which has anything to say on the subject, but also because of enactment of an inexorable time-limit in the concerned provision itself. The idea of a time-limit for exercise of a right or privilege is to say that beyond the time-limit the right or privilege cannot be exercised. Otherwise, the Legislative purpose of imposing a bar would be stultified. For these reasons, without referring to the history of the legislation or any other factors, I am of the view that the claim for deduction of tax for a sales return cannot be made at any time, after the expiry of six months from the relative sale itself. I am further of the view that the claim appertains, and must appertain, only to the particular assessment of the turnover in which the sale itself figures.

29. Reference was made to R. 5-A (b) (i) of the Rules made under the Act. Reference was also made to the definition of the expression 'taxable turnover' and 'turnover' in the interpretation clauses in the Act. The former term is defined as the turnover on which a dealer shall be liable to pay tax as determined after making such deduction from his total turnover and in such manner as may be prescribed. The latter expression 'turnover' has a definition to which are appended explanations. Explanation (iii) says that, subject to the rules in this regard, any amount refunded in respect of articles returned by customers 'shall not be included' in the turnover. R. 5-A (b) (i) refers to all amounts refunded to purchasers in respect of goods returned by them to the dealer, and provides that the said amounts shall not be included in the total turnover of the dealer.

30. From the words 'shall not be included' occurring in the definition in S. 2 (r) read with Explanation (iii) and R. 5-A of the Rules, it is sought to be argued that whenever there is a sale return the amount covered by that return can be deducted from the turnover for arriving at the taxable turnover. It is principally on the basis of these words that the view has been expressed in the judgment of my learned brother, V. Ramaswami J., These words, it is said, warrant the taxation of a sale in one year's assessment and the exclusion of the sales return in respect of that very sale in a subsequent year's assessment. With respect, I do not see how the words point to his conclusion. Ramaswami J. has observed that the words 'shall not be included' only mean that to the extent of the sales return there shall be a 'deduction' from the turnover. In my view, the concept of a deduction in the sense of an allowance such as we know in the realm of income-tax for business expenditure, is alien to the scheme of the Tamil Nadu General Sales-tax Act. "Shall not be included" does not mean shall be deducted. Nor does it mean, shall be excluded. In my opinion the words "shall not be included" convey the idea that but for the provision for non-inclusion the thing would be included in the turnover.

Samuel Goldwyn the movie Mogul in a famous Goldwynism asked his host to 'include me out' from the list of invitees. Adopting this Goldwynism I would say that a sale return is such a return as might be included out of the taxable turnover. In other words, only those sales returns whose relative sales, but for their non-inclusion are includable in the very assessment of the turnover concerned can be kept out of the taxable turnover. It follows, therefore, that even on the basis of the statutory definitions of turnover and the pertinent rule relating to non-inclusion of sales returns, there is no warrant for the conclusion that a sales return may be claimed in any assessment year, provided the return is made in that year.

31. In the earliest Bench case on the subject in Devi Films (P) Ltd. v. State of Madras, (1961) 12 S.T.C. 274 (Mad) which was under the earlier Sales-tax Act of 1939, the position was somewhat epigrammatically put: the year of assessment is the year of sale, but the year of exemption for sales return is the year of return. The concerned rule that the Bench had to construe employed the expres-

ion 'shall be deducted from the gross urnover'. The words we are dealing with are different, as I have sought to show n the foregoing paragraphs. It is not necessary, and no purpose would be served, to examine whether Devi Films (P) Ltd. v. State of Madras, (1961) 12 S.T.C. 274 (Mad) even on the language of the statute or the statutory rules as they then existed, was correctly decided in the epigram I have referred to above. It is necessary to emphasise that under the 1959 Act, after the inclusion of S. 13 (5) all the law and principles for the tax treatment of sales returns must be found only in that section and nowhere else in the Act. Rule 5-A cannot bear the meaning sought to be given to it that irrespective of the bar of limitation under S. 13 (5) a dealer would be entitled to tax deduction in respect of a sales return. To permit a dealer to obtain a deduction, as it is called, from a later year's assessing turnover for a sales return appertaining to an earlier year's sale would amount to a failure to tax a taxable sale on the last year.

32. The above principle can be borne out by an illustration. Sales of commodities A, B, C and D of Rs. 10,000 each are made in 1975-76. In 1976-77 there are sales of E, F, G, and H of Rs. 10,000 each. In that year commodity A is returned and the dealer refunds the price to the customer. In terms of S. 13 (5) the claim for the sales return must be made in 1975-76 assessment to which the sale of A appertains. To say that in 1976-77 Rs. 10,000 can be deducted would be equivalent to leaving out of account from proper charge of tax any one of the sales of E, F, G and H. I do not find any warrant in the words of R. 5-A (b) (i) to desist from taxing a sale which falls within the charge. The exclusion of a sales return must, therefore, be strictly confined to the very year in which the sale itself has been effected and would otherwise have had to be included and charged to tax.

This is the principle and provision in S. 13 (5). When the section uses the words deduction of tax', which, so far as I can see, is a new phrase in sales-tax literature, it is implicit that only that tax with which the sale itself is charged, or would be charged, is the subject of tax relief. It is in this context that S. 13 (5) provides for adjustment of tax in the assessment in cases where the claim for deduction of tax is made before the assessment is over, although within six months of the turnover. It is on the same principle that S. 13 (5) provides for actual refund of tax—another innovation introduced by the Amendment Act of 1964—whenever the claim is made after the sale gets completed, but within six months of the sale.

33. It was suggested that S. 13 (5), occurring as it does in the section marginally noted as 'provisional assessment', must be confined to provisional assessments. A marginal note, made by the legislative draftsman before the amendment, but omitted to be altered suitably after amendment, cannot be a proper basis for statutory construction. Vide Commr. of Income-tax v. Bhogilal Lalchand, 25 ITR 50: (AIR 1954 SC 155) and Commr. of Income-tax v. Ahmedbhai Umarbhai & Co. 18 I.T.R. 472 : (AIR 1950 SC 134). The words of S. 13 (5) are clear enough, and I have already explained why they should be regarded as a complete Code in themselves on the subject of tax relief to sales returns.

34. Reliance was placed on a supposed rule of construction of taxing Acts that where two views are possible of a fiscal provision the more favourable to the tax payer should be held to be the correct interpretation. As a student of revenue law, I have never been able to understand the rationale behind this doctrine of interpretation of fiscal enactments. In any case, I cannot accept the validity of a doctrine of judicial construction the last resort of which is doubt, not conviction. Recent trends in tax decisions show the decline of this theory of interpretation. Forensic ingenuity might be capable of raising a cloud of doubt in the most unequivocal of taxing provisions. But whatever doubts might be created in other people's minds, the court at any rate must be in a position to make up its mind in every case. That is because, while there may be a possibility of more than one construction being mooted of the same taxing provision, there can only be one view that can be correct. In any case, in expressing my views aforesaid I have not been assailed by any doubts whatsoever.

35. For the above reasons, I concur with the conclusion expressed in the judgment of my Lord, the Chief Justice and differ from that expressed by my learned brother, V. Ramaswami J. In my view, the Division Bench decision in Madras Radiators and Pressings v. State of Tamil Nadu, 37 S.T.C. 123 : (1976 Tax LR 1533 (Mad)) is wrongly decided.

ORDER:

KAILASAM, C. J.:—36. In accordance with the opinion of the majority of the Full Bench, it is held that Madras Radiators and Pressings v. State of Tamil Nadu 37 STC 123: (1976 Tax LR 1533) (Mad) has been erroneously decided.

37. In the result, the tax case is dismissed. There will be no order as to costs.

Revision dismissed.

AIR 1978 MADRAS 14
= 1977 LAB. I. C. 1698
FULL BENCH

KAILASAM, C. J., V. RAMASWAMI AND BALASUBRAHMANIAM, JJ.

The Management of Safire Theatre, Madras, Petitioners v. The Additional Commissioner for Workmen's Compensation, Madras and others, Respondents.

Writ Petn. No. 1141 of 1976, D/- 14-12-1976.

(A) T. N. Shops and Establishments Act (36 of 1947), S. 41 — Industrial Disputes Act (1947), S. 2-A — Constitution of India, Article 254 — Whether S. 41 of Shops Act is repugnant to S. 31 of Industrial Disputes Act — Whether there is repugnancy arising within Art. 254.

The object of the Tamil Nadu Shops Act is to regulate the conditions of work in shops and commercial establishments while the object of the Industrial Disputes Act is to make provision for the investigation and settlement of industrial disputes, which is a different field. (Para 7)

There is no repugnancy between the provisions of S. 41 of the Tamil Nadu Shops Act and those of Section 2-A of the Industrial Disputes Act as the subject-matter of the Tamil Nadu Act is different from that of the Central Act and the field of operation is distinct and separate. There is also no repugnancy arising within the meaning of Art. 254 (1) of the Constitution. 1972 Lab IC 808 (Pat) (FB), Followed. (Paras 12, 23)

(B) T. N. Shops and Establishments Act (36 of 1947), S. 41 — Industrial Disputes Act (1947), Ss. 2A, 10 and 25-J (I) Proviso — Scope of — Remedies under both the Acts if could be availed of side by side. 1972 Lab IC 808 (FB) (Pat), Dissented from.

When once an individual dispute which is treated as an industrial dispute is referred, it becomes a collective dispute in every sense of the word and thereafter the procedure that can be followed can only be under the Industrial Disputes Act. The effect of the proviso to S. 25-J (1) is that the provisions of any other Act would be saved only if it is more beneficial, After a reference is made, S. 41 of the Tamil Nadu Shops Act ceases to be more beneficial and as such would not be saved by the proviso to S. 25-J (1). Though it is rather incongruous that the application of S. 41 of the T. N. Shops Act would depend upon whether there is a reference or not, no other conclusion is possible. Any other conclusion would be inconsistent with the provisions of S. 2-A and the proviso to S. 25-J (1) of the Industrial Disputes Act. The result would be that both the remedies under the T. N. Shops Act and the Industrial Disputes Act would be available to an individual workman. If he avails himself of the provisions of the T. N. Shops Act and if he succeeds, he will get a declaration that the employer dispensed with his services without a reasonable cause. Once such a decision is given by the authority under S. 41 (1) of the T. N. Shops Act, under S. 41 (3) that decision would be final and binding on both the employer and the person employed. The rights thus adjudicated would become final and all other proceedings would become infructuous. But if before a final decision is rendered under S. 41 of that Act, the grievance of the individual worker is referred under S. 10 of the Central Act by the Government no further proceedings can be continued under S. 41 of the T. N. Shops Act, 1972 Lab IC 808 (Pat) (FB), Dissented from. Case law reviewed. (Para 14)

Section 2-A of the Industrial Disputes Act does not fully bar the remedy under S. 41 of the T. N. Shops Act, 1947. Though both the remedies are available, if a reference has been made before the conclusion of the appeal under S. 41 of the T. N. Act, the proceedings under the Industrial Disputes Act will have to be followed. After a reference has been made under the Industrial Disputes Act, as the provisions of S. 41 of the T. N. Act would not be applicable, the dispensing with the services of the workmen could not be challenged under S. 41 of that Act. (Paras 20, 21, 23)

Cases Referred: Chronological Paras

1975 Lab IC 1199: (1975) 2 Lab LJ 168: AIR 1975 SC 1160 16
1975 Lab IC 1651: (1975) 2 Lab LJ 445: AIR 1975 SC 2238 17
1974 Lab IC 1283: (1975) 1 Lab LJ 450: AIR 1974 SC 1915 18

1972 Lab IC 808 : (1972) 2 Lab LJ 395 (FB) (Pat) 12
AIR 1951 Mad 141 8, 10, 11

P. R. Govindaswami Iyer and P. Vedavalli, for Petitioners; The Advocate General, The Govt. Pleader, M, G. R. Prasad, Row and Reddy, for Respondents.

KAILASAM, C. J.:— This petition is filed by the Management of the Safire Theatre against the Additional Commissioner for Workmen's Compensation and nine workmen for the issue of a writ of certiorari to quash the order of the Additional Commissioner for Workmen's Compensation in T. S. E. Appeals Nos. 75 to 88 of 1973,

2. Respondents 2 to 10 in the petition were employed in the Snack Bar and Maintenance section of the Safire Theatre. The management decided to close down the Snack Bar and the Maintenance section, and in pursuance of that decision, 14 workers, including respondents 2 to 10 were retrenched with effect from 10-10-1972. The required formalities in effecting retrenchment under the Industrial Disputes Act were complied with, but the workers refused to receive the notice, pay and compensation etc, offered at the time of retrenchment. In October-November 1972, the Union raised an industrial dispute before the Labour Officer challenging the retrenchment as illegal and unjustified. When the dispute was pending before the Labour Department the workers filed separate appeals before the Additional Commissioners for Workmen's Compensation under the Tamil Nadu Shops and Establishments Act challenging the termination as being in contravention of S. 41 of that Act. The Additional Commissioner held that the retrenchment was not bona fide and set aside the order of retrenchment on 14-5-1975. Against the said order, the present writ petition is filed.

3. When this petition came up before Koshal J., the learned Judge felt that this is a fit case to be referred to a larger Bench, preferably a Full Bench, in view of the situation that quite a few complicated questions of law arise for determination and are likely to arise in a very large number of cases between labour and its employers. Thus the matter is now before a Full Bench.

4. It was submitted that, after the introduction of S. 2-A of the Industrial Disputes Act, (hereinafter referred to as the Central Act), even though there may be a dispute between an individual workman and the management regarding discharge, dismissal, retrenchment etc, the dispute shall be deemed to be an industrial dispute and the only remedy available was under the Central Act and not under the provisions of S. 41 of the Madras Shops and Establishments Act 1947 (hereinafter referred to as the Madras Act). In any event it was submitted that the provisions of S. 41 of the Madras Act were repugnant to the provisions contained in S. 2-A of the Central Act and therefore S. 41 was rendered ineffective by the rule envisaged in Art. 254 of the Constitution of India. It was then submitted that even if it was held that both the remedies under the Central Act and the Madras Act were available, the respondents could not have recourse to both of them and they having elected to proceed under the Central Act, were not entitled to avail the remedy under S, 41 of the Madras Act. It was further contended that, as the provisions of the Central Act relating to payment of compensation in respect of retrenchment had been followed, the remedy under S. 41 of the Madras Act was not available. These contentions were raised before the learned Judge and the points are referred to us for decision.

5. The Industrial Disputes Act 1947, Central Act 14 of 1947, has been enacted by the Parliament for providing for investigation and settlement of industrial disputes and for certain other purposes. The preamble states that whereas it is expedient to make provision for the investigation and settlement of industrial disputes. and for certain other purposes, the Industrial Disputes Act has been enacted. Therefore, the object of the legislation is for investigation and settlement of industrial disputes, The Act constituted under Chapter II the Authorities under the Act, namely, Works Committee, Conciliation Officers, Boards of Conciliation, Courts of Inquiry, Labour Courts, Tribunals, National Tribunals etc. Chapter III of the Act provided for references of disputes by the Government to Boards, Courts or Tribunals. Provision is also made for voluntary reference of disputes to arbitration. Under Chapter IV, the procedure, powers and duties of the authorities are enumerated. Chapter V deals with strikes and lock-outs, Chapter VA with lay off and retrenchment and Chapter VI with penalties for illegal strikes and lock-outs. It will thus be seen that the scope of the Act is to investigate and settle industrial disputes.

6. It is only a dispute or difference between the employers and employee, or between employers and workmen or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person that is considered as an industrial dispute under S. 2 (k) of the Central Act, It was only collective disputes that were considered as industrial disputes and not a dispute by an individual

workman. But under S. 2-A, which was introduced on 1-12-1965 by Act 35 of 1965, any dispute between an individual workman and his employer connected with his discharge, dismissal, retrenchment or termination, is deemed to be an industrial dispute.

7. The Madras Shops and Establishments Act 1947 is a Madras Act and the preamble of the Act states that, as it is expedient to provide for the regulation of conditions of work in shops, commercial establishments, restaurants, theatres and other establishments and for certain other purposes, the Act has been enacted. Chapter II of the Act deals with opening and closing hours of shops, daily and weekly hours of work in shops, spread over of periods of work and the closing of shops and grant of holidays, while Chapter III deals with establishments other than shops, Chapter IV prohibits employment of children and prescribes the working hours for young persons, Chapter V deals with health and safety. Chapter VI deals with holidays with wages. Chapter VII deals with payment of wages, fixation of wage period, wages for overtime work, time of payment of wages etc.. Chapter VIII deals with appointment, powers and duties of inspectors. Chapter IX prescribes the penalties for offences. It will thus be seen from the contents of this Act that the object of the enactment is to regulate the conditions of work in shops and commercial establishments, while the Industrial Disputes Act is to make provision for the investigation and settlement of industrial disputes, which is a different field.

8. A Bench of this Court in Manager, U. C. Bank v. Labour Commr. AIR 1951 Mad 141, has pointed out the difference between the two enactments. Rajamannar C. J. has expressed his opinion that the two Acts are not in pari materia and that, though in one sense Sec. 41 (2) of the Madras Act concerns a dispute between an employee and employer, an individual dispute falling under it would not by itself be an industrial dispute falling within the scope of the Industrial Disputes Act. Viswanatha Sastri J. pointed out that Chapter 7 of the Madras Act, in which S. 41 is found, deals with an individual dispute between an employer and an employee whose services have been terminated, in which dispute the other employees have no interest and with which they need not or do not concern themselves, and that the Central Act 14 of 1947 deals with an industrial dispute, a collective dispute, a dispute between the employer on the one hand and the body of workmen or a section of that body on the other. The learned Judge pointed out that S. 41 (2) of the Madras Act gives a remedy to an individual employee by way of an appeal against an improper termination of his services by his employer. Viswanatha Sastri J. has observed that there is no reason why an individual employee should be deprived of this cheap and expeditious remedy merely because it might possibly form the subject of a reference along with many other disputes to a Tribunal under S. 10 of the Central Act. The learned Judge has come to the conclusion that there is nothing in the Central Act and no other reason has been shown to deprive an individual employee of his right to pursue the appeal which he had preferred long before the reference to the Tribunal under the Central Act was made. The learned Judge was of the view that it would perhaps be a different matter if the employer had taken his case before the Tribunal to which an industrial dispute had been referred under the Central Act and got an adverse decision against him from the Tribunal, before he filed an appeal under S. 41 (2) of the Madras Act. Thus the view taken by this Court is that the remedy under S. 41 of the Madras Act is not barred to a worker, though he might also have a remedy if an industrial dispute is raised by other workers joining and the matter being referred by the Government. The Court has also expressed its view that if a reference has already been made and an adverse decision was given, the remedy under S. 41 (2) of the Madras Act would not be available.

9. Since the above decision was rendered, there are certain changes, namely, S. 2-A has been introduced in the Industrial Disputes Act, by Act 35 of 1965 on 1-12-1965 and a proviso to S. 25-J (1) has been added by S. 17 of Act 36 of 1964 on 19-12-1964. The impact of these two amendments will have to be closely examined to determine the question whether the remedy under S. 41 of the Madras Act is still available to an individual employee and, if so, to what extent.

10. Under S. 2-A of the Industrial Disputes Act, any dispute between a workman and his employer arising out of his discharge, dismissal etc, is deemed to be an industrial dispute. The result of this amendment is that an individual dispute, which was not an industrial dispute, has now been made an industrial dispute, enabling an individual employee to raise an industrial dispute and entitling a reference under S. 10 (1) of the Central Act. The basis of the decision of a Bench of this Court in Manager, U. C. Bank v. Labour Commissioner AIR 1951 Mad 141, referred to above has been taken away. It was held in that decision that as an indivi

dual dispute was not an industrial dispute, the remedy was open under S. 41 of the Madras Act. In fact Rajamannar C. J. has observed that, when an individual dispute between a dismissed workman and the employer becomes an industrial dispute between the workmen on the one hand and the employer on the other, it may be called a collective dispute, which cannot be the subject-matter of an appeal under S. 41 of the Madras Act. This observation would indicate the effect of the amendment under S. 2-A of the Central Act, which converts an individual dispute into an industrial dispute, The remedy under S. 41 of the Madras Act is barred in such a case.

11. At this stage, it is useful to refer to the proviso to S. 25-J (1) of the Industrial Disputes Act. While S. 25-J (1) states that the provisions of Chapter V-A shall have effect notwithstanding anything inconsistent therewith contained in any other law (including Standing Orders) made under the Industrial Employment (Standing Orders) Act, 1946, the proviso states that where under the provisions of any other Act or rules etc, a workman is entitled to benefits in respect of any matter which are more favourable to him than those to which he would be entitled under this Act, the workman shall continue to be entitled to the more favourable benefits in respect of that matter, notwithstanding that he receives benefits in respect of other matters under this Act. This proviso, as already stated, was introduced in 1964, long after the decision referred to above was rendered. Though Section 25-J provides that Chapter V-A shall have effect notwithstanding anything inconsistent therewith contained in any other law, the provision preserves the more favourable benefits to the worker under any other Act. The effect of this proviso would be that if under S. 41 of the Madras Act, a worker is entitled to more favourable benefits, those are preserved. It may also be noted that Section 25-J (2) makes it clear that nothing contained in Chapter V-A shall be deemed to affect the provisions of any other law for the time being in force in so far as that law provides for the settlement of industrial disputes. It also requires that the rights and liabilities of employers and workmen in so far as they relate to lay off and retrenchment shall be determined in accordance with the provisions of Chapter V-A. The result of the proviso so far as the question under consideration is concerned, is that, if a workman is entitled to more benefits under any other Act, he would be entitled to them. The question therefore is whether S. 41 of the Madras Act is more favourable. The answer is difficult for when a reference is made under Section 11-A of the Industrial Disputes Act, the Labour Court, or the Tribunal, if it is satisfied that the order of discharge or dismissal is not justified, may, by its award, set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions as it thinks fit, or give such other relief to the workmen including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require. These are far reaching powers when compared to the relief provided for under S. 41 of the Madras Act. Section 41 (1) provides—

"No employer shall dispense with the services of a person employed continuously for a period of not less than six months, except for a reasonable cause and without giving such person at least one month's notice or wages in lieu of such notice....."

The remedy that is available under this section therefore is that the services of a person employed continuously for a period of not less than six months shall not be dispensed with except for a reasonable cause and without the prescribed notice, While the authority under S. 41 of the Madras Act is empowered to decide whether the dispensing with the services is for a reasonable cause or not, he has not got the powers of directing reinstatement, or to give any other relief including the award of lesser punishment, as provided for under S, 11-A of the Central Act. The relief provided for under S. 41 (1) of the Madras Act cannot be said to be more favourable to the worker. But before a worker can get relief under S. 11-A of the Central Act, the dispute will have to be referred by the Government under S. 10. Under S. 10 (1) the power to refer vests with the Government and the Government may refer, or refuse to refer. It is quite possible that though an individual dispute has become an industrial dispute by virtue of Sec. 2A, the other workers may not be interested in that dispute and they may even be hostile and not agreeing with the individual worker, who seeks to make a reference. In such a case, it is likely that the Government may refuse to make a reference, in which case, the individual workman would be without a remedy. The result is, if there is no reference, the relief provided for under S. 41 of the Madras Act is more beneficial, but if a reference is made under S. 10 of the Central Act, the relief under S. 41 of the Madras Act is not more beneficial. As pointed out earlier, the proviso to S. 25-J (1) saves the provisions of any other Act whereby the workman is entitled to benefits in respect of any matter

which are more favourable to him than those to which he would be entitled under the Industrial Disputes Act. Such a situation arose before a Bench of this Court in Manager U. C. Bank v. Labour Commissioner, AIR 1951 Mad 141 which was already referred to. Rajamannar C. J. observed thus—

"We do not think that anything turns on the actual making of a reference. The learned counsel for the petitioner perceived the difficulty of contending that the right of appeal under S. 41 (2) of the Madras Act would be available if there was no reference under Act LIV (54) of 1949, but such right of appeal would not exist or would cease to be effective the moment a reference was made." It may be strange that we are forced to come to a conclusion which the learned Judges were not prepared to countenance because of the changes effected by S. 2-A and the proviso to S. 25-J (1) of the Central Act.

12. Full Bench of the Patna High Court in Indian Oil Corpn. Ltd. v. C. D. Singh 1972-2 Lab LJ 395 : (1972 Lab IC 808) considered the effect of S. 2-A of the Central Act on the Bihar Shops and Establishments Act. The facts of that case are as follows:— One Singh was dismissed after a domestic enquiry on 3-9-1965. He filed an application under the Industrial Disputes Act before the Assistant Labour Commissioner questioning the correctness of his dismissal. Conciliation failed. The Government made a reference by notification dated 31-3-1970 and referred the industrial dispute whether the dismissal of the petitioner was proper and justified, While reference was still under consideration, Singh filed an application under Section 26 (2) of the Bihar Shops and Establishments Act before the Presiding Officer, Labour Court, Ranchi, on 18-12-1969. The petition was filed out of time, but the delay was excused by an ex parte order. The application to set aside the ex parte order was dismissed. A further application for rejection of the application made under S. 26 (2) was also rejected. A writ petition was filed praying that the order of the Presiding Officer, excusing the delay be quashed, It was submitted that with the amendment and insertion of S. 2-A in the Central Act, the legislative field was fully occupied by the Parliamentary enactment and Ss. 25 and 26 of the Bihar Act became inoperative and the Labour Court had no jurisdiction to entertain the petition. It was further submitted that as Singh had asked for the same relief before two competent Courts, he must be asked to elect his remedy. It was also submitted that as Singh had invoked the jurisdiction of the authorities under the Central Act, before filing a complaint under the Bihar Act, the Labour Court must stay the proceedings under the Bihar Act pending adjudication of the industrial dispute. S. 26 of the Bihar Act is in pari materia with S. 41 of the Madras Act and it requires that no employer shall dismiss an employee who has been in continuous employment for not less than six months without reasonable cause and without giving such employee at least one month's notice or one month's wages in the lieu of such notice. The court held that there is no repugnancy between the provisions of the Bihar Act and those of the Industrial Disputes Act as the subject-matter of the Bihar Act is different from the subject-matter of the Central Act and the field of operation is distinct and separate and there is no actual collision or conflict between Sec. 26 of the Bihar Act with any provisions of the Central Act. The Court also held that there is no repugnancy arising within the meaning of Art, 254 (1) of the Constitution. The Court further held that the proceedings under Sec. 26 of the Bihar Act are independent and original proceedings where the competent authority has to arrive at its own finding on the evidence laid before it and not on the evidence adduced in a domestic enquiry. We have reached the same conclusion as the Full Bench of the Patna High Court and hold that there is no repugnancy between the provisions of Sec. 41 of the Madras Act and those of the Industrial Disputes Act as the subject-matter of the Madras Act is different from that of the Central Act and the field of operation is distinct and separate. There is also no repugnancy arising within the meaning of Art. 254 (1) of the Constitution.

13. The Patna High Court proceeded to observe that the fundamental difference between Sec. 26 of the Bihar Act and the scheme of reference under the Industrial Disputes Act is that no workman falling within the definition under the Central Act has a right to ask for a reference by the appropriate authority. But on being dismissed, the Bihar Act gave a right to an employee to complain about the dismissal and to obtain redress. The court pointed out that the objects of the two proceedings under the two Acts were entirely different and there was no reason to hold that either of the proceedings must give way to the other.

14. We feel it difficult to accept the position that both the remedies could be available side by side. When once an individual dispute by virtue of S. 2-A is considered as an industrial dispute and is referred by

he Government, an elaborate procedure as o how the reference has to be disposed of s provided for under the Industrial Disputes Act. Such a contingency is not provided for nder the Madras Act, The Madras Act is imited in its scope in that it can only decide whether the dispensing with the services was with or without reasonable cause. When a reference is made, the dispute is considered as a collective dispute and the remedy provided for is for the entire body of workers. The Patna decision does not refer to the provisions of Sec. 25-J (1) of the Central Act; t concludes thus:—

"If the dismissal of Sr. C. D. Singh ....is not interfered with by the Tribunal ....in the reference made under Sec. 10 of the Central Act, it will be in consequence of following the well established procedure of solving an industrial dispute and if the same respondent's dismissal is set aside by the Labour Court in the proceeding under S. 26 of the Bihar Act, it will be as a result of the procedure laid down by the section, without any reference to a dispute in the nature of an industrial dispute."

We find ourselves unable to go so far, for we feel that when once an individual dispute which is treated as an industrial dispute is referred, it becomes a collective dispute in every sense of the word and thereafter the procedure that can be followed can only be nder the Industrial Disputes Act. The effect of the proviso to Sec. 25-J (1) is that the provisions of any other Act would be saved only if it is more beneficial. After a reference s made, Sec. 41 of the Madras Act ceases o be more beneficial and as such would not be saved by the proviso to S. 25-J (1). Though it is rather incongruous that the application of S. 41 of the Madras Act would depend upon whether there is a reference or not, we feel that no other conclusion is possible. Any other conclusion, in our view, would be inconsistent with the provisions of S. 2-A and the proviso to S. 25-J (1). The result would be that both the remedies under the Madras Act and the Industrial Disputes Act would be available to an individual workman. If he avails himself of the provisions of the Madras Act and if he succeeds, he will get a declaration that the employer dispensed with his services without a reasonable cause. Once such a decision is given by the authority under S. 41 (1) of the Madras Act, under S. 41 (3) that decision would be final and binding on both the employer and the person employed. The rights thus adjudicated would become final and all other proceedings would become infructuous. But, if before a final decision is rendered under S. 41 of the Madras Act, the grievance of the individual worker is referred under S. 10 of the Central Act by the Government, no further proceedings can be continued under S. 41 of the Madras Act.

14A. In this writ petition, the Union raised an industrial dispute before the Labour Officer challenging the retrenchment as illegal and as the compromise talks failed, the Union demanded reinstatement of the workers. At that stage, when the dispute was pending, the workers filed appeals under Sec. 41 of the Madras Act by about 25-4-1973. The industrial dispute was referred by the Government regarding the non-employment of the 14 workers and it was taken on file as I. D. 150 of 1973. The workers' claim therein was dismissed for default on 29-3-1975. The fact of dismissal was intimated and the authority under S. 41 was requested to drop the proceedings. The appeals under S. 41 were allowed on 15-4-1975, that is after the order in I. D. 150 of 1973, Later on 2-7-1975, the Union filed I. A. 249 of 1975 for restoration of the claim. But the claim was withdrawn by the Union in I. D. 150 of 1973 and was dismissed, The position therefore is that after the claim in I. D. 150 of 1973 was dismissed on 29-3-1975, the order under Sec. 41 of the Madras Act was passed on 14-5-1975. The application by the Union for restoration of the claim in I. D. 249 of 1975 was also withdrawn on 19-7-1975. The position therefore is that the appeals under S. 41 of the Madras Act were pending when the industrial dispute was decided and the claim was dismissed for default on 29-3-1975 and it became final as the petition for restoration was dismissed. The reference of the dispute to the Labour Court by the Government was on 13-9-1973. According to the conclusion we have arrived at, after 13-9-1973, no further proceedings is available to the workers under Sec. 41 of the Madras Act. Though the appeals were actually filed on 21-4-1973 under S. 41 of the Madras Act, they would not be pursued after 13-9-1973.

15. The learned counsel for the petitioner submitted that the industrial dispute was dismissed for default and the award was not in accordance with law as the award could not be passed ex parte and that it could be only on evidence. In support of his contention he referred to the award printed in the Tamil Nadu Government Gazette, Supplement to Part II Sec. 2, dated 15-1-1975 at page 22, where it is stated that "the workmen and their representatives were absent. The dispute is therefore dismissed. An award is passed accordingly." The learned

counsel referred to R, 48 of the Tamil Nadu Industrial Disputes Rules which provides that if without showing sufficient cause any party to the proceedings fails to attend or to be represented, the court may proceed as if the party had duly attended or had been represented. This, according to the learned counsel, would indicate that the award must be on the facts and not passed ex parte. It is unnecessary for us to go into this contention for, in our view, the remedy under S. 41 of the Madras Act cannot be pursued after a reference has been made by the Government under S. 10 of the Central Act.

16. We would now refer to certain decisions cited at the Bar. The learned Advocate General referred to the decisions of the Supreme Court in Chemicals and Fibres of India Ltd. v. D. G. Bhoir (1975) 2 Lab LJ 168 : (1975 Lab IC 1199) (SC) and submitted that, though under S. 2-A, dispute between an individual workman and his employer connected with discharge, dismissal, retrenchment or termination shall be deemed to be an industrial dispute, the deeming should be taken to be for a limited application. In the case cited, the point that arose for determination was whether, when a reference is pending before a Labour court in respect of a matter under S. 2-A, any strike by the other workers would be illegal. Under S. 23 of the Industrial Disputes Act, no workman who is employed in any industrial establishment shall go on strike in breach of a contract and no employer of any such workman shall declare a lock out. The Supreme Court held that the prohibition of strikes during the pendency of proceedings before a Labour Court under S. 23 was, in the Act as originally enacted, confined only to disputes between the employer and the general body of employees and not to individual workman and that it is in this context that S. 23 should be interpreted. The Supreme Court observed that while there is a justification for preventing a strike when a dispute between the employer and the general body of workmen is pending adjudication, it would be too much to expect that the Legislature intended that a lid should be put on all strikes just because the case of a single workman was pending. In the circumstances, it was held that giving a limited application to S. 2-A, the pendency of a dispute between an individual workman as such and the employer did not attract the provisions of Sec. 23, The above decision does not help to determine the question at issue for the special reasons given by the Supreme Court for not applying S. 2-A would not be applicable to the present case.

17. In Premier Automobiles Ltd. v. K. S. Wadke (1975) 2 Lab LJ 445 : (1975 Lab IC 1651) (SC) the Supreme Court laid down the principles applicable to the jurisdiction of the civil court in relation to an industrial dispute at page 459 of the report. The Supreme Court held that if the industrial dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to the suitor is to get an adjudication under the Act. In the case of a dismissal of an unsponsored workman which in view of the provision of law contained in S. 2-A of the Act will be an industrial dispute even though it may otherwise be an individual dispute the civil courts will have hardly an occasion to deal with those types of cases. This decision is not applicable to the facts of the present case. It was dealing with the jurisdiction of a civil court in relation to an industrial dispute and not with the rights conferred under a different Act. which is governed by the provisions of S. 25-J (1) of the Industrial Disputes Act.

18. In Remington Rand of India Ltd. v. Jambulinga, (1975) 1 Lab LJ 450 : (1974 Lab IC 1288) (SC) the Supreme Court was dealing with an appeal by a workman under S. 41 of the Madras Act when proceedings under the Industrial Disputes Act were pending. He was dismissed after an enquiry into certain charges. An industrial dispute was pending and the management obtained the permission of the Industrial Tribunal under S, 33 (2) (b) of the Act. However, the workman in the meanwhile filed an appeal under S. 41 (2) of the Madras Act and the Additional Commissioner set aside the order of dismissal. The management approached the Supreme Court and it held that the jurisdiction of the Commissioner was wider unlike that of the Industrial Tribunal in an application under S. 33 of the Industrial Disputes Act in interfering with the order of dismissal. The argument that was advanced before the Supreme Court was that as a special forum for relief had been provided under the Industrial Disputes Act for making an application under S. 33-A of the Act, the remedy resorted to by the workman under the Shops Act must be held to be excluded. It was also contended that since the workman claimed to be a protected workman before the Tribunal, he should have made an application under Sec. 33-A for violation of S. 33 of the Act before it and that he having chosen a wrong forum was precluded from challenging the order of dismissal before the Commissioner. Repelling this contention, the Supreme Court held that as the

management submitted to the jurisdiction of he Commissioner and had not raised any objection to its jurisdiction to hear the appeal, it would not allow the plea of jurisdiction to be raised before it for the first time.

19. On a careful consideration of the cases cited and the various provisions of the two Acts, we answer the questions referred to by Koshal J., as follows:—

20. Section 2-A of the Industrial Disputes Act does not fully bar the remedy under Section 41 of the Madras Shops and Establishments Act 1947. If a decision is rendered under Section 41 (2) of the Madras Act before the Government had made a reference under S. 10 of the Industrial Disputes Act the decision would be final between the parties. But, before the conclusion of the enquiry under S. 41 of the Madras Act, if the Government makes a reference under Section 10 of the Industrial Disputes Act, the pending proceedings under S. 41 of the Madras Act cannot be continued.

21. On the second question we hold that both the remedies are available. But if a reference has been made before the conclusion of the appeal under S. 41 of the Madras Act, the proceedings under the Industrial Disputes Act will have to be followed.

22. In view of our decision that after a reference had been made under the Industrial Disputes Act, the provisions of S. 41 of the Madras Act would not be applicable, the dispensing with the services of the workmen could not be challenged under S. 41 of that Act.

23. On the fourth question we hold that S. 41 of the Madras Act is not repugnant to the provisions contained in S. 2-A of the Central Act and is not rendered ineffective by the provisions of Art. 254 of the Constitution of India.

24. In the result, the writ petition filed by the management is allowed and a writ of certiorari will issue and the order of the Additional Commissioner for Workmen's Compensation in T. S. E. Apps. Nos. 75 to 88 of 1973 is quashed. There will be no order as to costs.

Petition allowed.

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N. S. RAMASWAMI, J.

Chellammal and another, Appellants v. Valliammal, Respondent.

Second Appeal No. 1833 of 1974, D/- 22-8-1977.*

(A) Civil P. C. (1908), S. 100 — New plea — Plea of pure question of law — Neither raised in any of the Courts below nor in the grounds of second appeal — Allowed to be argued for first time in second appeal. (Para 9)

(B) Hindu Law — Partition — Two widows succeeding to their husband's properties— Right to demand partition— They can by mutual consent put an end to the right of survivorship by effecting a final and absolute partition by metes and bounds — Position in law prior and after enactment of Hindu Women's Rights to Property Act, 1937.

Even prior to the application of the Hindu Women's Rights to Property Act, 1937, under the textual law, there can be a final and absolute partition so as to put an end to the right of survivorship by mutual consent of the widows.

In the instant case the finding of the Courts below was that there had been a final and absolute partition in 1943 by mutual consent between two co-widows who had succeeded to their deceased husband's estate in 1942 and as such the right of survivorship was put an end to and could not be continued thereafter. AIR 1965 SC 1752, Rel. on. (Paras 10, 13)

Even the theory that one of the two co-widows is not entitled to demand a final and absolute partition so as to put an end to the right of survivorship had been given the go-by under the Hindu Women's Right to Property Act, 1937. Under that Act, on the death of her husband, the widow gets the same share as the son. That means she would be entitled to enforce a final and absolute partition even though the co-widows or any other sharer may not consent for such a partition. AIR 1962 SC 1493, Rel. on. (Para 11)

(C) Hindu Succession Act (1956), S. 14 (2) — Words "Property acquired under an instrument" — Meaning of.

It is settled law that if a partition deed or any other instrument only re-

*(Against decree of Dist. J., Coimbatore in A. S. No. 129 of 1972.)

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cognised a pre-existing right of the widow, it is not a case of the widow 'acquiring' the property as contemplated under S. 14 (2) and that under such circumstances that sub-section would have no application. (Para 15)

(D) Hindu Succession Act (1956), S. 14 (1) — Words 'acquired by a female Hindu at a partition' — Meaning of.

The words 'acquired by a female Hindu, at a partition' would not refer to properties given to a female Hindu (even though it might be under a partition deed) in lieu of maintenance or arrears of maintenance, because the explanation refers to acquisition of properties in lieu of maintenance or arrears of maintenance as distinct from property acquired at a partition. Therefore, the words 'acquired by a female Hindu..... at a partition' do not mean that she should not have had any pre-existing right in the property. (Para 15)

(E) Hindu Succession Act (1956), S. 14 (1) — Possession contemplated by S. 14 (1) not restricted to physical possession but also includes constructive possession — Two widows in joint possession of their widows estate effecting final partition of their shares by metes and bounds in 1943 — Possession by plaintiff widow of her share thereafter being exclusive physical possession her right to those properties enlarged into an absolute estate under S. 14 (1). (1970) 1 Mad LJ 437, Rel. on. (Paras 17, 18)

(F) T. P. Act (1882), S. 111 (g) — Forfeiture for denial of landlord's title — Suit by plaintiff widow for declaration of title and possession after partition of estate amongst co-widows — Defendant 2, after taking lease of item 2 from plaintiff obtaining gift deed from defendant co-widow — This amounts to setting up of title by defendant 2 in himself and defendant 1, and amounts to forfeiture of his lease — Not entitled to protection under Madras Cultivating Tenants Protection Act. AIR 1965 SC 1923, Dist. (Para 19)

Cases Referred:	Chronological Paras
(1970) 1 Mad LJ 437	18
AIR 1965 SC 1923	19
AIR 1965 SC 1752	10
AIR 1963 Mad 50	14
AIR 1962 SC 1493	11

T. R. Ramachandran and T. R. Rajagopalan, for Appellant; S. Nainarsundaram, V. Natarajan and V. Nicholas, for Respondents.

JUDGMENT:— The defendants are the appellants. The appeal arises out of a suit for declaration of title in respect of the suit properties, for permanent injunction in respect of one item and for recovery of possession and other reliefs in respect of another.

2. The plaintiff and the first defendant are the widows of one Kandaswami Gounder who died on 18-9-1942. He had no issue. He left considerable immoveable properties in the shape of agricultural lands. The case of the plaintiff has been that even in the year 1943 there had been a final partition of the properties by metes and bounds between the two widows by mutual consent, that in the said partition the suit properties fell to her (plaintiff's) share, that in respect of one of the suit properties (item 2 of first schedule) the second defendant who is no other than Kandaswami Gounder's brother's son became a tenant under the plaintiff and that as the second defendant failed to pay the rent and began disputing her title along with the first defendant, the suit was necessitated. It is under Ex. A-1 dated 12-2-1964, the second defendant became a lessee of one of the suit properties under the plaintiff, but within five months thereafter, that is, under Ex. A-5, dated 13-7-1964, the first defendant purported to gift to the second defendant an undivided half share in the properties left by her late husband, Kandaswami Gounder. The second defendant, by virtue of the above settlement deed disputed his lessor's (plaintiff's) title contending that he had become the owner of an undivided half share in the suit properties. Only thereafter the suit out of which this second appeal arises came to be filed.

3. As I said, the case of the plaintiff has been that there had been a final partition by metes and bounds by mutual consent between her and the first defendant even in the year 1943 and that in the said partition, the suit properties fell to her share. It is her further case, that by virtue of the Hindu Succession Act, 1956, she became the absolute owner of the properties including the suit properties which fell to her share in the above said partition.

4. The defendants inter alia contended that there was no final partition as claimed by the plaintiff, that the division of the properties was only for the purpose of convenient enjoyment and not a final and absolute partition and

that therefore there is no question of the plaintiff getting a declaration of title in respect of the suit properties.

5. The trial Judge gave a halting finding regarding the question of partition. He found that the partition as claimed by the plaintiff was not true but still there was a partition arrangement under which she became entitled to the properties in question. Therefore, the learned Judge held that the settlement deed, purporting to gift an undivided half share of the properties executed by the first defendant in favour of the second defendant, is not valid in respect of the properties in question, that the plaintiff is entitled to an injunction in respect of item 1 and recovery of possession of item 2 of the plaint first schedule properties and that she is also entitled to arrears of mesne profits at a particular sum in respect of item 2. The future mesne profits regarding this item was directed to be determined in separate application. He awarded costs to the plaintiff, but limited it to a certain sum.

6. The defendants filed an appeal to the District Judge of Coimbatore against the decree and judgment of the trial court. The plaintiff filed a memorandum of cross-objections claiming that the trial court ought to have awarded past mesne profits at a higher rate and it was also not right in restricting the quantum of costs.

7. The first appellate court, on a review of the entire evidence, has given a finding that the partition of the year 1943 between the plaintiff and the first defendant was a final and absolute partition by metes and bounds of the properties left by Kandaswami Gounder and that therefore the plaintiff was entitled to the relief of declaration of title in respect of the suit properties as well as for injunction in respect of item 1 and for possession in respect of item 2 of the plaint first schedule properties. It had been contended before the first appellate Court that the second defendant was in any event entitled to the benefits of the Cultivating Tenants Protection Act and that therefore he cannot be evicted from item 2. This contention has also been negatived by the first appellate court and the decree for possession granted by the trial court was confirmed. The appellate Judge further held that the plaintiff was not entitled to any amount more than the amount awarded by the trial court regarding arrears of mesne profits, but the trial Court was not right in restricting the costs. Only regarding the question of costs, the memorandum of cross-objections was allowed. The appeal filed by the defendants was dismissed with costs.

8. In this second appeal by the defendants, the contention of Mr. T. R. Ramachandran, learned counsel for the appellants, is that in 1943, there could not in law be a final and absolute partition between the two widows, that then they had only a widow's estate in all the properties left by their late husband, Kandaswami Gounder, that they could divide only the usufructs from the properties and for the purposes of convenience, they were in separate possession of the properties, that the right of survivorship between the two widows continued and that on the coming into force of the Hindu Succession Act, 1956, both the widows became absolute owners of the entire estate left by Kandaswami Gounder. It is his contention that only after the coming into force of the Hindu Succession Act, the question of a final partition by metes and bounds between the two widows would arise and that therefore the plaintiff's suit for a declaration of title in respect of the suit properties on the ground that they had been allotted to her in the partition of the year 1943 is not well-founded. In respect of item No. 2 which is in the possession of the second defendant as a lessee, the further contention is that even if the defendants fail on the first point, the plaintiff would not be entitled to recovery of possession of item No. 2. The contention is that the second defendant has not forfeited the lease on the ground of denial of title as contended by the plaintiff and that therefore, as a lessee, he would be entitled to protection under the Cultivating Tenants Protection Act and not liable to be evicted.

9. I am unable to accept any of these contentions. The main contention is about the plaintiff's title to the suit properties. It is to be noted that the present contention of the learned counsel, as referred to earlier, is raised for the first time only now. There is admittedly no pleading, nor was it raised in the court below. What is more, it had not been raised even in the grounds of second appeal. Even so, the question being one of law, the learned counsel was allowed to put forth his arguments on the question. The contention, as already seen, is

that in law there cannot be a final and absolute partition between two widows inasmuch as they had only a widow's estate and the joint title of the widows cannot be put an end to. Learned counsel referred to certain passages in Mayne's Hindu Law for the purpose of pressing his point that one of the two widows in this case had no right to demand a final and absolute partition. There can be no dispute that in 1943, when the Hindu Women's Right to Property Act had not become applicable to agricultural lands, neither the plaintiff nor the first defendant in this case had a right to demand an absolute and final partition which would put an end to joint title to the estate. But what the learned counsel overlooked is that even before the Hindu Women's Right to Property Act was made applicable to agricultural lands, there can be a final and absolute partition between the two widows by mutual consent.

10. In Karpogathachi v. Nagarathinathachi, AIR 1965 SC 1752, it is pointed out that when two widows inherit their husband's properties, they take together one estate as joint tenants with rights of survivorship and equal beneficial enjoyment and that one without the consent of the other cannot enforce an absolute partition of the estate so as to destroy the right of survivorship. However, it was recognised that there can be an absolute and final partition of the estate destroying the right of survivorship by mutual consent of the widows. In that case, on facts it was found that there had been no final and absolute partition and that the partition arrangement was only for the purpose of convenient enjoyment. But in the present case, as already seen, the finding of fact by the first appellate Court which cannot be challenged, and in fact rightly not challenged by Mr. T. R. Ramachandran, is that by consent of the two widows there had been a final and absolute partition by metes and bounds of the properties left by Kandaswami Gounder. In the face of such a finding, it is idle to contend that the right of survivorship continued even after the said partition of the year 1943. It must be remembered that even under the Hindu Law it is open to the co-widows to put an end to the right of survivorship and if there had really been a final and absolute partition by metes and bounds, as held by the first appellate court, there can be no further right of survivorship between the two.

11. Even the theory that one of the two co-widows is not entitled to demand a final and absolute partition so as to put an end to the right of survivorship had been given the go-by under the Hindu Women's Right to Property Act, 1937. Under that Act, on the death of her husband, the widow gets the same share as the son. That means she would be entitled to enforce a final and absolute partition even though the co-widows or any other sharer may not consent for such a partition. In Munnalal v. Rajkumar, AIR 1962 SC 1493 at p. 1500, it is pointed out that the Legislature by enacting the Hindu Women's Right to Property Act, 1937 made a significant departure from the textual law.

12. But it is pointed out on behalf of the defendants that in the present case Kandaswami Gounder having died in 1942 and the partition between the two widows being in 1943, when the Hindu Women's Right to Property Act, 1937 had no application to agricultural lands, the change effected under that Act has no application to the present case. Per contra, it is contended on behalf of the plaintiff-respondent that after the 1937 Act was made applicable to agricultural lands (it was so made applicable in November, 1946 by Madras Act 26 of 1947) one widow could have demanded a final and absolute partition so as to put an end to the right of survivorship and that the mere fact that there had already been a partition between the two could not make any difference.

13. But I think it is unnecessary to pursue this point because it cannot be disputed that even prior to the application of the 1937 Act, under the textual law, there can be a final and absolute partition so as to put an end to the right of survivorhsip by mutual consent of the widows. That is what has happened in this case. It is needless to stress that in this case the finding of fact by the first appellate Court is that by consent of the plaintiff and the first defendant, there had been a final and absolute partition of the properties left by Kandaswami Gounder.

14. Mr. T. R. Ramachandran, learned counsel for the appellants, contended that the plaintiff in this case cannot be said to have acquired the suit property under the partition of 1943, inasmuch as she along with the first defendant had inherited a widow's estate on the death

of Kandaswami Gounder and that therefore it cannot be claimed by the plaintiff that by virtue of S. 14 (1) of the Hindu Succession Act, she had become the absolute owner of the suit properties. In this connection, learned counsel referred to Sampathkumari v. Lakshmiammal, AIR 1963 Mad 50. There the question was whether S. 14 (2) applied because of the recitals contained in the partition deed between the widows. At page 60, the Division Bench observed that the partition deed does not in any way restrict the ordinary Hindu widow's estate which each of the widows would otherwise have had in the properties on that date. It was further pointed out that the recitals in the partition deed merely stated what would otherwise have happened, namely, that the property would go to the heirs according to law, and that there was no clause whatever in the deed restricting the ordinary Hindu women's estate which the two widows would normally have. It was further pointed out that the widows did not 'acquire' the right to the property only under the partition deed, for the simple reason that they had acquired the right even previously by inheritance as widows of their husband and the partition merely divided the property by allotting some to one widow and the rest to the other widow. On behalf of the appellants herein the observations of the Division Bench that the word 'acquired' in S. 14 (2) means that prior to the acquisition the widows should not have had any interest in the lands whatever is pressed.

15. It is settled law that if a partition deed or any other instrument only recognised a pre-existing right of the widow, it is not a case of the widow 'acquiring' the property as contemplated under that sub-section and that under such circumstances that sub-section would have no application. But when S. 14 (1) speaks of a female Hindu acquiring property before or after the commencement of the Act, the question is whether the acquisition contemplated should necessarily be without any pre-existing right whatsoever. The explanation to S. 14 (1) defines the word 'property' occurring in that sub-section as including both moveable and immoveable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance etc. The contention on behalf of the plaintiff-respondent is that in this case, in any event, there having been a partition (whether the widows were entitled to enter into a final and absolute partition or not) in the year 1943, it must be held that the plaintiff acquired the suit properties under the said partition as contemplated under S. 14 (1) and as she is in possession, her widow's estate became an absolute estate. However, the contention on behalf of the appellants is that the plaintiff did not 'acquire' the suit properties under the partition inasmuch as she along with the first defendant had inherited a widow's estate in the properties on the death of their husband. But it should be remembered that the explanation to Section 14 (1) specifically refers to acquisition of properties under a partition. One can get a share under a partition only if he or she had some pre-existing right in the same. It is true that in a partition in a family, a woman may be allotted certain properties even though she had no pre-existing right to a share because of her right to maintenance or arrears of maintenance. But as already seen the explanation to S. 14 (1) specifically refers to property acquired in lieu of maintenance or arrears of maintenance apart from property acquired at a partition. What I stress is that the words 'acquired by a female Hindu..... at a partition' would not refer to properties given to a female Hindu (even though it might be under a partition deed) in lieu of maintenance or arrears of maintenance, for the simple reason, the explanation refers to acquisition of properties in lieu of maintenance or arrears of maintenance as distinct from property acquired at a partition. If a female Hindu does not have a pre-existing right to a share and she is not given property in lieu of maintenance or arrears of maintenance, but still if property is given to her under a partition deed it would be a case of pure gift. The mere fact that the property is given to the female Hindu under a partition deed would not mean that she did not acquire the property by way of gift and that she so acquired 'at a partition'. I am of the view that the words 'acquired by a female Hindu..... at a partition' do not mean that she should not have had any pre-existing right in the property.

16. Assuming that the plaintiff did not acquire the suit properties under the partition on the ground that she had acquired them even earlier; I fail to see how the defendants can resist the plaintiff's claim. Undoubtedly the plaintiff

was in possession of the suit properties when the Hindu Succession Act came into force. There can be no dispute that the widow's estate of the plaintiff in the suit properties enlarged into an absolute estate by virtue of S. 14 (1). But the purport of the contention of Mr. T. R. Ramachandran is that not only the plaintiff but also the first defendant should be deemed to have been in possession of the suit properties (as well as other properties left by their husband), that the plaintiff cannot be said to have been in exclusive possession of the suit properties and that there re not only the plaintiff but also the first defendant got an absolute title to the suit properties and other properties. This contention is fallacious.

17. For the present discussion I am assuming that the partition of the year 1943, even though factually a final and absolute partition by consent of the two widows, is not valid in law as contended by the learned counsel for the defendants-appellants. But the question is whether in spite of the partition the first defendant can be deemed to have been in joint possession of the suit properties with the plaintiff on the date when the Hindu Succession Act came into force. It is needless to stress that on facts there is a clear finding by the first appellate Court that by consent of the two widows there was a final and absolute partition of the properties left by their husband and that each widow was in separate possession of the properties that fell to her respective share. Even assuming that the widows had no right to effect such an absolute partition putting an end to the right of survivorship, I fail to see how the two widows can be said to have been in joint possession of the suit properties and other properties left by their husband. It cannot be disputed and in fact it is not disputed that whatever be the legal effect of the partition of the year 1943, the two widows were bound by that partition during their lifetime. In other words, they having effected by mutual consent a final partition, it was not open to any one of them to claim a re-allotment or possession of the properties allotted to the other. Under such circumstances, I am unable to agree with the contention that both the widows should be deemed to have been in joint possession of the entire estate in spite of the division of the year 1943. It is true that 'possession' contemplated in S. 14 (1) need not necessarily be physical possession but it would include constructive possession also. But I am quite clear that the first defendant cannot be deemed to have been in constructive possession of the suit properties in view of the partition of the year 1943, by which the two widows were bound during their lifetime. That means the first defendant does not get any right to the suit properties by virtue of S. 14 (1) of the Hindu Succession Act.

18. There is no use saying that the right of survivorship continued on the ground that the widows had no right to effect a final and absolute partition. Assuming such a right continued, on the coming into force of the Hindu Succession Act, that right comes to an end (vide Nagama Naicker v. Ponnuchinnayyan, 1970 (1) Mad LJ 437). The plaintiff by virtue of the partition was in exclusive possession of the suit properties and the right of survivorship, even assuming that it continued, came to an end when the Hindu Succession Act came into force and the first defendant was neither in physical nor constructive possession of the suit properties nor had she any right to possession because of the partition of the year 1943 and therefore only the plaintiff's right to the suit properties enlarged into an absolute estate by virtue of S. 14 (1).

19. The only other question argued is whether the second defendant is a cultivating tenant in respect of item No. 2 of the suit properties and whether he is entitled to protection under the Cultivating Tenants Protection Act. The contention on behalf of the defendants, as already said, is that the second defendant never denied the plaintiff's title and therefore the courts below are not right in holding that he has forfeited the lease. I am unable to agree with this contention. In Mohamed Amir v. Municipal Board, Sitapur, AIR 1965 SC 1923, on facts it had been held that there was no denial of title by the tenant. But that decision has no application to the present case because here undoubtedly the second defendant had denied the plaintiff's title and under the circumstances there can be no doubt that such denial was wilful. It is to be noted that within five months of the execution of the lease deed in favour of the plaintiff, the second defendant obtains a gift deed from the first defendant in respect of all the properties inclusive of the properties which he took on lease. The very taking

of the gift from the first defendant would go to show that he set up title in the first defendant and in himself. It is true that in the written statement the second defendant states that he neither denies nor affirms the plaintiff's title. But such a stand has evidently been taken only to get over the plaintiff's plea that the second defendant had forfeited the lease. Ex. A-2 is the office copy of the notice dated 13-3-1968 sent by the plaintiff to the defendants. In this notice the plaintiff charges the second defendant of having taken the settlement deed from the first defendant in derogation of his position as a lessee under her. Ex. A-4 dated 29-3-1968 is the reply notice by the second defendant through his advocate. In this reply the stand taken is that the gift under the settlement deed is perfectly valid. That undoubtedly means, the second defendant claims title to an undivided half share in item 2 of the suit properties (which is the one which he had taken on lease) among other properties. In fact, even in the suit, he does not give up his claim under the settlement deed. Under such circumstances, the self-serving statement by the second defendant made in his pleading that he neither denied nor affirmed the plaintiff's title is of no avail. Undoubtedly he is setting up a hostile title and therefore the finding that he has forfeited the lease is right.

20. The second appeal fails and the same is accordingly dismissed with costs.

Appeal dismissed.

AIR 1978 MADRAS 27

RAMAPRASADA RAO, J.

Syed Abbas Sahib, Petitioner v. Musthiri Begam, Respondent.

C. R. P. No. 1649 of 1975, D/- 30-7-1976.*

(A) Interpretation of Statutes — Interpretation of definition — Object of enactment is to be taken into consideration. (Para 1)

(B) Tamil Nadu Indebted Agriculturists (Temporary Relief) Act (10 of 1975), S. 2 (c) — 'Debt' — Mahar under personal law of Muslims is not a debt.

Mahar which is peculiar to the personal law of Muslims is an amount which the husband obliges himself to pay to the woman whom he intends to marry. Though for all apparent purposes, Mahar is the result of a contract as between the woman and the man before marriage, yet the solemnity injected into such an obligation would not make it a sum payable under a contract for consideration. The payment flows from a pious and a dignified intent on the part of the husband to provide the necessities to the wife in case the marriage tie is disrupted. (1886) ILR 8 All 149, Rel. on. (Paras 1, 2)

Though for ordinary purposes and sometimes even for legal purposes Mahar could be pigeon-holed as one resulting from a contract between the man and the woman for consideration, yet the consideration is not the usual consideration within the meaning of that word used in the Contract Act or any legal parlance, but it has a peculiar connotation of its own having regard to the nature of the payment, the time at which it is promised and the parties who mutually agreed to pay and receive such a payment. The dower debt or the Mahar, therefore, would not come within the privileged meaning of 'debt' in S. 2 (c). (Para 4)

Cases Referred: Chronological Paras

AIR 1953 SC 413 2
(1886) ILR 8 All 149 2

S. Jagadeesan, for Petitioner; R. Gandhi, for Respondent.

ORDER:— A Muslim wife who filed an execution petition to execute a money decree obtained by her against her husband in respect of the amount of Mahar due to her from him was resisted on the ground that the husband was an agriculturist and the Tamil Nadu Indebted Agriculturists (Temporary Relief) Ordinance 1975 (now Tamil Nadu Act 10 of 1975) is a bar thereto. The learned Dist. Judge of Dharmapuri at Krishnagiri did not accept the contention of the husband. Apparently, there was no dispute that the husband was an agriculturist. The only question that arose for consideration was whether Mahar in its original shape or after having merged itself into a decree of court, retains the character of a debt within the meaning of S. 2 (c) of Act 10 of 1975. Section 2 (c) of the Act defines 'debt' as follows—

" 'Debt' means any sum of money which a person is liable to pay under a contract (express or implied) for consideration received and includes rent in cash or kind which a person is liable to

*(To revise order of Dist. J., Dharmapuri, D/- 10-4-1975.)

pay or deliver in respect of the lawful use and occupation of agricultural land." It is a fundamental norm of interpretation of statutes that while applying a particular provision to a particular situation, if it becomes necessary for courts to interpret any of its provisions including one of the definitions therein, the object with which such legislation has been passed sometimes loom very much large. This Act is mainly intended to provide temporary relief to indebted agriculturists. It is therefore an enactment which is beneficial for the time being to an agriculturist who is indebted and whose indebtedness was in relation to a debt as defined in S. 2 (c) of the Act. There are debts and debts. It is in this situation that the object and intendment of the legislation comes to the forefront and which necessarily has to be taken into account by courts of law which have to administer justice as between parties. It is not only justice that is expected from courts, but decisions based on equity and good conscience as well. In this background if we examine the content of the expression Mahar which is peculiar to the personal law of Muslims, it will be seen that Tamil Nadu Act 10 of 1975 would not have contemplated to include within S. 2 (c) the Mahar debt as well. Mahar as is popularly known among the Muslim community is an amount which the husband obliges himself to pay to the hand of the woman whom he intends to marry, and that is a provision made by him in case he acts arbitrarily at any future point of time resulting in the snapping of the marital tie by voluntary or involuntary exuberance on his part. Amongst Muslims, divorce is easy. The mere pronouncement of 'talak' three times in the presence of the wife and corroborated by some witnesses by itself is sufficient to disrupt the bondage of marriage. Such being the easy process by which a disruption in the marriage bondage could be effected in accordance with the personal law of Muslims, a precaution was taken even at the threshold of the marriage that the husband should pay Mahar to his wife in cases where such marriages are disrupted for any cause whatsoever so that a lurking fear may be entertained by the husband to avoid hasty and unprovoked divorce.

2. Mr. S. Jagadeesan, appearing for the petitioner, however, would harp upon the definition of the word 'debt' and rely on the expression 'money which a person is liable to pay under a contract (express or implied) for consideration'. He relies on the observations of the Supreme Court in Kapore Chand v. Kidarnissa, AIR 1953 SC 413, and would contend that the Mahar is a debt coming within the mischief or purview of S. 2 (c) of Act 10 of 1975. There is a fallacy in this argument. Though for all apparent purposes, Mahar is the result of a contract as between the woman and the man before marriage, yet the solemnity injected into such an obligation would not make it a sum payable under a contract for consideration. The payment flows from a pious and a dignified intent on the part of the husband to provide the necessities to the wife in case the marriage tie is disrupted. Mohamood J. in Abdul Kadir v. Salima, (1886) ILR 8 All 149, observed as follows:—

"Dower is not the exchange or consideration given by the man to the woman for entering into the contract, but an effect of the contract imposed by the law on the husband as a token of respect for its subject, the woman."

3. Well-known authors in their books on Muhammadan Jurisprudence reiterate this principle and would say that it is a pious obligation undertaken by the husband at the time of the marriage. In my view, even the observations of the Supreme Court which were made in a different context and in a different situation might not help the learned counsel for the petitioner. In fact, the Supreme Court itself quoted Mr. Amir Ali and observed as follows (at p. 414 of AIR):—

"As pointed out by Mr. Amir Ali in his book on Mohammadan Law, the custom originated in ancient times with the payments made by husbands to their wives as a means for their support and as a protection against the arbitrary exercise of the power of divorce".

4. In the above decision, the learned Judges of the Supreme Court were considering the question whether a dower debt can be given priority over other debts. It is in that context the Supreme Court said that dower is purely in the nature of a marriage settlement and is for consideration. Undoubtedly it is for consideration. But the word 'consideration' used by the learned Judges of the Supreme Court is now sought to be taken advantage of by Mr. Jagadeesan who would like to superimpose the explanation given by the Supreme Court to the word 'consideration' to the word debt,

appearing in S. 2 (c) of the Act. Taking into consideration the well-intended object of Legislation, I am of the view that it cannot for a moment be suggested that when a husband is an agriculturist, he can with impunity avoid a Mahar claim, claiming it to be the result of a contract for consideration. Though for ordinary purposes and sometimes even for legal purposes Mahar could be pigeonholed as one resulting from a contract between the man and the woman for consideration, yet the consideration which is the foundation for such a contract is not the usual consideration, which comes within the meaning of that word as used in the Contract Act or any legal parlance, but it has a peculiar connotation of its own having regard to the nature of the payment, the time at which it is promised and the parties who mutually agreed to pay and receive such a payment. Such a consideration which springs from custom and orthodox Muhammadan Law cannot be equated to be the result of an express contract for consideration in the popular sense. I agree with the court below and hold that notwithstanding the fact that the husband is an agriculturist, the dower debt or the Mahar would not come within the privileged meaning of debt in S. 2 (c) of the Act and that therefore the respondent is entitled to execute the decree based on such a Mahar debt.

5. The civil revision petition fails and the same is dismissed. There will be no order as to costs in this petition.

Petition dismissed.

AIR 1978 MADRAS 29

KAILASAM, C. J. AND RAMANUJAM, J.

A. Venkatakrishnan and others, Petitioners v. The Union Territory of Pondicherry, and others, Respondents.

W. P. Nos. 6672, 6688 to 6696, 6734, 6898 of 1975, 182 and 490 of 1976, 6735, 6964, 7179, 6907, 6908, 7047, 7499, 7537 and 7538 of 1975, 598, 601 and 1537 of 1976 and 7045 and 7286 of 1975 (P), D/- 28-7-1976.

(A) Constitution of India, Art. 31-B — Pondicherry Land Reforms (Fixation of Ceiling on Land) Act (9 of 1974), Pre, S. 4 (4) — Act included in the 9th Schedule by the 40th Amendment — Act cannot be challenged on ground of violation of fundamental rights. (Para 2)

(B) Government of Union Territories Act (1963), S. 18 — Pondicherry Legislature — It has plenary powers which includes the power to make retrospective legislations — (1976) 2 Mad LJ 297 Followed. (Para 2)

Cases Referred: Chronological Paras

(1976) 2 Mad LJ 297 2

K. K. Venugopal for M. Krishnappan for Petitioner; V. K. Thiruvenkatachari for Govt. Pleader for Pondicherry on behalf of the Respondents 1 and 2 and C. Krishnan, Govt. Pleader for Pondicherry for Respondents 1 and 2 etc.

KAILASAM, C. J.:— In these Writ Petitions, the Petitioners have prayed for the issue of a Writ of Declaration or any other appropriate Writ declaring the Pondicherry Land Reforms (Fixation of Ceiling on Land) Act, 1973 (Act 9 of 1974) as null and void, in so far as it affects the petitioners.

2. In these Writ Petitions, the validity of Act 9 of 1974 generally, and particularly S. 4 (4) was challenged on two grounds; firstly, that the enactment was in violation of fundamental rights, and secondly, that the Pondicherry Legislature has no power to make retrospective laws. In fixing the ceiling on land holdings, S. 4 (4) provides as follows:

"In calculating the extent of land held by any person, any land which was transferred by sale, gift or otherwise or partitioned by that person after the appointed day but before the commencement of this Act, shall be taken into account as if such land had not been transferred or partitioned, as the case may be."

The result of this sub-section is that in determining the ceiling area, the land possessed by the landholder as on 24-1-1971, the appointed day, will have to be taken into account although the Act came into force on 14-10-1974. The giving of effect to the provisions under S. 4 (4) on a date prior to the date on which the Act came into force was challenged as retrospective legislation beyond the scope of the Pondicherry Legislature. As the Act has been included in the 9th Schedule of the Constitution by the 40th Amendment, 1976, the challenge to the Act on the ground of violation of fundamental rights is not available. Equally, the challenge as to the competence of the Pondichery Legislature is also not maintainable in view of the judgment of a Bench of this Court in W. A. 240 of 1972 dated 22-4-1975* where it was held that

FU/GU/C92/77/SSG

*(Reported in (1976) 2 Mad LJ 297).

the Pondicherry Legislature has plenary powers, which would include the power to make retrospective legislations. Hence, these Writ Petitions will have to be dismissed.

3. Pending the Writ Petitions on 24-10-1975 certain orders of stay of proceedings were passed, but later on 10-3-1976, they were modified enabling the Authorised Officer to serutinise the issue of draft statements. It is common ground that pending the Writ Petitions, returns were not filed and the Officers could not finalise the returns. The petitioners were also under the impression that they were bound to give the returns about the lands they owned on the date on which the Act came into force and not about the lands they owned on the appointed day i.e., on 24-1-1971. In order to enable the proceedings under the Act to proceed smoothly, thirty days' time from today is granted to enable the petitioners to file their returns or revised returns under S. 7 (1), in respect of the lands held in excess of the ceiling area. On receipt of the returns, the Authorities will proceed according to law.

4. With the above observations, the Writ Petitions are dismissed. No costs.

Petitions dismissed

AIR 1978 MADRAS 30

RAMAPRASADA RAO, Offg. C. J.
AND SURYAMURTHY, J.

Nagarajan, Appellant v. The Executive Officer, Sri Swaminathaswamy Devasthanam, Swamimalai and others, Respondents.

Writ Appeal No. 509 of 1976, D/- 20-4-1977.*

(A) Constitution of India, Art. 226 — Jurisdiction — Question of — Can be raised for the first time even at appellate stage.

If the question of jurisdiction goes to the root of the matter and if it shakes the foundation of the case, it can be addressed even at the appellate stage. If ultimately it is found that the order challenged under Art. 226 of the Constitution of India is one passed by an authority functioning under a statute or otherwise who did not have the necessary or requisite power to pass it, then, the form of it ought not to prevail but the substance of the contention is a feature which highlights the position. (Para 3)

(B) Tamil Nadu Public Trusts (Regulation of Administration of Agricultural Lands) Act (57 of 1961), S. 14-A— Scope — Possession of trust property — Property in occupation of interloper — There is no power under the Act to direct such person to restore possession. W. P. No. 3426 of 1976, D/- 23-11-1976 (Mad), Reversed.

Section 14-A deals with special powers of the authorised officer and is a non obstante section. It provides for suo motu power concurrently with the power to interfere on applications made by an aggrieved person. The enquiry contemplated under S. 14-A has to be for the reasons set out therein. (Para 4)

Sub-section (2) of S. 14-A again deals with tenants or cultivating tenants. The entire vein which runs through the special power of the authorised officer speaks of a jural relationship of landlord and tenant as between the trust and the person in possession. In the absence of such a relationship, either contractual or otherwise, the authorised officer has no power under S. 14-A or under any other provisions of the Act to interfere and take upon himself the responsibility of directing a person in possession of the property of the trust to restore the same in favour of the trust. (Para 4)

It may be that the statutory authorities have such a power to dispossess a person in possession provided the person sought to be dispossessed is either a lessee or a tenant or a cultivating tenant. (Para 4)

In the instant case, the person in occupation was an interloper or an intermeddler who had no authority to be in possession of the land. Hence the order under S. 14-A directing such person to restore possession, was without jurisdiction. W. P. No. 3426 of 1976, D/- 23-11-1976 (Mad), Reversed. (Para 4)

D. Peter Francis, for Appellant; N. S. Raghavan for M/s. D. V. Sivagnanam, S. Meenakshi Sundaram and T. Sathiadev, Govt. Pleader, for Respondents.

RAMAPRASADA RAO, Offg. C. J.:— The appellant, who lost before Mohan J., in a writ petition filed by him for the issuance of a writ of certiorari and for quashing the order passed by the third respondent in the writ petition, who in turn confirmed the order of the second

*(Against order of Mohan J. in Writ Petn. No. 3426 of 1976, D/- 23-11-1976.)

respondent, has filed this appeal. The facts have been summarised by Mohan, J., and it is unnecessary for us to re-state them. But for purposes of continuity we extract them:

"An extent of 4-93 standard acres in Adanur village, Papanasam taluk, Thanjavur District, which were belonging to the first respondent were leased to one Kaliyaperumal. The said Kaliyaperumal died in the year 1972. The writ petitioner being the brother of the deceased Kaliyaperumal was said to be cultivating the lands for some time. The Special Deputy Collector, Tiruvarur, conducted an enquiry into the lease of the lands belonging to the temple and found that the writ petitioner was not cultivating the lands but one Subramaniam was actually cultivating the lands."

The learned Judge, however, did not countenance the arguments of the appellant on the ground that pragmatic rather than a pedantic approach to the problem is necessary. He was of the view that having regard to the purport and object of the Tamil Nadu Public Trusts Act, 1961, the second respondent, who passed the order initially, and the third respondent, who confirmed it later, were or should be deemed to have acted within the limbs of the jurisdiction provided for and stated in the provisions of the above Act. But the learned Judge finds that the petitioner is an interloper. He also referred to the oral evidence given by the petitioner that he was not cultivating the property and that one Subramaniam was actually in occupation of it and cultivating the same. Nevertheless, the learned Judge thought that the statutory functionaries under the Act such as the second and the third respondents could act under S. 14-A and pass the challenged order. He upheld the said order which directed the petitioner to restore the subject-matter of the proceedings to the trust. Incidentally, another fact was also brought to his notice. The public trust in question, which is the first respondent, did file an application treating the writ petitioner as a cultivating tenant. But it transpires that the said application has been withdrawn and there is some controversy about it. It is not necessary to dwell on this aspect of the case as it would not be a relevant matter for consideration.

2. Mr. Peter Francis, learned counsel for the appellant, after taking us through the merits, would contend that there is no express provision in the Tamil Nadu Public Trusts Act, 1961, which would authorise either the second or the third respondent to act in the manner they did and pass an order which is challenged herein. According to him, if once the lands belonging to the trust are in the occupation of an interloper, then, such a person cannot be badged with the status of a tenant or a lessee and much less a cultivating tenant which has a special meaning in agrarian legislation. A fortiori, therefore, and on the facts found, the learned counsel says that if the petitioner is himself an interloper, then Subramaniam, who is actually found to be in occupation and cultivating the property, is certainly one who has no right, either contractual or otherwise, to be in possession of the property and cultivate the same. In effect, therefore, the argument is that the challenged order was passed by the statutory functionaries without jurisdiction. Mr. Raghavan, appearing for the trust, says that this aspect touching upon jurisdiction was not argued in the manner it is sought to be done, either before the statutory authorities or before the writ Judge. He would, therefore, say that this contention is not open to the appellant. Even otherwise he would sustain the order of Mohan, J., on the ground that S. 14-A is one of the sections which could be invoked by the statutory authorities for purposes of dispossessing a person actually in possession of trust lands, though he cannot be a tenant, a lessee or a cultivating tenant.

3. Arguments regarding the question of jurisdiction if it goes to the root of the matter and if it shakes its foundation can be addressed even at the appellate stage. If ultimately it is found that the order challenged under Art. 226 of the Constitution of India is one passed by an authority functioning under a statute or otherwise who did not have the necessary or requisite power to pass it, then, the form of it ought not to prevail but the substance of the contention is a feature which highlights the position. Once it is found, as was found by Mohan, J., that the petitioner is not cultivating the lands and he is in fact an interloper, as he characterised him, then, the question is whether the second or the third respondent could intervene and direct the person in occupation of the land belonging to the trust to restore the lands in favour of the trust. Admittedly there is no demise of the lands in favour of the writ petitioner. The writ petitioner is

only the brother of the original lessee. He came into occupation mainly because he rested his right presumably on filial relationship. But in the course of the investigation by the concerned officials it was found that he was not in actual possession but one Subramaniam was cultivating the property. It is alleged that Subramaniam is a relation. But so far as the trust is concerned, he is a stranger and he has, therefore, no locus standi to cultivate the land or be in possession of the same. If these are the admitted circumstances which halo the situation, the question is whether there are any provisions in the Tamil Nadu Public Trusts Act, 1961, which would enable either the second or the third respondent to pass the challenged order as they did.

4. The learned Judge himself felt a doubt about it. He would in effect say that, in the circumstances as above, the authorities are not powerless to direct restoration of the possession of the lands to the trust from a person who is neither a lessee nor one who could be said to be in juridical possession of the land. He would invoke S. 14-A. Section 14-A deals with special powers of the authorised officer and is a non obstante section. It provides for suo motu power concurrently with the power to interfere on applications made by an aggrieved person. The enquiry contemplated under S. 14-A has to be for the reasons set out therein. If the authorised officer is satisfied that the public trust has failed to lease out the land in accordance with the provisions of the Act or any lease by the public trust is not bona fide or any direction given by him under Cl (b) of S. 12 or Cl. (b) of sub-sec. (2) of S. 13 or sub-sec. (1) or sub-sec. (2) of S. 14 has not been complied with, he may pass an order directing the trustee to lease out the land within the prescribed period. We are unable to see any limb of this section as being invocable or applicable to the situation under consideration. Subsection (2) of S. 14-A again deals with tenants or cultivating tenants. The entire vein which runs through the special power of the authorised officer speaks of a jural relationship of landlord and tenant as between the trust and the person in possession. In the absence of such a relationship, either contractual or otherwise, then the authorised officer has no power under S. 14-A or under any other provisions of Act to interfere and take upon himself the responsibility of directing a person in possession of the property of the trust to restore the same in favour of the trust. Factually, therefore, this would be an order of eviction as against the person in occupation. It may be that the statutory authorities have such a power to dispossess a person in possession provided the person sought to be dispossessed is either a lessee or a tenant or a cultivating tenant. But in the instant case, the person in occupation is an interloper or an intermeddler who has no authority to be in possession of the land. The question, therefore, is whether S. 14-A or any other provision of the Act would help the statutory authorities to direct the person in such occupation to restore the land in his occupation to the trust concerned. We searched in vain for such a power and even the learned counsel was not able to just point out to us any power either expressly provided for or by necessary implication to be gathered from the provisions of the Act. We are unable to agree with the generic observation made by Mohan J., that the authorities are not powerless to direct restoration of the possession of the trust from a person who does not satisfy the tests which would badge him with the status of a tenant or a cultivating tenant or a lessee under the provisions of the Act. Whilst, therefore, accepting the finding of Mohan, J., that the petitioner is not cultivating the property but only one Subramaniam, and as the order challenged herein in effect would be as against the said Subramaniam to restore the lands in his possession in favour of the trust and as Subramaniam is a third person-stranger against whom no proceedings can be initiated by the statutory functionaries under the Act, under one or the other provisions thereto, we hold that the orders of the second respondent in the first instance and the third respondent on appeal are without jurisdiction. No doubt, this question has been raised before us clearly. It cannot be said that it was not raised at all before Mohan, J., as the learned Judge himself found, as a fact, that the authorities are not powerless to direct restoration and that S. 14-A is the provision which would come to the rescue of the statutory authorities. We are unable to agree with Mr. Raghavan that the contention of jurisdiction cannot be raised in this Court for the first time.

5. The other questions do not necessarily arise in view of our conclusion

that the challenged order is without jurisdiction. The writ appeal is allowed and, therefore, the writ of certiorari as prayed for shall issue and it is open to the public trust to take such action as is available to them in law as against the person in actual possession. We are not allowing any costs in the writ appeal and we, therefore, set aside the order regarding payment of costs made by the learned single Judge in the writ petition.

Writ Appeal allowed.

AIR 1978 MADRAS 33

RAMAPRASADA RAO Offg. C. J. AND SURYAMURTHY, J.

Haji S. P. E. S. Mohamed Aboobacker, Appellant v. The Tamil Nadu Wakf Board, Madras and another, Respondents.

W. A. No. 377 of 1976, D/- 12-4-1977.*

(A) Constitution of India, Art. 226 (3) (as amended in 1976) — Alternative remedy provided under law — Such remedy not availed — Writ petition cannot be entertained. (Para 5)

(B) Wakf Act (1954), Ss. 15 (1) and (2) (c) and 43 (1) (c) — Removal of mutavalli — Order directing taking over administration of wakf by Board and appointing executive officer — Omission to give notice under S. 43 (1) (c) — Wrong provision mentioned in the order — Effect.

Section 15 vests the statutory power in the Board to appoint or remove mutavallis and S. 43 provides the process and the methodology by which such removal can be effected. Unless the Wakf Board is able to bring the alleged misconduct of the mutavalli within the framework of various sub-clauses in S. 43 (1) it would be not in order to remove him at all. (Para 4)

Where the Wakf Board by an order in exercise of powers under S. 15 (1) read with sub-s. (2) (c) and (o) directed that the administration of the wakf would be taken over by the Wakf Board for a period of two years and an executive officer posted instead of the mutavalli and it was contended that because no notice under S. 43 (1) (c) was given no such order could be passed strictly under S. 15 (2) (c) expressly named in the order, it was held that a misquotation of the section or the omission to quote a provision of law in a notice or an order, would not make the notice or the order unenforceable and much less illegal. It was not the form but the substance that should prevail in such situations. The mere non-quotation or non-reference to S. 15 (2) (g) or S. 43 (1) of the Act would not make the order itself inoperative in the eye of law. (Paras 1, 4)

V. Shanmugham and Riaz Ali Khan, for Appellant; M. A. Sathar Sayeed and S. M. Amjad Nainar, for Respondents.

RAMAPRASADA RAO, Offg. C. J.:— The appellant, not satisfied with the order of Mohan J. passed in W. P. 2808 of 1976, whereby he made certain interim directions and ultimately dismissed his writ petition, is the appellant before us. The admitted facts are that 'Haji Pitchai Mohideen Rowther Wakf' was created by late Mohideen Rowther and it is common ground that the petitioner-appellant is the muthavalli of that wakf and is functioning in accordance with the terms of the deed of wakf. The petitioner claims that he was discharging his duties properly. One of the ordainments in the said wakf deed as per the intentions of the wakif was that an Arabic School Madarsa at Kayatar in Tirunelveli Dt., to propagate the Arabic language was to be maintained and education given to the students seeking for such benefits. Originally, to wit, during the year 1973, the Wakf Board which was in charge of the school, sought for a sum of Rs. 750 per month for the maintenance and upkeep of that Madarasa. In August 1974, they demanded a sum of Rs. 2,500 from the appellant who was admittedly in possession of both the moveables and immoveables belonging to the wakf. No doubt there was no previous notice to the Muthavalli about the proposed increase in the demand as above. The Muthavalli, therefore sought for reconsideration of the demand on the ground that it was excessive. Thereafter, it is said that as many as 18 charges were framed as against the appellant in connection with the alleged mal-administration of the wakf properties. It also transpires that on 26-4-1975, the Wakf Board reduced the demand to a sum of Rs. 1,500 equally without any enquiry or without any intimation to the petitioner. The petitioner-appellant would also allege that on 25-5-1975, there was a resolution whereunder the charges framed

*(Against order of Mohan J., in W. P. No. 2808 of 1976, D/- 15-9-1976).

against him in 1974 were dropped. Finding that the Wakf Board was persisting in demanding from him a sum higher than a sum of Rs. 750 towards the maintenance of the Madarasa, the appellant filed O. S. 229 of 1976 on the file of the court of the District Munsif, Tiruchirapalli, and obtained an interim injunction restraining the Wakf Board from collecting any further amount towards the aforesaid avowed purpose over and above Rs. 750. Between the appellant and the Wakf Board several occasions arose when there were acute differences between them and it is unnecessary for us to consider them finally on 14-5-1976, the Wakf Board issued a notice setting out the charges which were by then and according to the Board pending as against the Muthavalli and also stating that the explanation given by him earlier was not satisfactory and bringing to the notice of the appellant that he has misappropriated wakf funds and failed to carry out the directions of the Wakf Board and called upon the appellant to show cause why the wakf should not be taken over under the direct management under the Tamil Nadu Wakf Board as contemplated under S. 43 (1) (c) of the Wakf Act and as to why an Executive Officer should not be appointed for the better management of the wakf. The appellant has again submitted his explanation. But by a final order which is challenged in these writ proceedings dated 13-7-1976, the respondent Board in exercise of the powers conferred on them under S. 15 (1) read with sub-s. (2) (c) and (o) of the Wakf Act, 1954, directed that the administration of the wakf would be taken over by the Wakf Board for a period of two years and an executive officer posted instead of the Mutavalli. The appellant came to court challenging this order on two grounds; firstly his case was that no notice under S. 43 (1) (c) of the Act was given and that the order, as it purports to have been made under S. 15 (2) (c) and (o) of the Act is prima facie unenforceable, as no such order could be passed strictly under the above provisions expressly named in the order. In consequence of his first objection, the appellant also challenged the appointment of a Special Officer which according to him could only be done under certain other provisions of the Wakf Act. Mohan J. who heard the petition apparently was led by the emotional representations made on either side, whereas the appellant's case was that it was only an interim order which was made by the Board, the contention of the counsel for the Board was that it was a final order. On the assumption that it was an interim order, counsel for the appellant was emphatic that there was no such power in the Board to pass such interim orders of removal and, therefore, there is an error apparent in the record as well as in the order. Finding that the situation required an impartial approach and equitable treatment, the learned Judge gave certain interim directions to wit, the appellant was asked to deposit a sum of Rs. 4,000 on or before 30-10-1976, and after such deposit, the Wakf Board should frame specific charges for the removal of the appellant after due enquiry and in accordance with the provisions of the Act. With these observations, the writ petition was dismissed.

2. Mr. Shanmugham, learned counsel for the appellant, in the opening of the case made out that the order which is challenged in these proceedings is not one which could be passed by the Board in exercise of any known powers under the Wakf Act and as such an order is not well within the periphery of the powers of the Board it is unsustainable. In consequence he challenged the appointment of the Executive Officer, who would naturally and virtually remove him from office. The contention of Mr. Sathar Sayeed learned counsel for the Board is that the order is a final one and in the purported exercise of power statutorily vested in the Board under the provisions of the Act. It, therefore, became necessary for us to examine in some detail as to whether the order passed and challenged before us is one which could have been passed at all and if so, was it passed in exercise of the statutory power vested in the Board.

3. Section 15 of the Wakf Act 1954, speaks of the functions of the Board. Whilst enumerating the various situations under which the Wakf Board could act, and expressly stating that the general superintendence of all wakfs in a State shall vest in the Board and the duty of the Board is to exercise its powers under the Act so as to ensure that the Wakfs under its superintendence are properly maintained, controlled and administered and the income thereof is duly applied to the objects and for the purposes for which such wakfs were created or intended, the enactment pro-

vided specifically express powers and vested such powers in the Board. To this purpose, sub-cl. (2) (g) of S. 15 of the Muslim Wakf Act provides that without prejudice to the generality of the foregoing powers, the functions of the Board shall be to give directions for the administration of Wakfs to appoint and remove muthavallies in accordance with the provisions of the Act (and lastly, generally for the due control and maintenance and administration of the Wakf). We are not concerned with the sub-clause regarding the other expressive powers provided for in sub-cl. (2) of S. 15. Section 43 is complementary to S. 15 and it reads thus—

"43. Removal of Muthavallis — (1) Notwithstanding anything contained in any other Law or the deed of wakf, the Board may remove a mutavalli from his office if such mutavalli — (a) has been convicted more than once of an offence punishable under S. 41; or (b) has been convicted of an offence of criminal breach of trust or any other offence involving moral turpitude; (c) misappropriations or deals improperly with the properties of the wakf; or (d) is of unsound mind or is suffering from other mental or physical defect or infirmity which would render him unfit to perform the functions and discharge the duties of a mutavalli; or (e) has failed to pay, without reasonable excuse, for two consecutive years, the contribution payable by him under S. 46.

(2) Where a Committee is appointed by the Board to act as a mutavalli for managing or administering any wakf property and the Committee in the opinion of the Board, is unable to perform. or has persistently made default in the performance of, the duty imposed on it by or under this Act or has exceeded or abused its powers. the Board may supersede the Committee and appoint any other person or Committee to act as the mutavalli of the wakf property.....

(4-A) A mutavalli who is aggrieved by an order passed under any of the cls. (c) to (e) of sub-s. (1) or under sub-s. (2) may, within one month from the date of the receipt by him of the order, appeal against the order to the State Government and the decision of the State Government on such appeal shall be final and shall not be questioned in any Court of law."

We are not extracting the entire S. 43, as it is not necessary. Suffice it however to say that S. 43 (1) sub-cls. (a), (b), (c), (d) and (e) enumerate the situations and conditions under which the Wakf Board could exercise its powers to remove the mutavalli. In ordinary legal parlance therefore S. 43 (1) could be understood as the processual section whereas S. 15 (1) and (2) deals with the substantive provision regarding the appointment and removal of mutavallis. If, therefore, S. 43 (1) (a) to (e) are to be understood as dealing with the various situations whereunder the Board could remove a mutavalli after due enquiry, then it follows that if a person is aggrieved by an order passed under one or the other of the sub-clauses in sub-sec. (1) or under sub-s. (2) of S. 15 (with which we are not concerned in the instant case) he may within one month from the date of receipt by him of the order, appeal against the same to the State Government. In the above background the contention of Mr. Shanmugham has to be considered.

4. No doubt, it is common ground that the order which is challenged in these proceedings recites only S. 15 (1) read with sub-s. (2) (c) and (o) of the Muslims Wakfs Act. Though in view of the show cause notice which was the foundation for the later action resulting in the challenged order referable to S. 43 (a) (1) of the Wakf Act, the order in question, no doubt, does not make any specific reference to any other sub-section of S. 15 of the Wakf Act. Taking advantage of such an omission, it is contended by Mr. Shanmugham, that this order is unenforceable, as it does not come within the frame work of power envisaged in S. 43 of the Act. We have already stated in our preface that it is S. 15 which vests the statutory power in the Board to appoint or remove mutavallis and S. 43 provides the process and the methodology by which such removal could be effected. No doubt, it cannot be challenged that unless the Wakf Board is able to bring the alleged misconduct of the mutavalli within the framework of various sub-clauses in S. 43 (1), it would not be in order to remove him at all. But that is beside the point. What is urged is that the absence of a reference to S. 15 (2) (g) and S. 43 (1) of the Act makes the challenged order inoperative and ineffective. We are unable to agree. It is by now well established that a misquotation of the section or the omission to quote a provision of law in a notice or an order would not make the notice or the order

unenforceable and much less illegal. It is not the form but the substance that should prevail in such situations. Viewing the question in this perspective, we have no hesitation in stating that the substance of the order which is challenged before us is that the appellant is sought to be removed by the Wakf Board by reason of the challenged order and that the Executive Officer is being posted instead. The mere non-quotation or non-reference to S. 15 (2) (g) or S. 43 (1) of the Act would not make the order itself inoperative in the eye of law. We, therefore, understand the order as one passed within the frame work of the authority. The question is whether in these circumstances and in the light of our conclusion, the order of Mohan, J. is sustainable. As we have understood, the order, as a final order and not as an interim order as suggested before the learned Judge and before us, we are of the view that this is a case in which interim directions alone would not suffice and it would not be a proper exercise of power by the Board within the meaning of either S. 15 (2) or S. 15 (1) of the Act. The Wakf Board is no doubt expected to maintain, control and administer the wakf property and for this purpose it takes such action as is necessary. In a case where they have framed certain charges which are still under enquiry (this fact is disputed by the appellant), power is vested in the Board under S. 15 (2) (g) of the Act to appoint and remove mutavallis, but in accordance with the provisions of the Act. Finding this situation, Mr. Shanmugham proceeds to say that the procedure prescribed under S. 43 (1) has not been followed and he has not been fully heard and the principles of natural justice have been violated. It may be true. But the order having been passed by the Board in exercise of statutory power cannot lightly be set aside without a further probe into it on merits. The appellant as such had an opportunity to challenge the same on facts by approaching the State Government under S. 43 (4-A) already excerpted. The appellant has not availed himself of that alternative remedy. The only order, therefore, that we could pass in this writ appeal after the passing of the 42nd amendment of the Constitution is as follows.

5. Mr. Shanmugham is aware that after the 42nd amendment no writ petition for the redress of any injury referred in Art. 226 of the Constitution as amended shall be entertained if any other remedy for such redress is provided for by or under any other law for the time being in force. In the very Act, under which the challenged order was passed, there is a remedy which is available to the appellant. Undoubtedly, therefore, this is an alternative remedy which he could avail himself. He did not do so. The Constitution makes it clear that if such an alternative remedy is not availed of no writ petition under Art. 226 shall be entertained. On this ground, therefore, we are not inclined to give relief to the appellant.

6. The writ appeal is dismissed. The appellant however is given a month's time from today to prefer the appeal to the State Government and it is expected that the authorities prescribed under the Act to hear such appeals would not take the technical objection that the petition is beyond time as provided for in S. 43 (4-A) of the Act. We expect the Government Pleader who is fortunately here would give the necessary assistance.

There will be no order as to costs.

Appeal dismissed.

AIR 1978 MADRAS 36

SURYAMURTHY, J.

S. Venkataraman, Petitioner v. M. V. Krishnaswamy, Respondent.

Civil Revn. Petn. No. 31 of 1975, D/- 25-3-1977.*

(A) T. P. Act (1882), S. 108, Cl. (j) — Transfer of lease hold right — Lease of premises by Devastanam in favour of A (uncle of P) — Receipts issued by member of Devastanam staff for sums received from P towards rent — This is not sufficient to prove that Devastanam had inducted P into premises as a lessee in the place of A. (Hindu Law). (Para 6)

(B) Presidency Small Cause Courts Act (1882), S. 38 — Powers of Full Bench to interfere with findings of fact.

Even if there was misappropriation of evidence by the trial Judge, that would not entitle the Judges hearing the new trial application to interfere with the findings of fact arrived at by the trial Judge, because the Judges of the Court of Small Causes exercising powers under

*(To Revise Order of Sm. C. C. Madras in N.T.A. No. 218 of 1973).

S. 38 of the Presidency Small Cause Courts Act, do not constitute a Court of Appeal and their powers are substantially in the nature of revisional jurisdiction, though those powers are not so restricted as those under S. 115, C. P. C. Therefore, they have no jurisdiction to interfere with the findings of fact arrived at by the trial Judge on a proper appreciation of the evidence. (Para 7)

Where, however, the new trial Bench is definitely of the opinion that the findings of fact of the trial Court cannot be sustained, it can remit the matter to the trial Court for a reconsideration of the entire issue. It is possible that they can give their mind and indicate their views as well in the order of remittal. This is, however, left to the discretion of the Bench trying the matter. (1968) 2 Mad LJ 205, Foll. (Para 8)

Cases Referred: Chronological Paras
(1968) 2 Mad LJ 205 8

ORDER: — This is a civil revision petition against the judgment of a Bench of the Small Cause Court, Madras, allowing the appeal against the judgment of a single Judge of the Court of Small Causes, Madras.

2. S. C. No. 1082 of 1972 was filed by the respondent herein for the recovery of a sum of Rs. 1,260/-. The plaintiff claimed the same as arrears of rent. The plaintiff was in occupation of the building bearing No. 26 (No. 1) T. P. Koil St, Triplicane, Madras, as the tenant of Sri Parthasarathiswami temple, Triplicane, Madras. He permitted the defendant to use a portion of the property for two hours every day in the evening on the defendant agreeing to pay every month Rs. 35/-. According to the plaintiff, the defendant was only a licensee, who was permitted to use the premises during the said two hours every day on the aforesaid terms. Alleging that for the period from 1-11-1967 to 31-12-1971, the defendant did not pay and that a sum of Rs. 1,750/- was due, the suit was filed only for the sum of Rs. 1,260/-, as the claim for the balance was barred by limitation.

3. The defendant contended that there was no privity of contract between him and the plaintiff, that he became the sub-tenant under one V. V. Ranganathan, the plaintiff's uncle, on 6-2-1962, on a monthly rent of Rs. 35/-, that Ranganathan has issued receipts for the payment of rent for the months of March, April and May, 1962, that subsequently, the son of Ranganathan has issued receipts, that Ranganathan has received rent upto the end of May 1968, that the rent subsequently sent by money order was refused by Ranganathan, that Ranganathan has also received an additional sum of Rupees 200/- by way of advance, that after the notice dated 14-10-1968 issued by the plaintiff revoking the licence, he is no longer a licensee, under the plaintiff and that the suit for the alleged arrears of licence fees is not maintainable.

4. Though in the notice Ex. P-2, dated 14-10-1968, the plaintiff had contended that he had permitted the defendant to use a portion of the suit premises for two hours every day in the evening, deposing as P. W. 1, he had endeavoured to make out that he permitted the use of the building every day in the morning for two hours and in the evening for two hours. P. W. 1 also admitted that his uncle was in occupation of the premises as a tenant of the Devasthanam and deposed that subsequently, he got a transfer of the rights in his favour.

5. The learned trial Judge has observed that the plaintiff had failed to file any receipt or communication from the Devasthanam in support of his case, that he was the tenant of the Devasthanam. The learned trial Judge held that there was absolutely no proof on the side of the plaintiff to show that the plaintiff was entitled to the property obviously meaning that the plaintiff was entitled to be in possession of the property as the tenant of the Devastanam. There was also no evidence to prove that the leasehold right of Ranganathan was transferred to the plaintiff. Ranganathan also was not examined as a witness to support the case of the plaintiff. No employee of the Devastanam was examined in support of the case of the plaintiff. The other circumstances, on which the learned trial Judge has relied is the notice Ex. P-2, in which there was no reference to any transfer of the leasehold right of Ranganathan in favour of the plaintiff. The learned trial Judge came to the conclusion that the plaintiff has miserably failed to establish his case. He, therefore, dismissed the suit.

6. The learned appellate Judges, have, however, reversed the judgment of the trial Court because of their view that — ".....the oral testimony of the applicant

is very much there. His oral evidence is entitled to acceptance since the legal status of the applicant has been established by the production of Ex. P-1 series. Even if it is taken for the purpose of argument that the applicant had not inducted the respondent into possession of the premises as a licensee at the first instance, the applicant having become the main lessee under the Devastanam has succeeded and stepped into the shoes of V. Ranganathan who was the main lessee under Devastanam and by continuing in possession of the portion of the premises as a sub-tenant, the implied legal relationship of licensor and licensee has been brought into existence between the applicant and respondent. The respondent has not chosen to adduce the evidence of V. Ranganathan who according to the respondent is stated to be the main lessee even today. In our view, the applicant has established that he is the main lessee of the premises and that as licensor he is entitled to collect the licence fee for the suit period from the respondent."

In this view, the learned Judges have erred. Admittedly, the lease by the Devastanam was in favour of V. Ranganathan, the uncle of the plaintiff. The receipts, Ex. P-1 series, have been issued by the Devasthanam for the sums received from the plaintiff towards the rent for the premises. This is not sufficient to prove that the Devastanam had inducted the plaintiff into the premises as a lessee in the place of Ranganathan. The leasehold right could not be transferred by any arrangement between Ranganathan and the plaintiff. The lease could be granted only by the Devastanam. No doubt, the employees of the Devastanam have received the rent from the plaintiff for the premises. The employees of the Devastanam would have been prepared to receive the rent for the premises from any one. Obviously under the impression that the rent was being paid on behalf of Ranganathan, the rent was received. The receipt of rent by any member of the staff of the Devastanam office would not be tantamount to recognition of the plaintiff as the tenant. The Executive Officer alone could validly represent the Devastanam and grant a lease. The plaintiff has not proved that such a lease was granted.

7. After the alleged transfer of the leasehold right in favour of the plaintiff, the defendant has not paid him any money towards the alleged licence fee. Even this licence was revoked by the plaintiff by his notice Ex. P-2 dated 14-10-1968. Therefore, there is no privity of contract between the plaintiff and the defendant. In the circumstances, the learned appellate Judges were not justified in relying on the oral evidence of P. W. 1, the plaintiff. The learned trial Judge was right in rejecting the case of the plaintiff. There was no misappreciation of evidence by the learned trial Judge. Even if there was such misappreciation of evidence by the learned trial Judge, that would not entitle the Judges hearing the New Trial application to interfere with the findings of fact arrived at by the trial Judge, because the Judges of the Court of Small Causes exercising powers under S. 38 of the Presidency Small Cause Courts Act do not constitute a Court of Appeal and their powers are substantially in the nature of revisional jurisdiction, though those powers are not so restricted as those under S. 115, C. P. C. Therefore, they had no jurisdiction to interfere with the findings of fact arrived at by the learned trial Judge on a proper appreciation of the evidence.

8. In Madras Cine Service v. Shyamala Pictures, Pvt. Ltd., (1968) 2 Mad LJ 205 Ramaprasada Rao, J. has held that under S. 38 of the Presidency Small Cause Courts Act, the Full Bench has no jurisdiction to reverse findings of fact, as their jurisdiction is purely revisional and not appellate in character. However, the learned Judge also observed that—

"... ... ...where the new trial Bench definitely is of the opinion that the findings of fact of the trial Court cannot be sustained, it can remit the matter to the trial Court for a reconsideration of the entire issue. The new trial Bench has the power in such circumstances to direct a new trial of the case by remitting the matter to the trial Court. It is possible that they can give their mind and indicate their views as well in the order of remittal. This is, however, left to the discretion of the Bench trying the matter."

That situation, however, does not arise here, because the judgment of the learned trial Judge is based on a proper appreciation of the evidence in the case, and there is no justification for interference in revision. In the result, the civil revision petition is allowed, the judgment of the learned appellate Judges is set aside and the judgment of the learned trial

udge is restored, and the suit is dismissed. There will be no order as to costs.

Revision allowed.

AIR 1978 MADRAS 39

RAMAPRASADA RAO, J.

G. V. Ramaswami Iyer, Petitioner v. Krishnaveni Ammal, Respondent.

Civil Revn. Petn. No. 824 of 1976, D/- 22-3-1977.*

Tamil Nadu Buildings (Lease and Rent Control) Act (18 of 1960) (as amended by Act 23 of 1973), S. 10 (2)—Wilful default —Effect of Explanation added — Default kept by tenant for a period of two months after notice — Tenant is wilful defaulter.

Though prior to the induction of the Explanation to S. 10 (2) Courts were revelling in expression annotating the expression 'wilful default' yet such revelling explanations and understandings of the expression 'wilful default' is no longer available even to Courts. The Explanation almost gives a definition on wilful default. It makes default in the payment of arrears of rent wilful if the tenant fails to pay or respect the demand for such arrears of rent within two months from the date of such notice of demand. It, therefore, follows that in a case where a tenant defaults in the payment of rent after a demand for the purpose is made by the landlord and he keeps on such a default for a period of two months thereafter, he is deemed to be a wilful defaulter. (Para 1)

ORDER : — The lower appellate Court was wrong in having held that the respondent did not commit wilful default in the matter of payment of rents. That there was an arrear of Rs. 510/- on the date of petition is not in dispute. But the explanation offered by the tenant-respondent was that she paid the taxes due on the property and after deducting the said amount, only a sum of Rupees 398.85 would be due as and by way of arrears of rent, that even this amount was not payable by her since she lent a sum of Rs. 500/- to the landlord's wife and that it was represented that the rent would be adjusted towards the advance made by her. Though the defence prima facie appears to be attractive, yet, it should fall to the ground for the reason that the petitioner was taking the precaution of giving biennial notices to the tenant under Exs. A-5, B-2 and A-2 once in 1970, secondly in 1972 and on the last occasion in 1974, reminding her of such arrears of rent. There was no reply to such demands for payment of rent. In the light of the Explanation appended to S. 10 (2) which says that for the purposes of this sub-section, default to pay or tender rent shall be construed as wilful, if the default by the tenant in the payment or tender of rent continues after the issue of two months' notice by the landlord claiming the rent, it is proved beyond any doubt that the respondent committed wilful default in the payment of rents. But the question is whether her defence is true. This was found against her by the Court below and, in my view, rightly because there was no evidence to support the advance made by the tenant to the landlord's wife. The net result of it is that a sum of Rs. 398.85 remained unpaid in spite of three notices of demand. In spite of the above narration and circumstances, the Court below thought that there was no wilful default. Though prior to the induction of the Explanation to S. 10 (2) as above, Courts were revelling in expression in annotating the expression 'wilful default' yet such revelling explanations and understandings of the expression 'wilful default' is no longer available even to Courts. The explanation referred to above almost gives a definition on wilful default. It makes default in the payment of arrears of rent wilful if the tenant fails to pay or respect the demand for such arrears of rent within two months from the date of such notice of demand. It, therefore, follows that in a case where a tenant defaults in the payment of rent after a demand for the purpose is made by the landlord and he keeps on such a default for a period of two months thereafter, he is deemed to be a wilful defaulter. The respondent is one such. The lower Court was wrong in having held that there was no such wilful default although it found that the theory of adjustment and advance trotted by the tenant was not true. I, therefore, set aside the order of the Appellate Authority and find that the respondent-tenant has committed wilful default. The petition for eviction is, therefore, ordered on that ground.

*(To Revise Order of Sub-J., Cuddalore, in C.M.A. No. 57 of 1975).

2. The revision petition is allowed. The tenant is granted six months time to vacate.

Petition allowed.

AIR 1978 MADRAS 40

KOSHAL, J.

Premraj and Ganpatraj & Co. (P) Ltd. (now known as Madras Electrical Conductors (P) Ltd., Petitioner v. The Assistant Collector of Customs, Madras and others, Respondents.

W. P. No. 2699 of 1972, D/- 14-3-1977.

Constitution of India, Art. 226 — Mandamus — Recovery of excess duty in contravention of the rules and notifications issued — Application for refund — Dismissal — Legal, as time barred — Still as recovery was without jurisdiction it was liable to be refunded by directions in the nature of mandamus. Spl. Civil Applns. Nos. 909, 910, 911 of 1971, D/- 18-3-1972 (Guj) and W. P. Nos. 3236 to 3251 of 1970, D/- 14-9-1972 (Mad), Rel. on. (Para 3)

Cases Referred: Chronological Paras

(1972) Spl. Civil Applns. Nos. 909, 910 and 911 of 1971, D/- 18-3-1972 (Guj) 3

(1972) W. P. Nos. 3236 to 3251 of 1970, D/- 14-9-1972 (Mad) 3

Habibullah Badsha, for Petitioner; T. Chengalvarayan, for Respondents.

ORDER: — The petitioner before me is M/s. Premraj and Ganapatraj and Co. (P.) Ltd. (now known as M/s. Madras Electrical Conductors (P) Ltd., and hereinafter referred to as the Company), which has been carrying on business at Madras and in the course thereof imported 99707 tons of electrolytic aluminium wire bars under bill of entry No. D-1796 dated 17-6-1967. The duties payable by the Company on the goods under the Customs Act, 1962 (hereinafter referred as the Act) were worked out by the assessing officer on the basis that customs duty was due at 15% of the value of the goods and another type of duty known as countervailing duty was due at the rate of Rs. 740/- per metric ton under S. 2 (a) of the Tariff Act. Really, however, countervailing duty had been reduced in the case of the goods in question from Rs. 740/- per metric ton to Rs. 620/- per metric ton by notification No. 170/1967 dated 26-5-1967, issued by the Government of India, which stated thus —

"In exercise of the powers conferred by sub-r. (1) of R. 8 of the Central Excise Rules, 1944, read with sub-cl. (4) of Cl. 41 of the Finance (No. 2) Bill, 1967, which clause has by virtue of a declaration made under the Provisional Collection of Taxes Act, 1931 (16 of 1931), the force of law, the Central Government hereby exempts, with effect from 26-5-1967, aluminium in any crude form falling under sub-item (a) of item No. 27 of the First Schedule to the Central Excises and Salt Act, 1944 (1 of 1944) and aluminium manufactures falling under sub-item (b) of the said item No. 27, from so much of the special duty of excise as is equivalent to the special duty of excise leviable at Rs. 120/- per metric ton."

It appears that neither the Company nor the assessing officer were aware of the contents of this notification when the duty was worked out as stated above and paid accordingly.

2. On 28-11-1968, the Company applied to the Assistant Collector of Customs, Madras (respondent No. 1), for refund of the duty paid by it in excess, i.e. at the rate of Rs. 120/- per metric ton the total amount claimed being Rs. 11,952.84. That application was dismissed by respondent No. 1, on the ground that it was time-barred in view of the provisions of S. 27 of the Act as it had been presented more than six months from the date of payment of the sum claimed as refund. The Company preferred an appeal to the Appellate Collector of Customs, Madras, but without success. A revision petition instituted before the Government of India under S. 131 of the Act was also rejected. That is why the Company has invoked the jurisdiction of this Court under Art. 226 of the Constitution of India, with a prayer that the orders of the Assistant Collector of Customs, Madras, the Appellate Collector of Customs, Madras, and the Government of India, who are the three respondents before me, be quashed by a writ of certiorari and that the Government of India be directed to refund to the Company the said sum of Rupees 11,952.84.

3. In so far as the orders of the respondents are concerned, no fault can be found therewith, inasmuch as the application for refund made by the Company was actually time-barred, having been

presented, as already stated, beyond six months of the payment of duty so that the customs authorities were bound to reject it in pursuance of the provisions of S. 27 of the Act. That, however, does not end the matter because the recovery of excess duty was clearly and admittedly in contravention of the notification above extracted and, therefore, without jurisdiction so that the same is liable to be refunded by directions in the nature of Mandamus to be issued by this Court. This conclusion finds support from the judgment in Special Civil Appln. Nos. 909, 910 and 911 of 1971, decided by a Division Bench of the Gujarat High Court consisting of Mehta and Sheth, JJ. on the 17th/18th of March 1972, which was followed by Ramaprasada Rao, J. in Premraj Ganapatrai and Co. (P) Ltd. v. Asstt. Collector of Customs, Madras, W. P. Nos. 3236 to 3251 of 1970, decided on 14-9-1972 (Mad).

4. In the result, the petition succeeds in part. While the orders of the three respondents holding the application made by the petitioner to the Assistant Collector of Customs, Madras, for a refund of the excess duty to be time-barred are not interfered with, the respondents are directed by a writ of Mandamus to refund to the Company the sum of Rs. 11,952.84. The parties are, however, left to bear their own costs.

Order accordingly.

AIR 1978 MADRAS 41

KOSHAL, J.

V. K. Somasundara Pandarasannadhi, Petitioner v. The State of Tamil Nadu, Respondent.

Writ Petn. No. 2803 of 1972, D/- 20-1-1977.

Tamil Nadu Hindu Religious and Charitable Endowments Act (22 of 1959), S. 3 (3) — Notification under — To extend provisions of the Act to petitioner's Endowment — Objection filed by him considered behind his back — Held there was no proper consideration of objections —Consideration of objections to be legally effective must be done after hearing the person concerned and affording him an opportunity of proving the truth of his objections. (Para 2)

K. Raman, for Petitioner; C. Chinnaswami for Govt. Pleader, for Respondent.

IU/JU/D566/77/PNK/SNV

ORDER: — On the 20th April 1971, the Government of Tamil Nadu, who is the sole respondent before me, issued an order requiring the Commissioner, Hindu Religious and Charitable Endowments (hereinafter referred to as the Commissioner) to arrange for the publication of a notification declaring its intention to extend to Adivara Matam, Vedaranyam, which is a chariatble endowment operating in Tanjore Dist., the provisions of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 (hereinafter referred to as the Act), on the ground that the endowment was being mismanaged by the petitioner. The notification was duly published in pursuance of the provisions of sub-s. (3) of S. 3 of the Act, and in response thereto the petitioner filed his objections on 17th June 1971, before the Commissioner who called upon the petitioner to produce the accounts relating to the endowment. The petitioner complied with the Commissioner's order, but the accounts produced by him were found to be incomplete in material particulars and were returned to him. Thereafter, the Commissioner held an enquiry with which the petitioner was not associated in any manner. A report was made by the Commissioner to the Government, and on the basis thereof, the Government passed an order dated 27-9-1972, holding that the irregularities attributed to the petitioner stood proved and that his objections were without substance, and extending the provisions of the Act to the endowments managed by him. It is that order by which the petitioner feels aggrieved and which he seeks to have quashed by a writ of certiorari on the sole ground that it was passed behind his back, inasmuch as no reasonable opportunity was afforded to him to prove the correctness of the objections raised by him.

2. It is admitted on all hands that the petitioner was never called upon to substantiate the truth of the objections raised by him to the extension of the provisions of the Act to the endowment in question. According to the proviso to sub-s. (3) of S. 3 of the Act, a notification through which the Government publishes a notice of its intention to extend the provisions of the Act to any endowment has to fix a period for the persons interested in the endowment concerned to show cause against the issue of the notification, and the Government has to consider their objections, if any. That such a notice was published

is true; but then, the consideration of the objection was limited to the ex parte discussion thereof, which, in the eye of law, is really no consideration at all. For a consideration of the objections to be legally effective, it must be done after hearing the objector and affording him an opportunity of proving the truth of his objections. In the present case, neither the Commissioner nor the Government called upon the petitioner to substantiate his objections by any oral representation or the production of evidence, and in this situation, it cannot be said that the objections of the petitioner were considered at all. The impugned order, therefore, must be held to have been passed in contravention of the provisions of S. 3 of the Act.

3. In the result, the petition succeeds and is accepted, and the impugned order is quashed. It will, of course, be open to the Government to take fresh proceedings under the Act in the light of the observations made above and in accordance with law. The petitioner shall have his cost of these proceedings. Counsel's fee Rs. 100/-.

Writ petition allowed.

AIR 1978 MADRAS 42

N. S. RAMASWAMI. J.

The Secretary to Government Home Department and another, Appellants v. T. V. Hari Rao, Respondent.

Second Appeal No. 1577 of 1977, D/- 8-11-1977.*

(A) Evidence Act (1 of 1872), S. 32 (5) — Applicability — Conditions to be fulfilled — Statement in a horoscope need not necessarily be one made at about the time of birth.

Four conditions must be fulfilled for the application of sub-s. (5) of S. 32. They are: (1) The statements either written or verbal of relevant facts must have been made by a person who is dead or cannot be found etc. (2) The statements must relate to the existence of any relationship by blood, marriage or adoption. (3) The person making the statement must have special means of knowledge as to the relationship in question. (4) The statement must have been made before the question in dispute was raised. Statements contained in a pedigree or horoscope would certainly come under S. 32 (5) provided the other conditions are satisfied. A statement in a horoscope need not necessarily be one made at about the time of the birth of the child to attract S. 32 (5). Even if it is made subsequently it would be admissible provided it had been made before the question in dispute was raised and the other conditions mentioned earlier are satisfied. AIR 1959 SC 914, Foll. (Para 6)

(B) Evidence Act (1 of 1872), Ss. 32 (5) & 3 — Original horoscopes — Though admissible under S. 32 (5), their evidentiary value is very little. AIR 1941 All 385; AIR 1957 Ker 103 and AIR 1965 Him Pra 32, Rel. on. (Para 12)

(C) Civil P. C. (5 of 1908), S. 100 — Substantial question of law — Misconstruing of evidence and acting without evidence is certainly a substantial question of law. (Para 13)

Cases Referred:	Chronological	Paras
AIR 1965 Him Pra 32		12
AIR 1959 SC 914		6
AIR 1957 Ker 103		12
AIR 1941 All 385		12

The Addl. Govt. Pleader, for Appellants; G. K. Damodar Rao, for Respondent.

JUDGMENT: — This second appeal by the State Government and the Director of School Education (the defendants in the suit) arises out of a suit for declaration that the date of birth of the plaintiff is 14-2-1923 and for a direction for entry of the said date in the service register. T. V. Hari Rao, the plaintiff in the suit was a Government servant. His date of birth as entered in the service register is 15-5-1921. That is in accordance with his date of birth entered in the S. S. L. C. book which he declared to be correct when he entered service. As per that date the plaintiff was due to retire by 14-5-1976. A few months prior to the retirement or superannuation, the plaintiff filed the suit for declaration and direction as mentioned earlier. According to him, his real date of birth is 14-2-1923, that the date had been wrongly given as 15-5-1921 in the S. S. L. C. book and that the same mistake had been carried over when he entered service. He said that some time prior to the filing of the suit he came across certain old papers while searching for records in

*(Against Judgment and decree of City Civil J., Madras, in A. S. No. 165 of 1976).

connection with a partition among members of his family and then he found Exs. A-1 and A-2, said to be horoscopes relating to the plaintiff in the hand writing of the plaintiff's father who is now no more. According to the said horoscopes, the date of birth is given as 3rd of Masi of Thunthubi year which corresponds to 14-2-1923.

2. The defendants refuted the plaintiff's case that he was born on 14-2-1923 and challenged the genuineness of the horoscopes relied on by the plaintiff.

3. The trial Court held that the plaintiff has not proved that he was born on 14-2-1923, that the entry in the service register showing the date of birth as 15-5-1921 is not wrong and that the horoscopes relied on by the plaintiff are not genuine and cannot be acted upon.

4. The plaintiff filed A. S. No. 165 of 1976 on the file of the City Civil Court, Madras, and the First Additional Judge, holding that Exs. A-1 and A-2 are genuine documents, has given a declaration in favour of the plaintiff as prayed for. However, the plaintiff himself gave up, before the lower appellate Court, his prayer for a direction to the defendants to correct the entry in the service register. The only prayer stressed before the lower appellate Court was for a declaration that the plaintiff's real date of birth is 14-2-1923. That has been granted by the lower appellate Court. Hence the second appeal by the defendants.

5. The finding of fact by the lower appellate Court is that the plaintiff had come across Exs. A-1 and A-2, only some time prior to the institution of the suit, that the two documents were in the hand writing of the plaintiff's father and that therefore they are genuine documents. This finding cannot be attacked in second appeal. The question is whether there is legal evidence to prove that the plaintiff's real date of birth is 14-2-1923 and not 15-5-1921. Ex. A-1 is described in the index of exhibits as original horoscope, but admittedly it is not the original. At the top of the paper containing the horoscope chart and the particulars of the child that was born, one finds the name, T. V. Hari Rao, B.A. Even according to the finding of the lower appellate Court this document ought to have been prepared only after the plaintiff had obtained the B. A. degree. Ex. A-2 is only an elaboration of Ex. A-1, and that is also said to be in the hand writing of the plaintiff's father. The view of the lower appellate Court is that the plaintiff's father ought to have had a kurippu containing the horoscopes and from that Ex. A-1 should have been prepared. That means Ex. A-1 is not the original horoscope but it is only a copy. Needless to say that Ex. A-2 which is said to be a document which came into existence subsequent to Ex. A-1 is also a copy and not the original.

6. At one stage the learned Advocate-General who appeared for the defendants-appellants contended that under S. 32 (5) of the Evidence Act, the horoscope would be admissible as a statement of a deceased person only if the same had been prepared at about the time of the birth of the child; but I think there is no warrant for such a contention. If a deceased person had made a statement regarding relationship at any time before the question in dispute arose it would be admissible under S. 32 (5) of the Evidence Act provided that the deceased who made the statement had special means of knowledge about relationship etc. As pointed out by the Supreme Court in Dolgobinda v. Nimaicharan, AIR 1959 SC 914, four conditions must be fulfilled for the application of sub-s. (5) of S. 32. They are: — (1) The statements either written or verbal of relevant facts must have been made by a person who is dead or cannot be found etc. (2) The statements must relate to the existence of any relationship by blood, marriage or adoption. (3) The person making the statement must have special means of knowledge as to the relationship in question. (4) The statement must have been made before the question in dispute was raised.

Statements contained in a pedigree or horoscope would certainly come under S. 32 (5) provided the other conditions are satisfied. A statement in a horoscope need not necessarily be one made at about the time of the birth of the child to attract S. 32 (5). Even if it is made subsequently it would be admissible provided it had been made before the question in dispute was raised and the other conditions mentioned earlier are satisfied. Therefore, on the ground that the horoscopes, Exs. A-1 and A-2 had not been written at about the time of the birth of the child it cannot be said that they are not admissible in evidence under S. 32 (5). If the said horoscopes constituted a statement as contemplated under S. 32 (5), then undoubtedly they would be admissible in evidence.

7. Now the finding is to the effect that Exs. A-1 and A-2 are only copies of a horoscope which should have been prepared earlier. If the plaintiff's father had merely taken copies from a horoscope which had been prepared earlier, the question is whether the father was making a statement then. If taking of copies of an original document cannot be construed as a statement, then Exs. A-1 and A-2 should be held to be inadmissible under S. 32 (5). But I think it is unnecessary to give a finding as to whether Exs. A-1 and A-2, being copies of an original horoscope, contained a statement as contemplated under S. 32 (5), made by the plaintiff's father, for, even admitting these documents there is no evidence to prove that the plaintiff was born only on 14-2-1923.

8. The plaintiff has examined himself as P. W. 2 and his elder brother has given evidence as P. W. 1. It is seen from their evidence that the plaintiff is the third child of their parents. Admittedly, the plaintiff has an younger brother. The point to be noted is that neither in the body of Ex. A-1 nor in that of Ex. A-2 there is any indication that they relate to the birth of the plaintiff. In the body of these two documents, all that is stated is that a male child was born on the 3rd of Masi Thuntubi year corresponding to 14-2-1923. Of course the parents' names and other particulars are given. But what is missing is any indication that they relate to the birth of the plaintiff. If it is stated in the body of these two documents that the child was the third issue of the parents, then one can connect the evidence of P. Ws. 1 and 2 and hold that Exs. A-1 and A-2 relate to the birth of the plaintiff. But there is no such reference in the body of Exs. A-1 and A-2. Therefore, without the name 'T. V. Hari Rao, B.A.' being written in English at the top of the papers, the horoscopes may as well relate to the birth of the plaintiff's younger brother. The plaintiff wants to connect the two documents with his birth only by the name found written at the top of the documents as mentioned earlier. The trial Court, on a consideration of the evidence and examintion of the two documents has given a categorical finding that the name T. V. Hari Rao, B.A. found at the top of the documents had been written in a different ink and it could not have been written at the same time when the horoscopes were written. The plaintiff and his elder brother who have given evidence have not specifically stated that the name of T. V. Hari Rao found written in Exs. A-1 and A-2 is also in the hand writing of their father. Merely stating that the horoscopes are in the handwriting of the father would not necesarily mean that the name written at the top of the paper is also in the hand writing of the father. Their omission to speak specifically about this aspect has to be considered with the pleadings in the plaint.

9. In the beginning of the plaint it has been categorically stated that the horoscopes had been prepared and preserved by the plaintiff's brother. Lower down in the plaint, no doubt it is stated that the horoscopes are in the hand writing of the father. No attempt had been made to correct the first part of the plaint where it is stated that the horoscopes had been prepared by the plaintiff's elder brother. There is also nothing in the evidence that that statement in the plaint is wrong. Therefore in this background, one cannot conclude that the name T. V. Hari Rao had also been written by the plaintiff's father and that too at the time when the horoscopes were written. As I said, the trial Court has given a clear finding that the name T. V. Hari Rao, B.A., is in a different ink and should have been written subsequently. This finding has not been disturbed by the lower appellate Court. That means the plaintiff has not shown that Exs. A-1 and A-2 really relate to his birth.

10. It is also to be noted that the plaintiff has not produced birth register extract either regarding his birth or that of his brothers. It is stated that an application was made at the office of the Sub-Registrar of Musiri for birth register extract and that the office said that no entry was found. However, no documentary evidence has been produced even to prove the fact that an application was made in the office of the Sub-Registrar.

11. Anyway, as matters now stand, I am of the view that there is no evidence that Exs. A-1 and A-2 really relate to the birth of the plaintiff. The version of P. Ws. 1 and 2 in the witness box that these two documents relate to the birth of the plaintiff is not legal evidence, for they speak only from what is contained in the documents and not from personal knowledge. They want to connect the documents with the birth of the plaintiff

rom the name T. V. Hari Rao written t the top. But that is not part of the oroscope, and as found by the trial Court, which finding has not been disurbed by the lower appellate Court, that vriting is in a different ink, made subequently.

12. Even original horoscopes, though nay be admissible under S. 32 (5) of the Evidence Act, their evidentiary value is very little — See Bharat Basi v. Gopinath, AIR 1941 All 385; V. M. Namboohiri v. K. K. Kuruvila, AIR 1957 Ker 03 and Parasram v. Dayaldas, AIR 1965 Him Pra 32. In the present case there s not even the original horoscope but nly copies thereof. Even these copies ave not been really connected with the laintiff. Therefore it must be held that here is no evidence that the plaintiff was born on 14-2-1923 as is now claimed.

13. Misconstruing of evidence and acting without evidence is certainly a substantial question of law as between he parties. The second appeal is therefore allowed. The judgment and decree of the lower appellate Court are set aside and those of the trial Court are restored. I make no order as to costs in the second appeal.

Appeal allowed.

AIR 1978 MADRAS 45

MOHAN, J.

K. R. Raman, Petitioner v. The Special Deputy Tehsildar, Tenancy Records, Tirupattur and others, Respondents.

W. P. No. 1073 of 1974, D/- 10-3-1977.

Constitution of India, Art. 226 — Tamil Nadu Agricultural Lands Record of Tenancy Rights Act (10 of 1969), S. 4-A (e) — Enquiry as to rights of tenants — Petitioner challenging the enquiry — Held, enquiry should not be perfunctory and petitioner should be given opportunity to prove his rights as a tenant.

(Para 2)

K. V. Sankaran, for Petitioner; N. R. Chandran, for Govt. Pleader and K. Chandramouli, for Respondents.

ORDER:— How light heartedly the vital rights of the tenants could be dealt with is exemplified in this case. The petitioner filed an application to register his name as a tenant under the Tamil Nadu Agricultural Lands Record of Tenancy Rights Act, 1969. The petitioner received summons on 22-10-1972, stating that hearing will take place on "27th" of which month it was not made known. The petitioner presumably thought that it must be only in the month of October and he appeared for the enquiry. But nothing happened on that day. Thereafter the enquiry is alleged to have taken place on 29-11-1972, regarding which the petitioner did not receive any notice. The matter was proceeded therefore ex parte. In spite of his filing appeal to the Revenue Divisional Officer about there being no enquiry, that plea fell on deaf ears. Curiously, the Revenue Divisional Officer held that an enquiry took place on 26-11-1972. The matter was taken up in revision. The District Revenue Officer would commit a more serious error in coming to the conclusion that the enquiry took place on 24-11-1972. Therefore Mr. K. V. Sankaran, the learned counsel for the petitioner, contends that at no point of time an enquiry ever took place. It is somewhat curious to note that if in fact an enquiry had taken place why three different dates should be given by the officers. This itself would amply prove that no enquiry whatsoever had taken place. The learned Government Pleader would say from the available records that an enquiry did take place on 29-11-1972, while the learned counsel for the 4th respondent would contend that the petitioner has not proved his case that there existed a valid tenancy in this case. In para. 5 of the counter, it is stated thus:—

"It is a fact that the petitioner and others filed applications in Form No. IV before the Record Officer, Tirupattur. The Additional Record Officer, Tirupattur the first respondent himself, in his note dated 29-11-1972, has stated that he conducted the enquiry on their applications on 27-10-1972 and 24-11-1972, at Devakottai, that after the completion of the enquiry on 24-11-1972, he left the handbag containing the Form IV applications and the records of enquiry as they were stolen at the Bus Stand at Devakottai and that he filed a complaint with the Town Police Station, Devakottai on 24-11-1972, for the loss of records. He has also recorded that the police has registered a case and the matter was under investigation. Then he has proceeded with the enquiry on 29-11-1972, and examined the petitioner and others and concluded the enquiry. The petitioner himself has appeared before the

Record Officer and deposed on 29-11-1972. As such, it is incorrect to say that there was no enquiry at all. It is submitted that the notices issued by the Record Officer on 27-10-1972 and 24-11-1972, are not available as they have been stolen away. The petitioner has availed himself of the opportunity afforded to him to make his representation".

This counter has been filed by the District Revenue Officer, who had nothing to do with the enquiry and therefore he has no personal knowledge. Hence I reject this counter-affidavit.

2. Having regard to the fact that three dates are given for the so-called enquiry, even if such an enquiry had been held, which is highly improbable, it should have been somewhat perfunctory, without the petitioner having the real opportunity to prove his rights as a tenant. In these circumstances, in the interests of justice, the impugned orders are quashed and the matter is remitted to the original authority — the special Deputy Tahsildar, Tenancy Records, Tirupattur, now Tahsildar, Devakottai, for conduct of a proper and full enquiry after giving opportunity to the petitioner, to which he is entitled under law. The writ petition is allowed with costs. Counsel's fee Rs. 150.

Petition allowed.

AIR 1978 MADRAS 46

RAMAPRASADA RAO, OFFG. C. J. AND SURYAMURTHY, J.

B. C. Munirathinam Naidu, Appellant v. M/s Meena Financiers, Madras and another, Respondents.

O. S. Appeal No. 7 of 1974, D/- 26-4-1977.*

Presidency Towns Insolvency Act (3 of 1909), S. 9 — "Business"—Meaning of— (Words and Phrases — Words "Trade" and "Business" — Meaning).

"Business" is a much wider term than "Trade". The word "Business" covers a continuous occupation involving liabilities to others and involves dealings carried on frequently and systematically and over a considerable period and should be deemed to exist from the time of its commencement and till all the assets are realised and liabilities are discharged or otherwise settled. Case law discussed. (Para 6)

Where the appellant has not yet discharged the liabilities incurred by him in the course of the two businesses he was carrying on within the limits of the original jurisdiction of the High Court in the City of Madras, he should be deemed to be carrying on a business in the City of Madras and that, therefore, the High Court exercising jurisdiction under the Presidency Towns Insolvency Act on the original side is rightly seized of the case. Therefore, the order of adjudication passed by the single Judge is liable to be confirmed. I. P. No. 79 of 1972, D/- 28-11-1973 (Mad), Affirmed; AIR 1925 Mad 1249, Rel. on. (Para 15)

Cases Referred: Chronological Paras

AIR 1958 SC 861 : 34 ITR 368 6
(1950) 2 All ER 405 : 1950 AC 186 12
(1946) 28 Tax Cas 250 : (1946) 2 All ER 396 6
AIR 1940 All 154 : 8 ITR 187 6
AIR 1933 Bom 427 : 1 ITR 350 6
AIR 1925 Mad 1249 : ILR 48 Mad 795 14
(1915) 1 KB 285 : 84 LJ KB 271 11, 12
(1915) 2 KB 186 : 84 LJ KB 1348 9, 12
(1914) 3 KB 1095 : 84 LJ KB 89 8, 12, 14
(1901) 1 QB 309 : 70 LJ QB 93 10, 12
(1896) 2 QB 407 : 65 LJ QB 666 7, 8, 9, 12
(1882) 30 Ch D 697 : 51 LJ Ch 909 9
(1809) 15 Ves 449 : 33 ER 824 14

M. Velusami, for Appellant; P. B. Ramanujam, for Respondents.

SURYAMURTHY, J.: — This is an appeal by the respondent in I. P. No. 79 of 1972, who was adjudicated as an insolvent, on a petition filed by one of his creditors. The appellant was adjudicated as insolvent, because it was found that his property had been attached and had remained under attachment for more than 21 days in execution of a decree of this Court for the payment of the money. Several other grounds were urged by the creditor for adjudicating him as an insolvent and were found in his favour, and, therefore, they do not survive for consideration now. The ground on which the appellant was adjudicated as insolvent is also not impugned in this appeal. The argument of the learned counsel for the appellant was confined to the question of jurisdiction. It is contended by the learned counsel for the appellant that the appellant has not ordinarily resided or had a dwelling house or carried on

*(Against Order of Paul J., in I. P. No. 79 of 1972, D/- 28-11-1973).

business either in person or through an agent within one year before the date of presentation of the insolvency petition within the limits of the ordinary original civil jurisdiction of this Court and that, therefore, the order passed by the learned Judge of this Court on the original side is without jurisdiction. The petition for adjudicating the appellant as insolvent was filed under Ss. 9 (d) (ii) and (iii), 9 (e) and 9 (g) of the Presidency Towns Insolvency Act. In that petition it is alleged that the appellant "is residing at No. 166-A, Poonamallee High Road, Madras", and was residing within the jurisdiction of this Court within a year before the date of presentation of this petition. It is also alleged that he "is carrying on business at No. 364, Poonamallee High Road, Madras-29, as Film Distributor as sole proprietor under the name and style of Sri Satyanarayana Pictures". The petition for adjudicating the appellant was presented on 19-7-1971 and filed on 14-8-1972. In the counter-statement filed by him, the appellant has not specifically denied the allegation in the petition regarding his residence and place of business. It is only in the additional counter-statement filed after the commencement of the enquiry by the learned trial Judge that the contentions to escape from the jurisdiction of the Court have been put forward. In the counter statement filed by him, the appellant has admitted that he "has a temporary residence at Shenoynagar, Madras, to facilitate his temporary stays at Madras for business and for his personal work." Therefore, it is evident that on the date of his filing the counter statement, the appellant had a dwelling house at Shenoy Nagar, Madras, and was also carrying on business at Madras.

2. The appellant has examined the karnam of Muthirampedu as R. W. 2 to prove that he has been residing in Muthirampedu for about 7 or 8 years. The President of the Panchayat Board at Muthirampedu has been examined as R. W. 3 to corroborate the evidence of R. W. 2 on this aspect. Deposing as R. W. 1, the appellant has also endeavoured to make out that he has been residing only in Muthirampedu, and not in the City of Madras. R. W. 4, the brother-in-law of the appellant, has gone into the witness box to swear that the appellant is not doing any business at No. 162, Shenoy Nagar, and that it is he (R. W. 4) who has been paying the rent for the premises in Shenoy Nagar. The phone in that premises is in the name of the wife of the appellant. R. W. 4 has not filed any document to prove that he has been paying the telephone charges or the rent for the premises. The premises were admittedly in the occupation of the appellant prior to the alleged occupation by R. W. 4. The receipts for the rent which R. W. 4 claims to have paid to the landlady have not been filed. There is nothing to show that R. W. 4 attorned to the landlady and that the landlady agreed to treat him as a tenant. R. W. 4 is an interested witness. No reliance can be placed on his mere word that he is a tenant of the premises bearing door No. 162, Shenoy Nagar. The best evidence, viz., the receipts for the payment of rent by R. W. 4 to the landlady not having been filed, the evidence of R. W. 1 and R. W. 4 have to be rejected.

3. We agree with the conclusion of the learned trial Judge that the appellant has a dwelling house at No. 162, Shenoy Nagar and used to stay there whenever he came to the City. The fact that he has a permanent residence at Muthirampedu is not inconsistent with his having another residence at Madras. The endeavour of R. W. 1 to get over his admission in the first counter statement filed by him that he was having a temporary residence at Shenoy Nagar, Madras, to facilitate his temporary stays at Madras, by trotting out the explanation that it is not correct, (which is not an explanation at all) betrays his total lack of veracity and disregard for consistency. He would like us to believe that it was his counsel who made such an averment in the counter-statement despite the instructions given to him to state that whenever he visited Madras he used to stay in the house of his brother-in-law. We are not prepared to believe that his counsel drafted the counter-statement containing any averment that was not based on the instructions of the appellant.

4. Even in the execution proceedings initiated to recover the amount due under the decree in C. S. No. 122 of 1965, the residential address of the appellant has been given as Nos. 166-A and 364, Poonamallee High Road. The notices were not served personally on the appellant and were returned with the endorsement that he was reported "to be not at home and gone out." Even after the insolvency proceedings had

been initiated, the appellant has not taken any steps to have the ex parte order passed in the execution proceedings set aside on the ground that there was no proper service of notices on him, and that the affixture of the notices on the aforesaid premises was not sufficient notice to him, as he was not residing in or carrying on any business from the aforesaid premises. Therefore, we have no hesitation in coming to the conclusion that the appellant has a residence within the City of Madras, as found by the learned trial Judge.

5. The appellant was carrying on business as a Film Distributor under the name and style of Satyanarayana Pictures and another business in the manufacture of bricks under the name and style of Rajalakshmi Brick Works, at No. 364, Poonamallee High Road, Madras. He has endeavoured to make out that he has wound up his business in 1954 and lives in Muthirampedu village. He has not discharged the debts contracted by him in the course of the aforesaid trades he carried on. The business carried on by him in the City of Madras within the jurisdiction of this Court should be deemed to be carried on by him so long as the liabilities contracted by him in his business remain undischarged.

6. "Business" is a much wider term than "Trade". The word "Business" covers a continuous occupation involving liabilities to others and involves dealings carried on frequently and systematically and over a considerable period and should be deemed to exist from the time of its commencement and till all the assets are realised and liabilities are discharged or otherwise settled. There is no definition of the word "Business" in the Presidency Towns Insolvency Act. In S. 2, Cl. (13) of the Income-tax Act, 1961, "Business" is defined as follows: "Business" includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture."

This definition is inclusive and not exhaustive and has an extending force and does not limit the meaning of the term (vide In re Lala Indra Sen, (1940) 8 ITR 187 at p. 202: (AIR 1940 All 154 at pages 161-162) and C. I. T. v. National Mutual Life Association, (1933) 1 ITR 350, 356. 361 : (AIR 1933 Bom 427 at pp. 429. 432). "Trade" is not only in the etymological or dictionary sense, but in legal usage, a term of the widest scope; and the word "Business" has even a wider content than the word "Trade". The trend of judicial decisions has been in favour of enlargement rather than restriction of the connotation of trade and business. (Vide Smith Barry v. Cordy, (1946) 28 Tax Cas 250, 259 (C. A.) and Mazagaon Dock Ltd. v. C. I. T., (1958) 34 ITR 368, 376-8: (AIR 1958 SC 861 at pp. 866-867). "Business" involves continuous exercise of an activity. So long as the liabilities incurred in the course of a business remained undischarged, the business activity should be deemed to continue.

7. In In re Dagnall. Ex parte Soan and Morley — (1896) 2 QB 407, it was held by Vaughan Williams, J. that, ".....as long as a woman trading separately from her husband had not paid the trade debts which she had incurred, so long she was continuing to trade. It seems to me that trading is not completed until you have performed all the obligations that the fact of trading imposed upon you. And that was the view that was taken in the older cases."

8. In In re Clark. Ex parte Pope & Owles, (1914) 3 KB 1095 a similar view has been taken, and the decision in In re Dagnall, Ex parte Span and Morley, (1896) 2 QB 407 was held to be perfectly right.

9. In In re Raynolds Ex parte White Brothers Ltd., (1915) 2 KB 186, Swinfen Bady L. J., has observed that, "Debts incurred during that period remained unpaid, and where a person is a trader and contracts debts the trading continues as long as the debts remain unpaid. A person cannot escape from liability already incurred as trader by putting up his shutters and ceasing to trade. In In re Dagnall, (1896) 2 QB 407, Vaughan Williams, J., said: "whether a person is carrying on a trade or not is a question of fact;" — that is a question of trade — "and if it were not for the decision in Ex parte McGeorge. In re Stevens, (1882) 30 Ch D 697" which he explains — "I should have said without any hesitation that as long as a woman trading separately from her husband had not paid the trade debts which she had incurred, so long she was continuing to trade. It seems to me that trading is not completed until you have performed all the obligations that the fact of trading imposed upon you." So that, on the first point. the trading continued until the debts were paid."

10. Lord Alverstone, C. J., held in In re Worsley, (1901) 1 QB 309, that a married woman who has sold the business carried on by her separately from her husband must be deemed to be still "carrying on" the business within S. 1, sub-s. (5) of the Married Women's Property Act, 1882, so long as the debts she has incurred in the business remain unpaid; and therefore, in such a case, she is subject under that sub-section, in respect of her separate property, to the bankruptcy laws, so that a receiving order may be made against her at the instance of a trade creditor.

11. In In re Allen. Ex parte Shaw, (1915) 1 KB 285, it has been held that the liability under the judgment against the married woman, who incurred a liability while carrying on business, was a trade obligation and that, not having discharged it, the debtor was still carrying on business and was liable to bankruptcy proceedings.

12. In Theophile v. Solicitor-General, (1950) 2 All ER 405, Lord Porter observed that,

".....there is a series of cases beginning with Re, Reynolds, (1896) 2 QB 407 and ending with Re Reynolds, (1915) 2 KB 186 which in unbroken sequence have decided that trading does not cease when, as the expression is, "the shutters are put up," but that it continued until the sums due are collected and all debts paid. It is true that all the decisions have been given in respect of married woman's trading and that a distinction has been made between the earlier Acts, where the expression was "as a trader", and the later, where the phrase "carrying on trade" is found, but it is the later, not the earlier, phrase which has been adopted in the Act of 1914. It was suggested on behalf of the appellant that the decisions had application to married woman only, because the wording was first used in the Married Women's Property Act, 1882, and transferred therefrom to the Bankruptcy and Deeds of Arrangement Act 1913, and thence to the present Act. I cannot follow why the same wording should have one significance when employed of married woman and another in the case of all other persons engaged in trade. More particularly, I think that the meaning placed on the words in the cases referred to must be followed when it is remembered that the Acts of Parliament have been passed since Re Dagnall, (1896) 2 QB 407 and Re Worsley, (1901) 1 QB 309 were decided and that those cases have been followed and approved in Re Clark, (1914) 3 KB 1095, Re Allen, (1915) 1 KB 285 and Re Reynolds, (1915) 2 KB 186. In my opinion, those cases were rightly decided, and are conclusive of the present question."

13. The principles enunciated in the decisions referred to above are applicable to the definition of the words "carrying on business" used in the Presidency Towns Insolvency Act.

14. In Gokuldoss Govardandoss v. Parry & Co., ILR 48 Mad 795 : (AIR 1925 Mad 1249) a Bench of this Court has referred with approval to the decision in Ex parte Banford, (1809) 15 Ves 449 where the Lord Chancellor laid down that so long as a trader did not pay the debts he had contracted while engaged in the trade he was to be regarded as still engaged in the trade. Spencer J., has further observed that,

"In In re Clark. Ex parte Pope and Owles, (1914) 3 KB 1095 a similar meaning was given by three learned Judges of the Court of Appeal to the words "carrying on business" and in this Court in petition No. 150 of 1916 our learned Chief Justice took the view that the meaning of "carrying on business" as understood by the Court of Appeal in England was the same in this country and that the language used by the English Court of Appeal was expressed in terms so general as to mean that, so long as there are debts of the business being discharged and assets being got in, a business must be regarded as still being carried on."

15. We follow the principles laid down by the Bench of this Court in the aforesaid decision and hold that as the appellant has not yet discharged the liabilities incurred by him in the course of the two businesses he was carrying on within the limits of the original jurisdiction of this Court in the City of Madras, he should be deemed to be carrying on a business in the City of Madras and that, therefore, this Court exercising jurisdiction under the Presidency Towns Insolvency Act on the original side is rightly seized of the case. Therefore, the order of adjudication passed by the learned single Judge is confirmed, and this appeal is dismissed with costs. Costs will come out of the estate.

Appeal dismissed.

AIR 1978 MADRAS 50

SETHURAMAN, J.

Marimuthu, Appellant v. Ambujam Ammal and another, Respondents.

Second Appeal No. 1099 of 1976, D/- 6-3-1977.*

Civil P. C. (5 of 1908), S. 65 — Sale of immovable property in execution of decree — Relevant date of sale — Title of purchaser relates back to date of sale and not to that of its confirmation.

The relevant date for the purpose of finding out as to when the sale takes place in Court auction in the course of execution of a decree is the date of sale and not the date of confirmation. AIR 1967 SC 608, Rel. on. (Para 5)

Cases Referred: Chronological Paras

AIR 1967 SC 608 5

JUDGMENT: — The plaintiff is the appellant. One Bangaru Naicker was the original owner of the suit property. He mortgaged the property in favour of the plaintiff on 9-1-1962, for a sum of Rs. 400. The plaintiff filed a suit O. S. No. 248 of 1968 on the said mortgage and obtained a preliminary decree and then a final decree. The suit property was brought to sale by the plaintiff in E. P. 328 of 1969 and with the court's permission he purchased the same in the court auction sale held on 11-2-1970. The sale was confirmed on 28-3-1970, and the plaintiff took delivery of possession of the property through court on 20-7-1970, in E. A. 1049 of 1970. The first defendant had also advanced money on a mortgage of the same property and the said mortgage was subsequent to the one in favour of the plaintiff. The first defendant filed a suit in O. S. No. 911 of 1967, against the mortgagor Bangaru Naicker and in execution of the decree, brought the property to sale. After getting permission of the court, she purchased the same in the court auction held on 7-1-1970. The sale was confirmed and the first defendant took delivery of possession of the property through court on 17-10-1970. The plaintiff brought the present suit for an injunction to restrain the defendant, their men and others from interfering with his peaceful possession and enjoyment of the suit property and for costs.

*(Against decree of Sub J., Tiruchi in A. S. No. 584 of 1974).

GU/HU/C605/77/AS/CWM

2. The first defendant resisted the suit on the ground that the court auction sale in her favour being on 7-1-1970 there was nothing that could have been sold to the plaintiff on 11-2-1970 and that as such the subsequent court auction sale in favour of the plaintiff was not binding on the first defendant. It was therefore, submitted that the plaintiff could not claim any right in pursuance of the subsequent court auction sale held on 11-2-1970. It was also stated that the plaintiff was not in possession of the suit property and that there was no cause of action for the suit.

3. The learned Additional District Munsif of Tiruchirapalli decreed the suit as prayed for with costs, holding that the plaintiff had title to the suit property by virtue of the court auction sale held on 11-2-1970, and that he had taken possession of the property through court as per the delivery athakshi Ex. A-2 and the delivery receipt Ex. A-3, on 21-7-1970. There was an appeal against this judgment by the first defendant and the appeal came before the Second Additional Subordinate Judge of Tiruchirapalli. The learned Subordinate Judge held that since the court auction sale in favour of the first defendant was earlier in point of time, though confirmed later, she alone was entitled to the suit property by virtue of the provisions of Section 65, C. P. C., and that it was the duty of the court to confirm a sale under O. 21, R. 92, C. P. C. in the absence of any petition filed under Rr. 89 to 91 and that as such, the plaintiff could not take advantage of the fact that his sale was confirmed earlier though the sale was actually held later. He further held that merely because the plaintiff was in possession of the property he was not entitled to the relief of injunction particularly when the first defendant was the lawful owner of the suit property. He therefore allowed the appeal and set aside the judgment and decree of the trial court granting injunction in favour of the plaintiff. The plaintiff has now come on second appeal disputing the correctness of this judgment of the learned Subordinate Judge.

4. Learned counsel for the appellant submitted that the mortgage in favour of the appellant was earlier in point of time and that he had also taken delivery of the property earlier than the first respondent. According to him, he was entitled to be in possession of the property and he had no objection to redeem the

econd mortgage within any reasonable ime. Learned counsel for the first respon-lent submitted that the sale in favour of he first respondent in the court auction)eing earlier in point of time, it is this ale which is valid and that on the date vhen the property was again sold at the nstance of the appellant on 11-2-1970 here was nothing which could have)een sold. According to him, the appel-ant is not entitled to the relief of in-unction because the first respondent is ntitled to the property subject, of ourse, to her discharging the mortgage n favour of the appellant.

5. The short question for considera-ion is whether the appellant, by reason f his prior mortgage and prior confirma-ion of sale, is entitled to the relief asked or. Section 65 of the Civil P. C. pro-ides—

"Where an immovable property is old in execution of a decree and such ale has become absolute, the property hall be deemed to have vested in the urchaser from the time when the pro-erty is sold and not from the time when he sale becomes absolute".

n Janakraj v. Gurdial Singh, AIR 1967 SC 608, the Supreme Court pointed out— at page 610 of AIR)

"The Civil P. C., 1908, contains elabo-ate provisions which have to be follow-d in cases of sales of property in execu-ion of a decree. It also lays down how nd in what manner such sales may be et aside. Ordinarily, if no application or setting aside a sale is made under ny of the provisions of Rr. 89 and 90 f O. XXI or when any application nder any of these rules is made and isallowed, the court has no choice in he matter of confirming the sale and he sale must be made absolute."

t was further observed—

"Under the present Civil P. C., the ourt is bound to confirm the sale and irect the grant of a certificate vesting he title in the purchaser as from the ate of sale when no application as is eferred to in R. 92 is made or when uch application is made and disallowed."

The legal position is thus clear that the elevant date for the purpose of finding ut as to when the sale takes place in ourt auction in the course of execution f a decree is the date of sale and not he date of confirmation. In the present ase, the date of sale in favour of the irst respondent is 7-1-1970. The sale in er favour is anterior to the one in fav-our of the appellant on 11-2-1970. The result is that on 11-2-1970, when the property was sold, there was absolutely nothing that could have been sold. The sale of 11-2-1970 was thus ineffective. The confirmation of the sale in favour of the appellant on 28-3-1970 which is anterior in point of time to the confirmation of the sale in favour of the first respondent on 13-8-1970, does not carry the matter further. As pointed out by the Supreme Court and as also seen from the provisions of the Civil P. C., the date of confirmation is not the criterion. So, the result is that as soon as the sale in favour of the first respondent was confirmed, it took effect from 7-1-1970. The first respondent was thus the purchaser of the property, subject to the discharge of the prior mortgage in favour of the appellant. The circumstance that the appellant is the prior mortgagee has absolutely no relevance to the question as to whether anything could have been sold on 11-2-1970 and if anything vested in the appellant so as to entitle him to the relief prayed for, having regard to the fact that the sale had been effected earlier in favour of the first respondent. Though the appellant is in possession of the property, he cannot sue for injunction as prayed for, as he has no right to be in possession. In these circumstances, the judgment and decree of the lower appellate court are sustained and the second appeal is dismissed. There will be no order as to costs.

Appeal dismissed.

AIR 1978 MADRAS 51

V. RAMASWAMI, J.

Chinnaiah Kownder, Appellant v. Kattayya Kownder, Respondent.

Second Appeal No. 1951 of 1974, D/-2-3-1977.*

Limitation Act (1963), Ss. 6 (1), 8 and 27 — Adverse possession against minor — When time begins to run — Only 3 years' time given to minor after he attains majority to sue for recovery of his land. AIR 1940 Cal 589, Not Followed.

Plaintiff sued for declaration and title to suit property which he purchased from the defendant's maternal uncle. The defendant averred that the vendor (mater-

*(Against decree of Sub-J., Cuddalore, in A. S. No. 117 of 1973).

nal uncle) had no authority to sell property as he was not a de facto guardian or legal guardian and that there was no legal necessity to sell the property. The plaintiff also based his claim by way of adverse possession.

Held, though prima facie under Article 65 read with S. 6 (1) of the Limitation Act, a suit for recovery of possession could be filed by the minor within 12 years from the date when he attained the age of majority in case where the transaction was void, by reason of S. 8, such a suit will have to be filed within three years of attaining the age of majority and the minor could not claim the extended period of 12 years. The period of limitation therefore for recovery of possession by a minor in respect of a void transaction is 12 years from the date of 'sale' or three years from the date the minor attained the age of majority, whichever is longer. In this case whether it is three years after attaining the age of majority or 12 years from the date of sales, the period had already lapsed by the time plaintiff filed the suit and as such the plaintiff was entitled to declaration of title by virtue of S. 27 of the Act. AIR 1922 Mad 12, Rel. on; AIR 1940 Cal 589, Not Followed; AIR 1945 Bom 63, Rel. on. (Para 4)

Cases Referred: Chronological	Paras
AIR 1945 Bom 63	4
AIR 1940 Cal 589	4
AIR 1922 Mad 12 : ILR 45 Mad 361	4

JUDGMENT:— The defendant is the appellant. The suit was filed by the respondent for a declaration of his title to the suit property and for an injunction. The suit property originally belonged to the defendant and his elder brother one Rama Gounder. In their hands it was a joint family property. The elder brother of the defendant died somewhere in the year 1950 when the defendant was a minor. The defendant's parents had died earlier than that. Therefore the defendant was brought up by his maternal uncle. The maternal uncle sold the property to the plaintiff on 12-11-1956 as guardian of the defendant who was then minor. The present suit was filed by the plaintiff on 21-8-1970, as already stated for a declaration and injunction. In the plaint it was stated that at the time when the sale deed was executed on 12-11-1956, the defendant was about 17 years old. But this was denied by the defendant in the written statement and he contended that he was only about 11 years old at the time of the transaction. The main defence of the defendant was that the maternal uncle was not the legal guardian or the de facto guardian and that the sale deed in favour of the plaintiff was void and inoperative. The defendant also pleaded that the sale was not supported by consideration and it was also not for necessity binding on the minor. Both the courts below have concurrently held that though the sale deed by the maternal uncle was void and inoperative both on the ground that it was not for necessity or for any binding purposes, and also on the ground that the maternal uncle was neither a legal nor a de facto guardian of the minor, the plaintiff is entitled to the declaration and injunction as on the date of filing of the suit, he had prescribed title to the suit property by adverse possession.

2. In this second appeal, the learned counsel for the defendant-appellant contended that since the transaction was held to be void, the period of limitation for prescribing title by adverse possession is 12 years from the date of the defendant attaining the age of majority, that the defendant has stated in the written statement that he was only 11 years in 1956 and he would have attained the age of majority only in 1963, and if 12 years is reckoned from 1963, the plaintiff should prove adverse possession till 1975 in order to get a declaration of title on the basis of adverse possession and since the suit itself was filed on 21-9-1970, the plaintiff was not entitled to the declaration of title as prayed for.

3. The defendant was 17 years old at the time of the sale in 1956, and therefore, he is not correct in contending that he was only 11 years old. There is no finding on this question by the Courts below. But in view of the categorical statement in the written statement that he was only 26 years old in 1971, and 11 years of the age in 1956, we shall proceed to consider the question on the basis that the plaintiff was only 11 years old in 1956.

4. The argument of the learned counsel for the defendant-appellant is that during the minority of the appellant, the plaintiff's possession was not adverse to him and that therefore his right to recover possession would not be lost until after the expiry of a period of 12 years from the date of attaining the age of

najority. In this connection, he relies on Art. 65 of the Limitation Act, 1963 (Central Act 36 of 1963), which provided a period of 12 years for a suit for possession of immoveable property based on title from the date when the possession of the defendant became adverse to the plaintiff. The proposition advanced by the learned counsel for the appellant that in every case where the sale is void as against a minor, the purchaser shall not be deemed to be in adverse possession during the minority cannot be accepted without any limitation. In Seethamaraju v. Subbaraju, ILR 45 Mad 361: (AIR 1922 Mad 12), a similar question was considered in a case where a lunatic's wife who was neither his committee in lunacy nor his legal guardian sold his lands to a third party. It was held in that case that it could not be stated as a general proposition that there could be no adverse possession of property which belongs to a lunatic or a minor during the continuance of the launcy or minority and the question in each case had to be decided with reference to the interior relationship between the person taking possession and the minor or lunatic and to whether any circumstances exist which would entitle the court to hold that the person who entered into possession did so under circumstances which would in law make him only an agent or bailiff of the minor or lunatic. The learned Judges observed that under the Limitation Act, lunacy or minority, does not by itself prevent time from running as against the lunatic or minor, although an extended period is provided in such cases. This decision is followed in Rachappa v. Hadiyalaya, AIR 1945 Bom 63, where also it was held that where the person entering into possession is under no duty to the minor, and has entered into possession for his own benefit and in assertion of his title hostile to that of the minor, limitation begins to run from the date when he has taken possession and his adverse possession against the minor commences from the date on which he has taken possession, though the minor should be entitled to file a suit within three years from the date of his attaining majority. But the learned counsel for the appellant relied on a decision of the Calcutta High Court in Lalit Kumar v. Nagendralal, AIR 1940 Cal 589, where we find a general statement that the possession of the purchaser could not be adverse to the minor until he attained the age of majority. For this proposition, the learned Judge has not given any authority, but as we found it, this is contrary to the various decisions of this court and the Bombay High Court. It is also seen from S. 6 of the Limitation Act, that minority does not in any way affect the possession being adverse. Clause (1) of that section reads as follows—

"Where a person entitled to institute a suit or make an application for the execution of a decree is, at the time from which the prescribed period is to be reckoned, a minor or insane, or an idiot, he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise, have been allowed from the time specified therefor in the third column of the Schedule."

It is seen from the first part of this provision that the first question to be determined is assuming that the person against whom the provisions of the Lim. Act are applied is a major and not suffering from any disability, what would be the time within which the suit will have to be filed. If the transaction is void, the purchaser would be prescribing title by adverse possession from the date on which he took possession under the void document. The possession thus becomes adverse from the date on which the sale took place. The second part of S. 6 (1) provides that if the person against whom the adverse possession had commenced is a minor, the minor will have an extended period of limitation for recovery of possession from the purchaser and a suit for recovery of possession could be filed within the same period after the disability has ceased, as would otherwise have been allowed from the time specified therefor in the third column of the schedule. If this clause alone had stood, probably the learned counsel for the appellant would be well-founded in his contention that the period of 12 years for prescribing title by adverse possession will have to be calculated from the date when the minor attained the age of majority. But under S. 8 of the Act, it is provided that nothing in S. 6 shall be deemed to extend for more than three years from the cessation of the disability the period of limitation for any suit or application. Therefore, though prima facie, under Art. 65 read with S. 6 (1) of the Lim. Act, a suit for recovery of possession could be filed by the minor within 12 years from the

date when he attained age of majority in case where the transaction was void, by reason of S. 8, such a suit will have to be filed (within) three years of attaining of the age of majority and the minor could not claim the extended period of 12 years. The period of limitation therefore for recovery of possession by a minor in respect of a void transaction is 12 years from the date of sale or three years after he attained the age of majority whichever is longer. In this case whether it is three years after the attaining of majority or 12 years from the date of sale, the period had already lapsed by the time the plaintiff filed the suit. In such a case, it is open to the plaintiff to ask for a declaration of his title, in effect the suit is for a declaration that the defendant is not entitled to recover possession of the property from the plaintiff and that his remedy is lost or his right is extinguished. Section 27 of the Limitation Act provides that at the determination of the period of limitation provided thereunder, his right to such property shall be extinguished. If the defendant's right is extinguished, the plaintiff is entitled to the declaration that he is entitled to the property. The suit construed in that manner is maintainable. As already stated, that even if the defendant's contention that he was only 11 years old in 1956, is to be accepted, since his right having been extinguished, the courts below were right in giving the declaration of title to the plaintiff. The second appeal accordingly fails and the same is dismissed. There will be no order as to costs.

Appeal dismissed.

AIR 1978 MADRAS 54

V. RAMASWAMI, J.

Ramaswami Naidu and another, Appellants v. Gopalakrishna Naidu and others, Respondents.

Second Appeal 1616 of 1974, D/- 24-2-1977.*

T. P. Act (1882), Ss. 8, 122 — Deed — Construction — Rule of — Deed, whether a will or a gift — Determination — Test. (Succession Act (1925), S. 74).

The main test to find out whether the document constitutes will or a gift is to see whether the disposition of the interest in the property is in praesenti in favour of the settlees or whether the disposition is to take effect on the death of the executant. If the disposition is to take effect on the death of the executant, it would be a will. But if the executant divests his interest in the property and vests his interest in praesenti in the settlee, the document will be a settlement. It is the substance of the document that matters and not the form of the nomenclature the parties have adopted. The various clauses in the document are only a guide to find out whether there was an immediate divestiture of the interest of the executant or whether the disposition was to take effect on the death of the executant. (Para 3)

Where under a deed styled as a settlement there is no present disposition and the disposition is to take effect on the death of the executant, the clause restricting the powers of the executant will not enlarge their interest and make it a disposition in praesenti. Such a clause does not in any way affect his power of disposition and the document is a will. 1977 Tax LR 1187 (Mad) and (1909) 10 Cal LJ 644, Followed. (Para 4)

Cases Referred: Chronological Paras

1977 Tax LR 1187 (Mad) 4
(1909) 10 Cal LJ 644 4
(1610) 8 Coke 82 (a) : 77 ER 597 4

JUDGMENT:— The question that arises for consideration in this second appeal by the plaintiff's is whether the deed dated 5-7-1962 executed by one Nachar Ammal is a will or a settlement. If it is construed as a will, the plaintiffs' suit is liable to be dismissed, and if it is construed as a settlement, the plaintiffs will succeed. Though the trial court held that it is a settlement deed, the lower appellate court held that it is a will and dismissed the suit.

2. The document is styled as a settlement deed. It was also registered as such. In the preamble of the document, it is stated that out of natural love and affection for the first plaintiff and his wife the second plaintiff who are the son and daughter-in-law of the executant's paternal uncle and with a view to make them absolute owners after her lifetime, she is executing the document. In the disposition clause, it was stated that after the lifetime of the executant, the property will have to be taken and enjoyed absolutely with all rights of alienation by the plaintiffs and that the

*(Against decree of Sub. J., Erode in A. S. No. 150 of 1973).

patta also will have to be transferred in favour of the plaintiff after her lifetime. The document further provided that during her lifetime, the executant was entitled to enjoy the income from the properties and without any power to encumber the property or in any way alienate the same. It was also stated that the executant had no right to either change or revoke the settlement deed for any reason.

3. The broad tests or characteristics as to what constitutes a will and what constitutes a settlement have been noticed in a number of decisions. But the main test to find out whether the document constitutes a will or a gift is to see whether the disposition of the interest in the property is in praesenti in favour of the settlees or whether the disposition is to take effect on the death of the executant. If the disposition is to take effect on the death of the executant, it would be a will. But if the executant divests his interest in the property and vests his interest in praesenti in the settlee, the document will be a settlement. The general principle also is that the document should be read as a whole and it is the substance of the document that matters and not the form or the nomenclature the parties have adopted. The various clauses in the document are only a guide to find out whether there was an immediate divestiture of the interest of the executant or whether the disposition was to take effect on the death of the executant.

If the clause relating to the disposition is clear and unambiguous, most of the other clauses will be ineffective and explainable and could not change the character of the disposition itself. For instance, the clause prohibiting a revocation of the deed on any ground would not change the nature of the document itself, if under the document there was no disposition in praesenti. In such a case the clause prohibiting revocation will be contrary to law and will be ineffective. If, on the other hand, the document is a settlement, merely because a right of revocation is given, it would not change the character of the document as a settlement because such a clause will be against law and will be invalid. The nomenclature of the document nor the fact that it had been registered also will not be of any assistance in most of the cases unless the disposition is very ambiguous and extraneous aid is required to construe that clause.

4. In this case, one other important circumstance which calls for special mention and consideration is the clause to the effect that the executant was to enjoy the income from the properties during her lifetime and that she will not have any right to encumber the property or in any way dispose of the same during her lifetime. This clause is normally consistent with a document being a settlement and a transfer of an interest in praesenti but the right to possession and the right to income being postponed to a future date. But as already stated, the fundamental and the only reliable test is to find out whether under the main dispositive clause an interest in praesenti was transferred or the disposition is to take effect on the death of the executant. If this is construed and we come to a conclusion that there was no present disposition and that the disposition is to take effect on the death of the executant, the clause relating to the enjoyment of the income and restraining the powers of alienation of the executant would be ineffective and will not enlarge the disposition nor affect the rights available to the executant under law.

Since in the present case according to the main disposition clause, as I already pointed out, the plaintiffs have to take the properties only on the death of the executant and that they have to enjoy the properties absolutely only after her death, the clause restricting the powers of the executant would not enlarge their interest and make it a disposition in praesenti. Though a document has to be construed with reference to the language used in the document and the decisions rendered for the construction of other documents cannot be called in aid, it is useful to refer to some of the decided cases where similar clauses were construed as a guide for the interpretation. In Halsbury's Laws of England, Simonds Edn., Volume 39, at page 844, it has been observed as follows —

"The revocable nature of a will cannot be lost, even by a declaration that it is irrevocable or by a covenant not to revoke it."

At page 888 of the same edition, it has been observed as follows —

"A will is of its own nature revocable, and therefore though a man should make his testament and last will irrevocable in the strongest and most express terms,

yet he may revoke it, because his own act and deed cannot alter the judgment of law to make that irrevocable which is of its own nature revocable."

To the same effect is the decision in one of the earliest cases in Sagarchandra Mandal v. Digambar Mandal, (1909) 10 Cal LJ 644 at p. 645, wherein it has been observed as follows—

"If therefore an instrument is on the face of it a testamentary character, the mere circumstance that the testator calls it irrevocable, does not alter its quality, for as Lord Coke said in Vynior's case, (1610) 8 Coke 82 (a), "If I make my testament and last will irrevocable, yet I may revoke it for my act or my words cannot alter the judgment of the law to make that irrevocable which is of its own nature revocable". The principal test to be applied is whether the disposition made takes effect during the lifetime of the executant of the deed or whether it takes effect after his decease. If it is really of this latter nature, it is ambulatory and revocable during his lifetime."

On the clause relating to enjoyment of income by the executant during her lifetime and provision to the effect that the executant should not in any way alienate the property during her lifetime, a Division Bench of this Court in T. C. No. 372 of 1970, dated 13-7-1976 : (reported in 1977 Tax LR 1187) has held on almost similar facts, that those restrictive clauses do not in any way affect the disposition and that the document is a will. The above decisions support the construction which I have placed on the document in question. I therefore hold that the document is a will and not a settlement. The second appeal fails and the same is accordingly dismissed. There will be no order as to costs.

Appeal dismissed.

AIR 1978 MADRAS 56

SETHURAMAN AND BALASUBRAHMANYAN, JJ.

V. K. Abraham, Appellant v. N. K. Abraham, Respondent.

Appeal No. 523 of 1973, D/- 4-10-1977.*

(A) Limitation Act (36 of 1963), Art. 1 — Mutual, open and current account — Reciprocal demands — Current account, what is — Test to determine.

In order that an account may be called a mutual, open and current account, there must be independent transactions resulting in possibility of reciprocal demands and shifting balances. The accounts must be open and continuing. (Para 11)

In the instant case the plaintiff had been paying moneys from time to time as required by the defendant and the payments were not actually advances against future supplies. The plaintiff had been supplying estate stores for which the defendant had to pay and those supplies were not intended to square up even in part the value of rubber supplied. The defendant on his part was supplying the rubber to the plaintiff. There were repayments by the defendant in cash.

Held that the correspondence and the accounts went to show that the transactions falling in those categories of rubber sales, estate store supplies and loans were clearly independent transactions in the nature of a mutual open and current account. The decision of the Court below that the suit was not barred by limitation was thus correct. Case law discussed. (Paras 11, 12)

Anno: AIR Com. (5th (1976) Edn.), Art. 1, N. 3.

(B) Limitation Act (36 of 1963), Art. 1 —Suit for balance due on a mutual, open and current account—Suit filed on 23-12-1969—Last of the dealings between parties was on 23-7-1966 — Accounts of plaintiff having been closed on 31-12-1966 suit was within time. (Para 6)

Anno: AIR Comm. (5th (1976) Edn.), Limitation Act, (1963), Art. 1, N. 18.

(C) Evidence Act (1 of 1872), S. 34 — Entries in account books — Standard of proof required to charge any person with liability.

The account books are not by themselves sufficient to charge any person with liability. The plaintiff has to show by some independent evidence that the entries in his books represented real and honest transactions and that the moneys paid or the transactions took place, in accordance with those entries. Case law Rel. on. (Para 15)

Anno: AIR Manual (3rd Edn.), Evidence Act (1872), S. 34, N. 3.

Cases Referred: Chronological Paras

AIR 1973 Andh Pra 219 9

AIR 1967 SC 1058 13

*(Against decree of Sub-J., Padmanabhapuram, in O. S. No. 91 of 1970).

AIR 1967 Mad 360 : (1967) 1 Mad LJ 163 10
AIR 1965 SC 1711 8
AIR 1959 SC 1349 8, 9, 10
AIR 1959 Mad 470 9
1936 Mad WN 472 15
AIR 1931 Cal 359 : ILR 58 Cal 649 8
AIR 1926 Mad 955 14
AIR 1919 Mad 132 : 52 Ind Cas 704 13
(1894) ILR 17 Mad 293 8
(1875) 23 Suth WR 390 (PC) 15
(1870) 6 Mad HCR 142 7

S. Padmanabhan, for Appellant; M. Srinivasan, for Respondent.

SETHURAMAN, J.: — The defendant in O. S. No. 91 of 1970 in the Court of the Subordinate Judge, Padmanabhapuram, is the appellant. The plaintiff is a rubber dealer in Kulasekharam. The defendant is the owner of a rubber estate called the Cross Field Plantation at Kaliel. From the year 1963 the defendant was supplying sheet rubber as well as scrap rubber to the plaintiff from time to time. The plaintiff was also supplying estate stores and other materials. There were in addition cash transactions between the parties. The last of the dealings between the plaintiff and the defendant was on 23rd July 1966. The defendant did not thereafter supply any rubber. The account of the defendant stood at a debit of, or overdrawn on that date by a sum of Rs. 46,505.67. The plaintiff filed the present suit for recovery of this sum along with interest at 12 per cent per annum, after giving credit for a sum of Rs. 8,494.20 being the amount due to the defendant's father M. K. Kuriakose on account of the price of scrap rubber supplied by him to the plaintiff. This credit entry was made on 20-4-1968. The present suit was for recovery of Rs. 58,660 including interest and future interest and costs.

2. The defendant in his written statement stated that how the amount of the opening balance of Rs. 8,306.05 was due to the plaintiff was not clear, as the plaintiff had not produced the accounts for the year 1963-64. The defendant, therefore, reserved his right to file a detailed written statement when the particulars for the said amount were furnished by the plaintiff but he did not do so even after those accounts were filed. According to the defendant the plaintiff had not accounted for the price of the rubber properly and the plaintiff was not justified in adjusting the amount due to Kuriakose in his account. The defendant denied liability to pay interest. There was also a plea that the suit was hopelessly barred by limitation.

3. On the pleadings the following issues were framed for trial —

1. Was a sum of Rs. 8,306.05 due from the defendant to the plaintiff as on 31-12-1965 ?

2. Has the defendant been paid the proper price for the rubber sold by him to the plaintiff ?

3. Has not the entire quantity of rubber sold by the defendant to the plaintiff accounted for ?

4. Was there a contract between the defendant and the plaintiff that the latter shall pay the price of rubber at the rate prevailing in the Cochin auction or Cochin market ?

5. Was the store purchase dated 7-1-1966 on cash or on credit ?

6. Has the defendant received only one of the cash payments entered on 21-1-1966 and 22-1-1966 ?

7. Are the entries dated 31-1-1966 and 8-6-1966, by transfer of accounts from M. K. Kuriakose authorised and valid ?

8. Is the credit entry dated 20-4-1968 by transfer of accounts from M. K. Kuriakose made on the authorisation of the defendant or whether it is a bogus entry only to save limitation ?

9. Is the interest claimed excessive ?

10. What is the amount, if any, due from the defendant to the plaintiff ?

11. Reliefs and costs ?

12. Whether the plaint claim or any portion thereof is barred by limitation ?

4. The learned Subordinate Judge held on issue No. 1 that a sum of Rupees 8,306.05 was due to the plaintiff as on 31-12-1965. On issues Nos. 2, 3 and 4, he found that the plaintiff had credited in his account the entire quantity of rubber sold by the defendant to him and that there was no agreement between the parties for payment of the price at the rate prevailing in Cochin auction. He held on Issues 5 and 6 that the estate stores purchased by the defendant were only on credit and not for cash and that the defendant had received the amount of Rs. 1,500 each recorded in the books on 21-1-1966 and 22-1-1966. On issues Nos. 6, 7 and 8, 9, the credit for the amount due to M. K. Kuriakose given in the plaintiff's books as against the defendant was considered to be proper and interest was also held to be payable. On the question of limitation raised in issue

No. 12, the learned Subordinate Judge held that the dealings between the parties were of open, current and mutual accounts and not merely credit dealings creating obligations on one side and that the suit was within time as prescribed in Art. 1 of the Limitation Act. Interest at 12 per cent was held to be payable under issue No. 9. The defendant challenges the decree of the learned Subordinate Judge.

5. In the present appeal Mr. S. Padmanabhan, learned counsel for the appellant, took before us only three points viz.—

1. Whether the suit was barred by limitation?

2. Whether the accounts were properly accepted as proving the transactions between the parties? and

3. Whether the plaintiff was not entitled to any interest upto the date of the suit?

We shall consider each one of these points.

6. In the present case the only Article of the Limitation Act to be considered is Art. 1, running as follows:

Description of suit.	Period of limitation	Time from which period begins to run.
Art. 1. For the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties.	Three years.	The close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account.

The suit in this case was filed on 23-12-1969. As indicated earlier, the last of the transactions was on 23-7-1966. If Art. 1 were to apply, then the accounts of the plaintiff having been closed at the end of the calendar year i. e., 31-12-1966, the period of limitation would end on 31-12-1969. As the suit had been filed on 23-12-1969, it would be within time. The learned counsel for the appellant submitted that Art. 1 cannot apply to the present case, because there is no reference in the pleadings, except in para. 5 relating to the cause of action, to the accounts between the parties being mutual, open and current. In para. 1 of the plaint there is a reference to the supply of rubber and also to the payments and to a further fact that the defendant had overdrawn a sum of Rs. 46,505-67. The accounts appear in the schedule. The substance of the para. 1 read with para. 5 of the schedule (plaint?) does, in our opinion, indicate that the plaintiff filed the present suit on the basis of the dealings between the parties being on a mutual, open and current account. We have to look at the substance of the pleadings and an undue emphasis should not be made on the absence of use of particular expressions as if ritualistic repetition of those expressions would alone satisfy the requirements of law. The defendant had notice of the nature of the plea taken in the plaint and that is how issue No. 12 came to be discussed in the trial court. As far as the present case is concerned, the substance of the account being mutual, open and current is brought out in para. 1 read with para. 5 of the plaint. In fact, the learned Subordinate Judge has not referred to any plea taken by the defendant in the court below about the plaint not having referred in specific terms, except in para. 5, to the account being mutual, open and current. If such a plea had been taken, then it would have been possible for the plaintiff to consider, if necessary, amendment of the plaint. In the absence of any such plea and having regard to the manner in which the trial has gone on, we do not consider that the appellant was justified in complaining at this stage about the absence of specific averment of the account being mutual, open and current.

7. We have now to consider the question whether the transaction between the plaintiff and the defendant can be said to fall within the category of a mutual, open and current account described in Art. 1 of the Limitation Act. In Hirada Basappa v. G. Mudappa, (1870) 6 Mad HCR 142, 144, Holloway, Acting C. J. observed:—

"To be mutual there must be transactions on each side creating independent obligations on the other and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharge of such obligations."

8. In Velu Pillai v. Ghouse Mahomed, (1894) ILR 17 Mad 293, a Bench of this Court adopted the above passage and held that an account consisting of entries of payments made by one party in reduction of his debt to the other and of payments made by the latter on behalf of the former party for the same purpose was not a mutual account within the meaning of Art. 85. It was also held that a shifting balance was a test of mutuality, but that its absence was not conclu-

sive proof against mutuality. These decisions have formed the bedrock of the interpretation of Art. 85 of the Limitation Act of 1908, in cases decided by this and other courts. In Tea Financing Syndicate Ltd. v. Chandrakamal, ILR 58 Cal 649 : (AIR 1931 Cal 359), a company advancing money by way of loans to the proprietor of a tea estate and the proprietor sending tea to the company for sale and realisations of the price were involved in a litigation in which the proprietor of the tea estate sued for recovery of the balance of the advance made after giving credit for the price realised from the sale of the tea. The question arose as to whether the case was one of reciprocal demands resulting in the account between the parties being mutual so as to be governed by Art. 85 of the Limitation Act. Rankin C. J. laid down at page 368 the test to be applied for deciding the question in these words (at p. 368 of AIR) —

"There can, I think, be no doubt that the requirement of reciprocal demands involves, as all the Indian cases have decided following Holloway Ag. C. J. transactions on each side creating independent obligations on the other and not merely transactions which create obligations on one side, those on the other being merely complete or partial discharge of such obligations. It is further clear that goods as well as money may be sent by way of payment. We have, therefore, to see whether under the deed the tea sent by the defendant to the plaintiff for sale, was sent merely by way of discharge of the defendant's debt or whether it was sent in the course of dealings designed to create a credit to the defendant as the owner of the tea sold, which credit when brought into the account would operate by way of set-off to reduce the defendant's liability."

This passage was adopted as laying down the correct law by the Supreme Court in the Hindustan Forest Co. v. Lalchand, AIR 1959 SC 1349. Their Lordships pointed out that the observations of Rankin C. J. had never been dissented from in our courts. In the case before the Supreme Court the parties had entered into an agreement for the supply of 5000 maunds of maize, 500 maunds of wheat and 1000 maunds of dal at the rates and time specified. A sum of Rs. 13,000 had been paid as advance. The goods were delivered and the buyer was also making payments. The last delivery of the goods was made on 23-6-1947, and the suit was brought on 10-10-1950, for the balance of the price due. The Supreme Court pointed out that what had happened was that the sellers had undertaken to make delivery of the goods and the buyer had agreed to pay for them and had in part made payments in advance. There could be no question in such a case, in their Lordships' view that the payments had been made towards the price due and there were no independent obligations on the sellers in favour of the buyer. It was also observed that if the sellers had failed to deliver the goods, they would have been liable to refund the moneys advanced and also for damages. But such liability would then have arisen from the contract and not from the fact of the advances having been made and that the buyer could not recover the moneys paid in advance. On the facts of that case, it was held that Art. 115 of the Limitation Act applicable to Jammu and Kashmir corresponding to Art. 85 of the Indian Limitation Act, 1908, did not apply. The Supreme Court has again applied the test laid down by Holloway Ag. C. J. in a later decision in Kesharichand v. Shillong Banking Corpn. Ltd., AIR 1965 SC 1711.

9. Prior to the Supreme Court decision in Hindustan Forest Co. v. Lalchand, AIR 1959 SC 1349 another case came before a Bench of this court in Kesava Chettiar v. Ramanathan Mudaliar, AIR 1959 Mad 470 (at p. 475 of AIR) in which the plaintiff, a wholesale merchant, carrying on business in yarn had dealings with the defendant, a retailer, in the same business. The retailer was advancing substantial sums before supplies of yarn were made by the wholesaler. Subsequent to October 1946, payments made by the retailer to the wholesaler were mostly in the nature of payment of price for the yarn supplied. On 7-8-1947 there was a credit balance in favour of the retailer. But after a short period of two months the retailer had again to pay further sums as against the supply of yarn. In the suit filed by the wholesaler, the question of the applicability of Art. 85 of the Indian Limitation Act, 1908, came up for consideration. The following propositions were set out in that case—

"1. To constitute a mutual account between two parties, the essence of the transactions should be looked at in order to find out if independent obligations

arise on both sides, resulting in possibility of reciprocal demands, even though the transactions may relate to the same commodity or to the same kind of business.

2. Before deciding whether a particular course of dealings is a continuous course of transactions independent of the other transactions involved in the case, the number of dealings do not count to decide whether the counter-claim arises upon casual transactions. The real import of the casual transactions should be taken note of in deciding the question whether they give rise to independent obligations or whether they are merely a mode of liquidation of the obligation already undertaken by the party.

3. A shifting balance may, no doubt, be a test of mutuality, but its absence cannot be taken to be conclusive proof against mutuality. The real point to be noticed is not whether balances actually shifted but whether the nature of the transactions was such that it was capable of giving rise to shifting balances.

4. The absence of actual reciprocal demands would not matter, because the point to be considered is whether such demands were capable of being made on the account by one party upon the other."

A learned single Judge of the Andhra Pradesh High Court in Anumukonda Anjaneyalu v. Agricultural Traders, AIR 1973 AP 219 has doubted the correctness of this decision in the light of the decision of the Supreme Court in Hindustan Forest Co. v. Lalchand, AIR 1959 SC 1349. Whatever may be the justification for this criticism, with reference to the conclusion on facts, we do not find that any one of the propositions extracted above is open to question or is in conflict with any authority. We consider that these propositions do continue to be valid notwithstanding any doubt about the correctness of the actual decision in that case.

10. We may note in passing that this court again applied the dictum of Holloway Ag. C. J. and followed the decision of the Supreme Court in Hindusthan Forest Co. v. Lalchand, AIR 1959 SC 1349 in Gopal Chettiar v. Shanmuga Nadar and Bros., 1967-1 Mad LJ 163 : (AIR 1967 Mad 360).

11. Briefly stated in order that an account may be called a mutual, open and current account, there must be independent transactions resulting in possibility of reciprocal demands and shifting balances. The entries should not be mere repayments of advances already received. The accounts must be open and continuing. Examined in this light, we consider that the account between the plaintiff and the defendant here can be said to be a mutual, open and current account. The plaintiff has been paying moneys from time to time as required by the defendant and the payments were not actually advances against future supplies. The plaintiff has been supplying estate stores for which the defendant had to pay and these supplies were not intended to square up even in part the value of rubber supplied. The defendant on his part was supplying the rubber to the plaintiff.

12. The defendant has been asking for amounts not necessarily as advance for the supply of rubber. For instance in Ex. A-54 dated 18-10-1965, the defendant has asked for a sum of Rupees 10,000 being sent per bearer as he was urgently in need of that amount. He does not say that this amount was needed as and by way of any advance or towards any particular supply of rubber. Similarly in Ex. A-129 the defendant had asked for "Carboyot formic acid", being sent per bearer. The plaintiff sent it and had to recover the amount due therefor. There are similar items of stores required by the defendant for which indent was made to the plaintiff. There are certain other transactions in which the defendant has stated that the amount could be adjusted against the rubber to be delivered. In one of the letters the defendant has acknowledged the receipt of some manure and has asked for a sum of Rs. 2,000 being sent per bearer one Padmanabha Pillai. It was mentioned that this amount could be adjusted by next week. He has also asked for another load of rubber mixture by 18th July and stated that the amount could be adjusted by two weeks. There were repayments by the defendant in cash on 27-11-1964 and 24-12-1965. The correspondence and the accounts go to show that the transactions here falling in those categories of rubber sales, estate store supplies, and loans are clearly independent transactions in the nature of a mutual, open and current account. The decision of the Court below that the suit is not barred by limitation is thus correct.

13. The second point taken by the learned counsel for the appellant was

that the accounts themselves should not have been accepted without examining the scribe and without any proof to show that the entries represented real transactions. For this purpose reliance was placed on S. 34 of the Indian Evidence Act and also some decisions to be noticed presently. Section 34 runs as follows—

"34. Entries in books of account, regularly kept in the course of business are relevant whenever they refer to a matter into which the court has to enquire, but such statements shall not alone be sufficient evidence to charge any person with liability."

The illustration appended to that provision runs as follows—

"A sues B for Rs. 1,000 and shows entries in his account books showing B to be indebted to him to this amount. The entries are relevant, but are not sufficient, without other evidence, to prove the debt".

The Supreme Court has pointed out in Chandradhar Goswami v. Ganpati Bank Ltd., AIR 1967 SC 1058 as follows (at page 1060 of AIR) —

"The original entries alone under S. 34 of the Evidence Act would not be sufficient to charge any person with liability ... ... Therefore, where the entries are not admitted it is the duty of the Bank if it relies on such entries to charge any person with liability, to produce evidence in support of the entries to show that the money was advanced as indicated therein and thereafter the entries would be of use as corroborative evidence. But no person can be charged with liability on the basis of mere entries whether the entries produced are the original entries or copies under S. 4 of the Bankers' Books Evidence Act."

In relation to the question of the standard of proof expected in a case like this, our attention was drawn to a few decisions of this court. In Yesu Vadian v. Subba Naicker, 52 Ind Cas 704 : (AIR 1919 Mad 132) it was held as follows (at p. 136 of AIR) —

"S. 34 of the Evidence Act lays down that the entries in books of account, regularly kept in the course of business, are relevant, but such a statement will not alone be sufficient to charge any person with liability, that merely means that the plaintiff cannot obtain a decree by merely proving the existence of certain entries in his books of account, even though those books are shown to be kept in the regular course of business. He will have to show further by some independent evidence that the entries represent real and honest transactions and that the moneys were paid in accordance with those entries. The Legislature, however, does not require any particular form or kind of evidence in addition to entries in books of account, and I take it that any relevant facts which can be treated as evidence within the meaning of the Evidence Act would be sufficient corroboration of the evidence furnished by entries in the books of account, if true."

14. In Mathilda Sice v. Fritz Gaebele, AIR 1926 Mad 955 at p. 957 it was observed as follows :—

"There is no doubt that merely putting forward accounts is of no use whatever. They must be supported by some other evidence, which the court believes ... ... I take it that the law requires proof not only of account books generally but of each item, that is, in the interest of the person producing the books, but with regard to admissions, i.e., entries against the producer's own pecuniary interest, the law dispenses with all proof save that the book has been kept by or under the authority of the producer."

15. In Sundararajulu Nadar v. Kuppamma alias Bhagirathi, 1936 Mad WN 472, a learned Judge of this court sitting singly observed as follows—

"The entries in the account books do not prove themselves, they are at most when proved, corroborative evidence — See Babu Ganga Prasad v. Boboo Inderjit Singh, (1875) 23 Suth WR 390 (PC) and unless there is proof that the entries represent real transactions, they will not suffice to charge any person with liability thereunder."

The effect of the decisions is that the account books are not by themselves sufficient to charge any person with liability, that the plaintiff has to show by some independent evidence that the entries in his books represented real and honest transactions and that the moneys paid or the transactions took place in accordance with those entries.

16. In the present case, the plaintiff has examined himself as P. W. 1. He has spoken in substance to the transactions having taken place in the manner recorded in the books. We do not con-

sider that there is any deficiency in the matter of corroboration of the entries in the books as required by S. 34 of the Evidence Act. The defendant did not produce any books of account, which he admittedly maintained on some pretext or other. The learned counsel for the appellant stated that the failure of the defendant to produce his books had absolutely no effect in a case like this. According to him, he can rely on the failure of the plaintiff to prove his case. Even on the footing that the defendant's failure to produce the books admittedly maintained has no significance, we consider that on the fact the plaintiff had established the correctness of his account books and spoken to the reality of the entries and the transactions. The plaintiff was carrying on his business as an individual. Though occasionally he may not have been present when some particular transactions took place, still there is no gainsaying the fact that he knew all the transactions that took place between him and the defendant. His evidence, in our opinion, is satisfactory to establish the correctness of the entries in his books. There is, therefore, no error committed by the learned Subordinate Judge in holding that the amount claimed by the plaintiff was due to him.

17. The last point is regarding the liability of the defendant to pay interest on the amount due by him. The defendant has stated in his deposition as D. W. 1 that there was no agreement to pay interest on the outstanding balance and that there was no practice also to charge interest. In cross-examination he only says that he did not know whether there was business practice to pay interest on the outstandings upto 18 per cent. The plaintiff in his deposition has stated that there was no agreement in writing for payment of interest and that he claimed the interest as per business custom. The plaintiff has been charging interest at 12 per cent per annum at the close of each year, as against his other customers. The learned Subordinate Judge in para. 21 of his judgment has catalogued the instances in which the plaintiff has charged interest. We also consider it has been established in the present case by the accounts maintained by the plaintiff himself and there is no evidence to the contrary. The charging of interest at 12 per cent per annum cannot also be considered to be unreasonable or excessive. It may also be pointed out that the only issue on interest is issue No. 9 running as follows—

"9. Is the interest claimed excessive?" The liability to pay interest was thus not put in issue. The only question was about the rate of interest. The rate of interest at 12 per cent per annum cannot be considered to be excessive. We do not, therefore, see any reason to interfere with the judgment of the learned Subordinate Judge on this point also.

18. In the result, the appeal is dismissed with costs.

Appeal dismissed.

AIR 1978 MADRAS 62

V. RAMASWAMI, J.

P. Raju, Appellant v. Balakrishnan, Respondent.

S. A. No. 622 of 1975, D/- 24-8-1976.*

Madras Buildings (Lease and Rent Control) Act (18 of 1960), S. 10 (3) (c) — Order of eviction by consent — Whether can be subsequently challenged on grounds of lack of bona fide requirements of landlord or relative hardship to tenant.

In a suit for eviction on the ground of bona fide requirement, the tenant agreed to submit to an order of eviction provided 4 years time was granted to him for vacating and an order was accordingly passed by the Rent Controller. The tenant did not vacate during the prescribed time and filed a suit alleging that the order of Rent Controller was void on the ground that there was no satisfaction of the Rent Controller in respect of bona fide requirement of the landlord and relative hardship to the tenant.

Held that when a question arises for consideration whether the Rent Controller was satisfied as to the existence of the grounds, it will have to be decided with reference to the pleadings in the rent control proceedings, the evidence available and the admission of parties both in the compromise memo and otherwise and if, there were some materials on the basis of which the Rent Controller could have been satisfied as to the existence of the statutory ground of eviction, the Court could not set aside that order of eviction or refuse to execute the

*(Against decree of Sub-J., Madurai, in A. S. No. 172 of 1974).

decree. AIR 1973 SC 1311 and AIR 1970 SC 838 and AIR 1970 SC 794 and AIR 1974 SC 471, Ref. (Para 3)

In the instant case the Rent Controller had to decide whether to grant four years' time and allow the parties to compromise or reduce the time for eviction. The order made by the Rent Controller shows that the Rent Controller had agreed to grant four years time. This shows that the Rent Controller had exercised his mind and come to the conclusion that the bona fide requirements of the landlord was satisfied and an order for eviction should be granted, but the tenant will have to be given four years time for vacating. (Para 4)

In these days of tenancy legislations and the difficulties of the landlord to secure possession, the landlord agreeing to grant four years time for eviction cannot be said to be such an extraordinary period implying that the landlord was not requiring the building bona fide for purpose. (Para 4)

When the Rent Controller Orders eviction on the ground of bona fide requirement for additional accommdation, it necessarily follows that the Rent Controller must be also deemed to have been satisfied as to the relative hardship caused to the tenant. (Para 4)

Cases Referred:	Chronological Paras
AIR 1974 SC 471	2, 3
AIR 1973 SC 1311	1, 2, 3
AIR 1970 SC 794	2
AIR 1970 SC 838	2
(1969) 2 SCR 432	3

JUDGMENT: — The plaintiff is the appellant. He is the tenant under the defendant in respect of one room bearing shop No. 2 in premises No. 61 Arappalayam Cross Road, Madurai town. The landlord was using the remaining building for the purpose of his business as also his residence. He filed a petition under Ss. 10 (2) (i) and 10 (3) (c) of the Madras Buildings (Lease and Rent Control) Act, 18 of 1960, for eviction of the tenant on 3-4-1968 and this was numbered as R. C. O. P. 273 of 1968 on the file of the District Munsif Court, Madurai town, who was the Rent Controller. The two grounds on which the petition for eviction was sought for are wilful default in the payment of rent falling under S. 10 (2) (i) and bona fide requirement of additional accommodation for the landlord's occupation for carrying on his business falling under S. 10 (3) (c). It does not appear that a counter-statement was filed by the tenant in R.C.O.P. No. 273 of 1968. At any rate, there is no evidence in these proceedings that any such statement was filed by the tenant. On 19-7-1969 the parties made a joint endorsement on the petition for eviction which read as follows —

"The respondent submits to an order of eviction provided he is granted four years from today for vacating. Respondent to draw the sum of Rs. 100/- deposited by him into Court. There are no petition mentioned arrears. The respondent will not press the fair rent application. The respondent will pay the rent at Rs. 40/-. Respondent contends that there are no arrears."

On this joint endorsement, the Rent Controller made the following order on the same date:

1. That the respondent do put the petitioner in possession of the petition mentioned building within the period of four years from the date; and

2. That there be no order as to costs."

The tenant did not deliver possession on the 19th July 1973, as agreed to by him in the joint endorsement; but filed the present suit for a declaration that the order of eviction in R. C. O. P. 273 of 1968 was made without jurisdiction and, therefore, it is void ab initio and unenforceable. The plaintiff also prayed for consequential injunction restraining the defendant-landlord from executing the decree or otherwise interfering with his possession and enjoyment. The trial Court decreed the suit holding that the Rent Controller had not exercised his mind and given a finding on the existence of the grounds for eviction and that the order of eviction was made simply on the basis of the joint endorsement made by the parties and that there was no other materials except the joint endorsement for ordering eviction. Therefore, the order of eviction was held to be null and void. The trial Court relied on certain portions in the judgment in K. K. Chari v. R. M. Seshadri, AIR 1973 SC 1311, in support of these findings and also held that the landlord in this case did not come within the exception pointed out in that case. On appeal by the defendant, the lower appellate Court held that though the order ex facie does not show that the Rent Controller was satisfied that the requirements of the landlord are bona fide, the fact that the tenant did not defend the petition coupled with the fact of submitting to an order of

eviction clearly showed that he accepted as true the claim of the landlord that he required the premises bona fide for his own occupation. This amounted to the acceptance by the Rent Controller that the landlord had made out the statutory requirement entitling him to ask for possession of the premises for owner's occupation and that, therefore, under the decision in K. K. Chari v. R. M. Seshadri, AIR 1973 SC 1311, itself the order of eviction was valid and, therefore, the suit was liable to be dismissed. I may add that on the question of wilful default, the lower appellate Court also came to the conclusion concurring with the trial Court that the joint endorsement showed that there was no wilful default in the payment of rent. In the view that under S. 10 (3) (c) of the Act the landlord was entitled to an order for eviction and the order of eviction made by the Rent Controller was valid, the appeal was allowed and the suit dismissed.

2. In this second appeal, the learned counsel for the appellant contended that the finding of the lower appellate Court that the Rent Controller was satisfied as to the bona fide requirement of the landlord for additional accommodation for the purpose of business is not borne out either by the order of the Rent Controller or the joint endorsement made by the parties and that, therefore, squarely on the ratio of the judgments of the Supreme Court in Kausalya Devi v. K. L. Bansal, AIR 1970 SC 838; Feorozilal v. Manmal, AIR 1970 SC 794; K. K. Chari v. R. M. Seshadri, AIR 1973 SC 1311 and Nagindas v. Dalpatram, AIR 1974 SC 471, the order of the Rent Controller was void and unenforceable.

3. In the first two cases, the Supreme Court held with reference to the provisions in Delhi and Ajmer Rent Control Act, 38 of 1952, that the jurisdiction of the Rent Controller to pass a decree for recovery of possession of any premises depends upon his satisfaction that one or more of the grounds mentioned in S. 13 (i) of that Act have been proved. Where the Rent Controller had proceeded solely on the basis of the compromise arrived at between the parties, it was not competent for him to order eviction and the decree for eviction made on the basis of such compromise alone was a nullity. In these two decisions, the ratio of the judgment of the Supreme Court in an earlier reported decision in Bahadur Singh v. Muni Subrat Das, (1969) 2 SCR 432 was followed. The majority judgment in K. K. Chari v. R. M. Seshadri, AIR 1973 SC 1311, while approving and following the principle laid down in the earlier two cases, held that the satisfaction of the Rent Controller of the existence of the grounds of eviction might be gathered either from the order made by the Rent Controller or from other materials on record which showed the existence of such grounds which could have satisfied the Rent Controller. In the words of the Supreme Court (at p. 1320)

"The true position appears to be that an order of eviction based on consent of the parties is not necessarily void if the jurisdictional fact, viz., the existence of one or more of the conditions mentioned in S. 10 were shown to have existed when the Court made the order. Satisfaction of the Court, which is no doubt a pre-requisite for the order of eviction, need not be by the manifestation borne out by a judicial finding. If at some stage the Court was called upon to apply its mind to the question and there was sufficient material before it, the parties invited it to pass an order in terms of their agreement, it is possible to postulate that the Court was satisfied about the grounds on which the order of eviction was based.

It is no doubt true that before making an order for possession the Court is under a duty to satisfy itself as to the truth of the landlord's claim if there is a dispute between the landlord and tenant. But if the tenant in fact admits that the landlord is entitled to possession on one or other of the statutory grounds mentioned in the Act, it is open to the Court to act on that admission and make an order for possession in favour of the landlord without further enquiry."

The Supreme Court hastened to add that each case will have to be decided on its own facts to find out whether there is any material to justify an inference that an admission, express or implied, has been made by the tenant about the existence of one or other of the statutory grounds. On the facts of that case, it was noticed that the basis of the claim for eviction by the landlord was denied by the tenant and, before the compromise was entered into, P. W. 1 was examined in chief and as many as 45 documents were marked through him. Before P.W. 1 could be cross-examined, the parties settled the matter. In view of the fact that the tenant in that case was a knowledge-

able person and having been seen the evidence of P. W. 1 in chief and the documents filed the Supreme Court came to the conclusion that the tenant entered into the compromise being fully aware of the existence of the grounds for eviction and the possibility of the Court satisfying on that evidence itself and the ordering eviction. It is on that basis the Supreme Court held that the order made on the basis of the compromise memo was not invalid or without jurisdiction. In a later case reported in Nagindas v. Dalpatram, AIR 1974 SC 471, the Supreme Court went a little further than K. K. Chari v. R. M. Seshadri, AIR 1973 SC 1311, and held that admissions in pleadings or judicial admissions admissible under S. 58 of the Evidence Act made by the parties or their agents at or before the hearing of the case are fully binding on the party that makes them and constitute a waiver of proof. Those admissions can be made the foundation of the rights of the parties. The Supreme Court further held (at p. 477)—

".....in cases where an objection as to the non-executability of the decree on the ground of its being a nullity is taken the executing Court is not competent to go behind the decree, if the decree on the face of it, discloses some material on the basis of which the Rent Court could be satisfied with regard to the existence of a statutory ground for eviction. In such a case it must accept and execute the decree as it stands. If, on the face of it, the decree does not show the existence of such material or jurisdictional fact, the executing Court may look to the original record of the trial Court to ascertain whether there was any material furnishing a foundation for the trial court's jurisdiction to pass the decree it did. The moment it finds that prima facie such material existed, its task is complete. It is not necessary for it to go further and question the presumed or expressed finding of the trial court on the basis of that material. All that it has to see is whether there was some material on the basis of which the Rent Court could have — as distinguished from must have — been satisfied as to the statutory ground for eviction. To allow the executing court to go beyond that limit would be to exalt it to the status of a super court sitting in appeal over the decision of the rent court. Since in the instant case, there was a clear admission in the compromise, incorporated in the decree, of the fundamental facts that could constitute a ground for eviction under S. 12 (3) (a), the executing court was not competent to go behind the decree and question its validity".

Thus when a question arises for consideration whether the Rent Controller was satisfied as to the existence of the grounds, it will have to be decided with reference to the pleadings in the rent control proceedings, the evidence available and the admission of parties both in the compromise memo and otherwise and if, there were some materials on the basis of which the Rent Controller could have been satisfied as to the existence of the statutory ground of eviction, the court could not set aside that order of eviction or refuse to execute the decree.

4. In this case, as already stated, the eviction was sought for on two grounds, namely, wilful default in the payment of rent and bona fide requirement of additional accommodation for the landlord's own business. So far as wilful default is concerned, the joint endorsement made by the parties is clear and shows that there were no arrears at all on the date when the petition was filed. There is no evidence to show that there was any delay in the payment of rent much less wilful default in the payment of the same. The finding of the courts below that eviction could not have been ordered by the Rent Controller on the materials available on record and the Rent Controller could not have also been satisfied as to the wilful nature of default, is, therefore, correct and does not call for interference. But on the question whether there are materials to show that the bona fide requirements of additional accommodation for the business carried on by the landlord, the courts below have differed and I am of of opinion that the lower appellate court is correct in its finding that there were some materials on which the Rent Controller could have satisfied as to the bona fide requirement of the owner's occupation. The first sentence in the terms of the joint endorsement relates to this ground of eviction under S. 10 (3) (c) of the Act and reads as follows—

"The respondent submits to an order of eviction provided he is granted four years from today for vacating".

This sentence read with the actual order made by the Rent Controller on the basis

of the joint endorsement clearly shows that the tenant had conceded the existence of the bona fide requirement of additional accommodation for the business carried on by the landlord. This concession was accepted by the Rent Controller and was made a decree in para. 1 of the order. The joint endorsement really does not show that the landlord himself had granted four years' time for vacating the premises. This tenant had submitted to the order for eviction 'provided' he is granted four years' time for vacating. Therefore, it was for the Rent Controller to have decided to grant time or not to grant time. Maybe the Rent Controller could not have reduced the period of four years if the compromise had to survive. But the Rent Controller had to decide whether to grant four years' time and allow the parties to compromise or reduce the time for eviction. The order made by the Rent Controller shows that the Rent Controller had agreed to grant four years time. This in my opinion shows that the Rent Controller had exercised his mind and came to the conclusion that the bona fide requirements of the landlord was satisfied and an order for eviction should be granted, but the tenant will have to be given four years' time for vacating. The learned counsel for the appellant contended that the long period of four years' time granted itself showed that the claim of the landlord for bona fide requirement of additional accommodation could not be true and implied that the Rent Controller could not have been satisfied as to the bona fide requirement of the owner. I am unable to agree with this submission of the learned counsel. In these days of tenancy legislations and the difficulties of the landlord to secure possession, the landlord agreeing to grant four years' time for eviction cannot be said to be such an extraordinary period implying that the landlord was not requiring the building bona fide for purpose of his business. If he had not agreed for such four years, probably the tenant could have dragged on the proceedings for much longer period than that. In these circumstances, the contention that the mere fact that the time for eviction granted by the Rent Controller was four years itself showed want of bona fide requirement could not be accepted. It was then contended by the learned counsel that in the case of additional accommodation required by the landlord under S. 10 (3) (c) read with S. 10 (3) (e) and the proviso, the Rent Controller will have to be satisfied not only that the landlord bona fide requires additional accommodation but also the relative hardship which may be caused to the tenant by granting such relief. In other words, according to the learned counsel, the Rent Controller will have to be satisfied also that the hardship caused to the tenant will not outweigh the benefit or the bona fide requirement of the owner for purpose of additional accommodation. Neither the joint endorsement nor the order of the Rent Controller implies a satisfaction to the fact according to the learned counsel. Though this argument is plausible, again on the facts of this case, I am unable to agree with this contention. When the Rent Controller orders eviction on the ground of bona fide requirement for additional accommodation, which I have already implied that there was such a finding, it necessarily follows that the Rent Controller must be also deemed to have been satisfied as to the relative hardship caused to the tenant. We must also keep in mind that in this case there is no evidence to show that the tenant filed any objection to the petition filed by the landlord under S. 10 (3) (c) of the Act. As already pointed out, there is no evidence of any such objection produced in this court. We have, therefore, to presume that no such objection was filed before the Rent Controller. Though the non-filing of objections could not be taken as an admission, it goes a long way in understanding the joint endorsement made by the parties on the petition. I am, therefore, satisfied that this is not a case, where the order could be assailed on the ground that there is no evidence of satisfaction by the Rent Controller of the existence of the conditions for eviction. The second appeal therefore fails and it is dismissed. But there will be no order as to costs. No leave.

Appeal dismissed.

AIR 1978 MADRAS 66

KAILASAM, C. J. AND BALASUBRAHMANYAM, J.

D. Chelliah Nadar and another, Appellants v. G. Lalita Bai and another, Respondents.

L. P. A. No. 22 of 1972, D/- 21-7-1976.*

*(Against judgment of Raghavan, J., in S. A. No. 1719 of 1971, D/- 23-6-1972).

DU/EU/B386/77/DNK

(A) Interpretation of Statutes — Repeal — Repeal of a State Act by Central Act — Conditions necessary. (Constitution of India, Art. 254).

Law repealed should substantially provide for the same matters as the Central Act even though it may not be identical in all respect and it must cover the entire field which was covered by the law which is sought to be repealed.

(Para 7)

(B) Part B States (Laws) Act (1951), S. 6 — Corresponding law — Whether Christian Succession Act, Regulation II of 1092 (Travancore) is law corresponding to the Indian Succession Act, 1925, as contemplated by S. 6 of Part B States (Laws) Act, 1951.

Held since the two Acts deal with intestate succession, the Christian Succession Act of Travancore is law corresponding to the Indian Succession Act, 1925. AIR 1961 SC 1087; AIR 1962 SC 922 and AIR 1963 SC 853, Foll. (Paras 7, 8)

(C) Succession Act (1925), S. 29 (2) — Travancore Christians. (1974) 1 Mad LJ 53; Decisions in S. A. No. 1006 of 1968 (Mad) and S. A. No. 529 of 1968 (Mad), Overruled.

'A' dying intestate as a Travancore Christian — Christian Succession Act (Regulation II of 1092 of Travancore) providing for succession — Part B States (Laws) Act (1951), making Indian Succession Act applicable to Travancore to the exclusion of any corresponding State Law — Indian Succession Act, (1925), S. 29 (2), whether saves Christian Succession Act (Regulation II of 1092 of Travancore). Held: as Indian Succession Act did not provide for succession of Indian Christians in Travancore, in view of S. 29 (2), the Travancore Regulation was not repealed — Held also that A would therefore be governed by the Travancore Regulation and not by the Indian Succession Act, 1925: AIR 1957 Trav Co 1, Ref.; (1974) 1 Mad LJ 53; Decisions in S. A. No. 1006 of 1968 (Mad) and S. A. No. 529 of 1968 (Mad), Overruled.

(Paras 9, 10, 11)

Cases Referred: Chronological	Paras
1974-1 Mad LJ 53	11
(1968) S. A. No. 529 of 1968 (Mad)	11
(1968) S. A. No. 1006 of 1968 (Mad)	11
AIR 1963 SC 853	7
AIR 1962 SC 922	7
AIR 1961 SC 1087	7
AIR 1957 Trav-Co 1	10

KAILASAM, C. J.:— The plaintiffs are the appellants in this Letters Patent Appeal. The plaintiffs sued for a declaration of their title to and possession of the suit properties and for an injunction. Plaintiffs 1 and 2, Chelliah Nadar and Mercy Bai, are husband and wife. The first defendant, Lalitha Bai, is the sister of the first plaintiff. The second defendant Muthayyan is the husband of the first defendant. The suit properties belonged to one Daniel Nadar, the deceased father of the first plaintiff. Daniel Nadar died as a Travancore Christian leaving behind him his son, the first plaintiff, and four daughters, including the first defendant. The contest is between the son and the daughter of Daniel Nadar. If the Christian Succession Act of Travancore is applicable, the first plaintiff will be the sole heir. But, if the Indian Succession Act is applicable, the first plaintiff and the first defendant would each be entitled to a half share in the properties.

2. The trial court found that the Indian Succession Act governed the parties to the suit and dismissed the suit. On appeal, the learned District Judge of Kanyakumari held that the first plaintiff was not entitled to claim exclusive title to the properties. In the second appeal preferred by the plaintiffs, Raghavan, J. came to the conclusion that the Indian Succession Act was applicable. But, considering the importance of the question, gave leave to prefer a Letters Patent Appeal. Thus the matter has come up before a Bench.

3. The only question that arises in Letters Patent Appeal is whether the parties are governed by the Travancore Christian Succession Act, Regulation II of 1092, or the Indian Succession Act, 1925. The Indian Succession Act X of 1865 was enacted by the Governor General of India in Council and received the assent of the Governor General on 16-3-1865. The Act was to amend and define the law of intestate and testamentary succession in British India. The preamble states:

"Whereas it is expedient to amend and define the rules of law applicable to Intestate and Testamentary succession in British India, it is enacted... ... ..."

The rules contained therein constituted the law of British India applicable to all cases of intestate or testamentary succession. But Section 331 of the Act provided that the provisions of this Act shall not apply to intestate or testamentary succession to the property of any Hindu,

Muhammadan or Buddhist; nor shall they apply to any will made, or any intestacy occurring before 1-1-1866. Section 332 enabled the Governor General of India in Council to exempt the members of any race, sect, or tribe in British India from the operation of the Act. Though S. 2 provided that the Indian Succession Act shall constitute the law of British India applicable to all cases of intestate or testamentary succession, the provisions of the Act were expressly excluded from application to testamentary succession to the property of any Hindu, Muhammadan or Buddhist and to any intestacy occurring before 1-1-1866, the Governor General of India in Council was also empowered from time to time to exempt from the operation of the whole or any part of the Act any race, sect or tribe in British India. It may also be noted that at that time there was no intention to make the Act applicable to the native States as they were then constituted.

4. While the Indian Succession Act of 1865 was in force in British India, the Travancore Regulation II of 1092, corresponding to 1916, was passed. The Regulation was intended to consolidate and amend the rules of law applicable to intestate succession among the Indian Christians in Travancore. The Regulation was passed by his Highness the Maharajah of Travancore on 21-12-1916. In the preamble it is stated that whereas it is expedient to consolidate and amend the rules of law applicable to intestate succession among Indian Christians in Travancore, His Highness is pleased to enact the Regulation. In the objects and reasons, it is stated—

"The law of intestate succession among the various sections of Indian Christians in Travancore is vague and unsettled. The High Court has been complaining about the unsatisfactory state of the law among Christians. Repeated representations were made by Christians' representatives about the desirability of enacting a law of succession. The necessity for legislation has therefore long been felt". The Regulation provided for the succession among the Indian Christians in the Travancore State.

5. Subsequently, the Indian Succession Act of 1925 was passed in the year 1925. The Act was for consolidating the law applicable to intestate and testamentary succession. In the Preamble, it is stated that whereas it is expedient to consolidate the law applicable to intestate and testamentary succession the Act has been enacted. Section 3 of the Act provides that the State Government may, by a notification in the official Gazette, either retrospectively from 16th March 1865 or prospectively exempt from the operation of any of the provisions of the Act mentioned in that section, the members of any race, sect or tribe, to whom the State Government considers it impossible or inexpedient to apply such provisions or any of them mentioned in the order. This section more or less corresponds to S. 332 of the Indian Succession Act of 1865. There are several parts in the Indian Succession Act of 1925 and it is provided whether a particular part has a universal application or not. For instance, S. 4 states that Part II relating to domicile, will not apply if the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina. We are concerned with Part V which relates to intestate succession. Section 29 (1) provides that Part V shall not apply to any intestacy occurring before 1-1-1866, or to the property of any Hindu, Muhammadan, Buddhist, Sikh or Jaina. It is explicit therefore that Part V of the Indian Succession Act of 1925 has no application to the property of any Hindu, Muhammadan, Buddist, Sikh or Jaina. Section 29 (2) is very important as the decision in the case mostly depends upon it. It runs as follows—

"Save as provided in sub-s. (1) or by any other law for the time being in force, the provisions of this Part shall constitute the law of India in all cases of intestacy." The effect of sub-s. (2) is that apart from the non-applicability of the provisions of Part V to any Hindu, Muhammadan, Buddhist, Sikh or Jaina, they will not also apply if there is any other law for the time being in force. Otherwise, the provisions of this Part shall constitute the law of India in all cases of intestacy. It may be noted that at the time when the Indian Succession Act of 1925 was enacted, the Travancore territory, with which we are concerned, was a native State.

6. While Travancore Regulation II of 1092 was the law of intestate succession among the Christians of Travancore and the Indian Succession Act of 1925 was applicable to British India except to the classes exempted under S. 29 (2), after the consolidation of the States, the Part B States (Laws) Act was enacted in 1951. Many of the enactments that were in force in British India were extended to Part B States. The section with which

we are concerned in S. 6. It runs as follows—

"If immediately before the appointed day there is in force in any Part B State any law corresponding to any of the Acts or Ordinances now extended to that State, that law shall, save as otherwise expressly provided in this Act, stand repealed".

The two provisos, which are not material, need not be considered. The appointed date is 2-8-1952. The question is whether before the appointed date there was in force in Part B States any law corresponding to the Indian Succession Act. The point that has to be decided is whether the Christian Succession Act Regulation II of 1092 of Travancore, is a law corresponding to the Indian Succession Act, and if so whether the Indian Succession Act would repeal the Travancore Regulation.

7. The Christian Succession Regulation II of 1092 relates to intestate succession among the Indian Christians in Travancore, whereas the Indian Succession Act is a law relating among other things, to intestate succession, which is applicable to immovable property in India of a person deceased in India. The Act itself provides that it is not applicable to intestate succession of a Hindu, Muhammadan, Buddhist, Sikh or Jaina and to others, who are governed by any other law for the time being in force. The subject of legislation is intestate succession. Though the Travancore Regulation is confined to Indian Christians in Travancore, the conclusion is inescapable that the Travancore Regulation is a law corresponding to the Indian Succession Act, as contemplated in S. 6 of the Part B States (Laws) Act, 1951. In Custodian of Evacuee Property v. Abdul Shakoor, AIR 1961 SC 1087, the Supreme Court has pointed out that where the Act repealed provided substantially for all matters contained in the Act effecting the repeal there is correspondence between the two Acts and the earlier Act would thus stand repealed and that it is not necessary that there should be complete identity between the repealing Act and the Act repealed in every respect. Following the above decision the Supreme Court in Abdulkadir v. State of Kerala, AIR 1962 SC 922, 925, laid down that all that we have to see is whether the law repealed substantially provided for the same matters as the Central Act even though it may not be identical in all respects. The same view was reaffirmed by the Supreme Court in Anant Prasad v. State of Andhra Pradesh, AIR 1963 SC 853. There were two Acts in that case, the Charitable Endowments Act VI of 1890, and the Charitable and Religious Trusts Act XIV of 1920. It was contended that because of the application of these two Acts to the then Part B State of Hyderabad, the Regulation must be deemed to have been repealed in view of S. 6 of Part B States (Laws) Act. The Supreme Court rejected that contention holding that Act VI of 1890 definitely excluded religious public trusts from it, that the Regulations dealt with two kinds of trusts, namely, public religious trusts and trusts for purposes of charity and public utility and that in that case, they were concerned with a public religious trust which was specifically excluded from the purview of Act VI of 1890 and that therefore whatever might be the effect of Act VI of 1890, on that part of the Regulations which dealt with public trusts other than religious trusts, there was no doubt that the Regulations in so far as they applied to religious trusts, could not be held to have been repealed by the application of Act VI of 1890 to the then Part B States of Hyderabad, for the Regulations when they dealt with religious trusts would not be a law corresponding to Act VI of 1890. The Supreme Court therefore held that the application of Act XIV of 1920 to the then Part B State of Hyderabad could not be said to have repealed the Regulations by virtue of S. 6 of the Part B States (Laws) Act, 1951. The Supreme Court took this view as a perusal of S. 6 of Act XIV of 1920 showed that it was confined to a very limited purpose, whereas the Regulations were a much wider enactment and Act XIV of 1920 did not cover the entire field. The decisions of the Supreme Court make it clear that the law repealed should substantially provide for the same matters as the Central Act even though it may not be identical in all respects, and that it must cover the entire field which was covered by the law which was sought to be repealed. Applying the principle laid down in the three decisions of the Supreme Court, viz., Custodian of Evacuee Properties v. Abdul Shakoor, AIR 1961 SC 1087, Abdulkadir v. State of Kerala, AIR 1962 SC 922, and Anant Prasad v. State of Andhra Pradesh, AIR 1963 SC 853, it is clear that, unless the entire field is covered by the Central Act there will be no

repeal under the Part B States (Laws) Act. In this case, the Indian Succession Act, as it stands, does not purport to legislate so far as Indian Christians in Travancore State are concerned.

8. In the case before us both the laws relate to Intestate succession. Though the Travancore Regulation is confined only to Christians in that State, the field of legislation is the same and the Indian Succession Act has a universal application to the extent provided for under the Act. On the facts, there is no doubt that both the legislations are intended to provide for intestate succession, though the application of the Travancore Regulation is confined only to the Christian Community of Travancore. Section 6 of the Part B States (Laws) Act does not require the law to be identical, but only requires that it should correspond to the Central Act. Though the Central Act as well as the Travancore Regulation related to the same subject, namely, intestate succession and covered identical fields and to that extent is corresponding law, in view of the decisions of the Supreme Court cited above, it will not be corresponding law for the purpose of S. 6, as the Indian Succession Act does not cover Travancore Christians, governed by the Travancore Regulation. Taking all the circumstances into account, we feel that the Travancore Regulation is a law corresponding to the Indian Succession Act.

9. It has now to be considered whether the Travancore Regulation stands repealed. On and from the appointed date the Indian Succession Act, 39 of 1925, had come into force in Part B States. What it seeks to repeal is the corresponding law. But the Act comes into force without any modification and under its own provisions the Act will not apply to the property of any Hindu, Muhammadan, Buddhist, Sikh or Jaina or when any other law for the time being in force provides for the succession. It cannot be said that, because the Indian Succession Act is intended to apply in the case of succession to immoveable property in India, which will include Part B States also, it repeals all laws statutory or otherwise, relating to Hindus, Muhammadans, etc., for S. 29 (1) itself makes it clear that it shall not apply to the property of any Hindu, Muhammadan, Buddhist, Sikh or Jaina. There could therefore be no question of the Indian Succession Act repealing any corresponding law relating to Hindu, Muhammadan, Buddhist, Sikh or Jaina, for it is not applicable to them at all. Under S. 29 (2), the Indian Succession Act relating to Intestate succession is not made applicable to cases where there is any other law for the time being in force. On the date, when the Indian Succession Act came into force, the Travancore Regulation was in force in Travancore State, though strictly under the Indian Succession Act, they would not have contemplated any law in the Travancore State. But, on a proper construction of the intention of the enactment, it is seen that the Indian Succession Act, even after the merger of the State, will not be applicable to Christians in the Indian States. Thus Section 29 (2) stands, as much as S. 29 (1), thereby excluding the application of the enactment to Hindus, Muhammadans, Buddhists, Sikhs or Jainas and also persons who are covered by any other law for the time being in force, one such law being the Travancore Regulation II of 1092. When the Indian Succession Act itself does not provide for succession to the property of Indian Christians in Travancore, it cannot take the place of the Travancore Regulation. Therefore, as long as the Indian Succession Act of 1925 stands, with S. 29 (1) and (2) intact, the Travancore Regulation cannot be said to have been repealed because of the provisions of S. 6 of the Part B State (Laws) Act. If the Indian Succession Act had a universal application or applied to Indian Christians, then, to that extent, the corresponding legislation would have been repealed. But as we are satisfied that as the Indian Succession Act which seeks to provide for the law of intestate succession throughout the country, itself omitted from its operation the Travancore Regulation Act, we are of the view that the Travancore Regulation has not been repealed.

10. The question whether the Travancore Christian Succession Act (Regulation II of 1092) was repealed by Part B States (Laws) Act 3 of 1951 came up for consideration before the Travancore Cochin High Court. In Kurian Augusty v. Devassy Aley, AIR 1957 Trav-Co 1, the court, after extracting S. 19 (1) and (2) of the Indian Succession Act, came to the conclusion that from that section it was clear that the Indian Succession Act was not intended to interfere with the personal law of communities which have settled laws of their own as regards inte-

state succession. The Court took the view that the Travancore Christian Succession Act would in no sense be regarded as law corresponding to Part V of the Indian Succession Act and that it had to be regarded as forming part of the Indian Succession Act. We are of the view, though for different reasons, that as S. 29 (2), which is still in force, does not purport to legislate for the Indian Christians, there cannot be any repeal of the Travancore Christian Succession Act. We do not think it is necessary for us to consider whether the Indian Succession Act must be deemed to have adopted by reference all laws for the time being in force relating to intestate succession which will include the Travancore Succession Act so far as the Christians in the Travancore State are concerned.

11. The question was fully considered by Ismail J. in Solomon v. Muthiah, 1974-1 Mad LJ 53, where the learned Judge held that by virtue of S. 6 of the Central Act III of 1951, the Travancore Christian Succession Act, Regulation II of 1092, stood repealed with effect from 1-4-1961. The reasoning of the learned Judge is contained in para. 60 of the report, where he has stated that the expression 'save as provided by any other law for the time being in force' must necessarily refer to the exclusion of Part V made by any other law. The learned Judge has stated that so long as an existing statute has not excluded the applicability of Part V of the Indian Succession Act 1925, the provisions of the said Part V will apply and that no other enactment was brought to his notice specifically excluding the applicability of the provisions of Part V of the Indian Succession Act 1925 to the Christians of the former Travancore Cochin State. We feel that this reasoning is erroneous as the Travancore Regulation is of the year 1917, about eight years before the Indian Succession Act was passed. It was within the jurisdiction of the Indian State when the exclusion of the operation of the provisions of Part V could not have been contemplated. Further, in our view, it is S. 29 (2), as it stands, that has to be construed and if that excludes the application of any other law in force, it is needless for any law to state that Part V is not applicable. The Indian Succession Act by itself excludes its operation to the Indian Christians in the Travancore State. There could, therefore, be no repeal of any enactment not covered by the Indian Succession Act. In this view we are unable to accept the conclusion arrived at by the learned Judge, that being a corresponding law, the Travancore Christian Succession Act stood repealed. The decisions of Gokulakrishnan J. in S. A. No. 529 of 1968 (Mad), Devarees v. Earl Nadar and of K. N. Mudaliyar J. in S. A. 1006 of 1968 (Mad), Mary Santhakumari v. Susai Pakkiam, are also not good law.

12. In the result, we hold that the Travancore Christian Succession Act, Regulation II of 1092, is applicable to the appellants.

13. On behalf of the defendants-respondents, it is submitted that the plaintiffs are not entitled to a decree for possession as the relief of possession has not been asked for. The plaint proceeds on the basis that the plaintiffs are in possession. In para. 4 it is stated that the first plaintiff came into possession of A and B schedule properties and that he executed a gift in favour of his wife, the second plaintiff, in respect of the B schedule properties and thus she was in possession of the B schedule properties. In para. 6 it is also stated that the suit properties vest with the plaintiffs and that they are in enjoyment of the suit properties. The allegation is that the defendants are creating trouble in the enjoyment of the suit properties by the plaintiffs. Therefore the plaintiffs prayed for an order of injunction restraining defendants 1 and 2 from disturbing the possession of the plaintiffs of the suit properties. The relief prayed for is for declaration of title and possession of the plaintiffs over the suit properties and an order of injunction against the defendants from disturbing the plaintiff's possession. The plaint has not asked for possession of the suit properties as it proceeds on the basis that the plaintiffs are in possession.

14. The trial court did not go into the question as to who was in possession, but observing that whatever that might be, the first plaintiff possessed A and B schedule properties only as one of the heirs of Daniel Nadar, answered the issue as to whether the plaintiffs are in possession of the suit properties, accordingly. The appellate court did not agree with the trial court that the first plaintiff was in exclusive possession. It referred to the evidence of P. W. 2, who stated that Items 2 to 4 and 7 of A schedule and Items 13 and 16 of B schedule are in the

possession of the defendants ever since the death of father Daniel and found that it has not been proved that the plaintiffs are in exclusive possession of A and B schedule properties. This finding was not challenged in the second appeal and the learned Judge in disposing of the second appeal did not refer to this aspect of possession. On the evidence of P. W. 2 himself, which is accepted by the lower appellate court, it cannot be said that the plaintiffs have established that they are in possession of Items 2 to 4 and 7 of A schedule and Items 13 and 16 of the B schedule. As the relief of possession has not been asked for, the order of injunction cannot be granted against the defendants regarding these items. In other respects, the suit is decreed. The appeal is partly allowed, but there will be no order as to costs.

Appeal partly allowed.

AIR 1978 MADRAS 72

V. RAMASWAMI, J.

Visalakshi Ammal, Appellant v. Narayanaswami Naidu and others, Respondents.

Second Appeal No. 1431 of 1973, D/- 6-7-1976.

French Code Civil, Art. 188 and Article 201 and Art. 745 — Second marriage during lifetime of first wife — Second marriage not annulled — Children by second marriage are legitimate.

Under the Code Civil, marriages contracted in contravention of the provisions are not treated as void marriages and not taking effect ipso jure but will have to be so declared by Courts on the ground of contravention, as nullity. So long as there is no such declaration by judgment, neither the parties nor strangers are authorised to assume the nullity to be established. (Para 4)

If a husband or wife whose rights have been violated by the second marriage, wants to get the second marriage declared null, he or she can do it only during the lifetime of the person who had been previously married to him or to her. (Para 3)

In the absence of evidence to prove lack of good faith on the part of the spouses when they contracted the second marriage, the children born before the annulment are to be treated as legitimate children. (Para 3)

Hence the issues of both the marriages are legitimate children and entitled to equal share in the property of their father. (Para 5)

R. S. Venkatachari, for Appellant; V. Venkataraman, for Respondents.

JUDGMENT :— The plaintiff's legal representative is the appellant. The suit was filed for recovery of possession of the suit property which is said to measure an extent of one acre 98 cents. It is not in dispute that this property originally belonged to one Joseph De. Gonzaga who will hereinafter be referred to as Joseph. The plaintiff purchased the property from one John De. Gonzaga, hereinafter referred to as John, who is the son of Joseph, through a lady by name Roger under the sale deed dated 6-6-1962. The second defendant claimed title to the same property under a sale deed dated 7-2-1959 executed by one Piere who is the son of Joseph through another lady, Arumaikannu. The third defendant is the sister of the said Piere and the 4th defendant is a pre-deceased sister's son of the said Piere. Joseph, Roger and Arumaikannu are admittedly French Citizens governed by the French Civil laws.

It was the case of the second defendant that Joseph was married to Arumaikannu long prior to 1914, that they lived together as husband and wife, that Arumaikannu had seven children out of this marriage and Piere and the third defendant are the only person to survive Joseph. It was her further case that there was no factual marriage between Joseph and Roger and even if there was a marriage, it was not valid in law as second marriage was prohibited under the Code Civil.

2. It may be mentioned that the plaintiff's case was that there was no marriage between Joseph and Arumaikannu and it had not been proved as required by law and that there was a legal and valid marriage between Joseph and Roger. Therefore according to the plaintiff John, his vendor alone was the legal heir of Joseph and Piere if at all would only be an illegitimate child not entitled to any share. On the factual position, both the Courts below have held raising a legal presumption that there was a marriage between Joseph and Arumaikannu. Both the Courts below have also held that there was a factual marriage between

Joseph and Roger as per law, but the marriage was not valid and, therefore, John, the vendor of the plaintiff should be deemed to be an illegitimate child. On these findings the Courts below dismissed the suit of the plaintiff holding that his vendor had no title to the property and, therefore, he could not have conveyed any title to the plaintiff. It is not necessary for me, though the learned counsel for the appellant strenuously contended otherwise, to consider whether the marriage between Joseph and Arumaikannu had been proved by legal evidence. I will take it as a finding of fact and proceed on the assumption that there was a marriage between Joseph and Arumaikannu some time prior to 1914 and Piere and the third defendant are the two children through Arumaikannu. On the said reasoning I would have to accept the finding that Joseph was also married to Roger, that is factually there was a marriage between Joseph and Roger. The question for consideration is whether the marriage between Joseph and Roger was valid even as a second marriage and whether John, the admitted son of Joseph through Roger, could claim any right in the suit properties.

3. Title V of the French Civil Code deals with marriages. Article 147 states that it is not lawful to enter into a second marriage before the first had been dissolved. Chapter III of Title V deals with caveats to marriages and by whom such caveats should be filed. But these provisions relate to preventing a second marriage. The legal consequence of a factual second marriage and how a marriage could be annulled are to be found in Chapter IV of Title V, Art. 184 provides that a marriage contracted in violation of the provisions of Art. 147 may be impugned by the parties themselves, by all those interested and by the Public Prosecutor. Under Art. 187, whenever according to Art. 184 an action for declaration of nullity may be brought by the interested parties, such an action cannot be brought by the collaterals or by children born of another marriage while the parties to the marriage are alive. Article 188 provides that a husband or wife, whose rights have been violated by a second marriage, may demand the nullity of such marriage during the lifetime of the person who had been previously married to him or her. In such an action it was open to the parties to the second marriage to plead that the first marriage was null. (vide Article 189). If the action is to be brought by the Public Prosecutor he could only demand the nullity of marriage while the parties are still living and he must request the Court to order them to separate. The consequences of declaring a marriage null are contained in Arts. 201 and 202 which read as follows:

"201. A marriage which has been declared null has, if contracted in good faith, the civil consequences of a marriage so far as the parties thereto are concerned and the children.

202. If only one of the parties to the marriage has acted in good faith, the legal consequences of marriage only come into existence in favour of such person and the children born of the marriage."

It may be seen from these provisions that if a husband or wife whose rights have been violated by the second marriage, wants to get the second marriage declared null, he or she could do it only during the lifetime of the person who had been previously married to him or to her. In this case, if Arimaikannu the first wife wanted to get the second marriage with Roger declared as null, she could have taken proceedings for such a declaration only during the lifetime of Joseph. She could not get the marriage declared null and void after Joseph's death. Similarly, if the Public Prosecutor is to file an application for declaring the marriage void, he could do so only during the lifetime of Joseph and Roger and not after the death of any one of them. We find a note on the French Civil Code by Blackwood Wright which is the publication which is followed in this Court, to Art. 201 and Art. 202 which is to the following effect:

(d) These two latter sections are most important to persons marrying French subjects for it has been held under them that where either or both the parties acted in ignorance of law and in good faith, the marriage, though it may be annulled by the Court, still makes the children born before the annulment legitimate, and the parties who believed they were acting lawfully have the civil rights of married persons. Until a Court has pronounced a marriage null, though the forms required by French law have not been complied with the marriage is good. The word "null" throughout this chapter means "voidable" or "annullable by law". Thus, a Mexican woman who had gone through a religious ceremony of marriage with a Frenchman in good faith in

Mexico without having been married before the civil status officer, as required by Mexican law, was (as Courts of French held she had acted in good faith) given the civil rights of a wife and her children declared legitimate (sirey (1883) II 137). So a Non-French subject who has married a Frenchman outside France who was under twentyfive years of age without his having obtained the previous consent of his parents was declared to have the civil rights of a wife and her children declared legitimate. (Table de Jurisprudence, 1791-1850, Sub-tit. "Marriage," 437). The curious thing about this theory is that both the parties are entitled to marry again, though the innocent party has such rights, and the children born or conceived before the decree of nullity are ligitimate. A woman, for example, who has gone through a ceremony of marriage with a man who is already married has a right to support as if she were a lawful wife until she marries again, when such right ceases. (sirey, (1887), II, 235). The principle applies equally to mistakes of law (See Table Decennale, 1851-1860, Sub-tit. "Marriage," 74; Table Decennale 1871-1880, sub-tit. Marriage, "53,54 sirey (1900) II, 131). The nature and the seriousness of the error do not affect this principle, but are only facts which the Court must consider in determining whether there was good faith. (sirey, (1902), I. 225). The difference between the English Law, which requires certain statutory conditions to be complied with, in default of which there is no marriage, is very marked. By English law a marriage is only voidable for want of consent, or impotence, as distinct from sterility".

There is no evidence to prove lack of good faith on the part of Joseph or Roger when they contracted the second marriage. Therefore, even if the marriage had been annulled the children born before the anulment are to be treated as legitimate children and not illegitimate. If the court had not pronounced the marriage null, though the marriage was contrary to Art. 147, the marriage was good as the law provided only for a voidance of the marriage by the parties interested and had not declared the marriage itself as void ab initio.

4. In Amos and Walteen's Introduction to French Law, Second Edition, by Lawson, we find the following passage at page 65 which is to the same effect:

"The nullity of a null marriage must be declared by judgment. Neither the parties nor strangers are authorised, in default of such judgment, to assume the nullity to be established".

It may also be mentioned that even the case of marriage by persons who have not attained the age of consent is treated as a null marriage, but it could not be questioned after a lapse of six months from the attainment of that age or by the pregnancy of the wife. Another provision contained in Art. 146 requires the consent of the persons referred to in Arts. 150 to 155 as essential for the marriage and there could be no marriage where there is no consent. This want of consent by the father or mother or the ascendants, as the case may be, is also considered to make a marriage a null marriage. But the marriage could not be questioned after some time as provided in the other Articles. Thus under the Code Civil, marriages contracted in contravention of the provisions are not treated as void marriages and not taking effect ipso jure but it will have to be declared by Courts on the ground of contravention as nullity. So long as there is no such declaration by judgment, neither the parties nor strangers are authorised to assume the nullity to be established. In this case, the validity of the marriage could not be questioned, as Joseph died on 15-10-1956 and Roger died on 14-9-1963. Even Arumaikannu, the first wife, could not have questioned the second marriage after the death of Joseph. In fact, it appears, that she never questioned the marriage. On the other hand, she was describing John as the son of Joseph through Roger and as her husband's second wife's son. The result of it is both Joseph and Piere are the legitimate children of Joseph.

5. Under the French Law, in the case of intestate succession, when the deceased leaves children whether of the same or of different marriages, the children succeed equally without distinction of age or sex. That is provided under Art. 745 which reads as follows:

"Children or their descendants inherit the property of their father and mother, grandparents or other ancestors, without distinction of sex or right of primogeniture, even if they are the issue of different marriages. They inherit equally or per capita when they are all related in the first degree to the deceased and entitled in their own right; they succeed per stirpes when all or some of them inherit by representation".

The heirs of course, will have to be determined when the succession opens. The succession in this case opened on the death of Joseph on 15-10-1956. On that date, John, the vendor of the plaintiff, Piere, the vendor of the second defendant, and third defendant alone were alive. They would each be entitled to one-third share. Arumaikannu, the widow of Joseph who was alive was only entitled to a maintenance out of the income from the property.

6. But since she is dead now, that question also does not arise. Thus John, the vendor of the plaintiff had one-third share in the suit properties which he could have legally conveyed under Exhibit A-11 dated 6-6-1962 to the plaintiff. Thus, though the plaintiff claimed the entirety of the suit properties, he had established his title to a one-third of the suit properties. It is well settled that when the plaintiff claims a larger interest but was able to establish a lesser interest, to the extent he was able to establish his interest, a decree could be granted. The plaintiff is accordingly, given a preliminary decree for partition and separate possession of his one-third share in the suit properties, I may add that in the view that he will be a co-owner of the suit property, the defendants will not be entitled to any improvements even if they had made any such improvements.

7. The second appeal is allowed in part to the extent indicated above. There will be no order as to costs. No leave.

Appeal partly allowed.

AIR 1978 MADRAS 75

ISMAIL, J.

Karuppanna Gounder and another, Appellants v. Thirumalsi Gounder and others, Respondents.

Second Appeal No. 518 of 1973, D/-5-2-1976.*

T. P. Act (1882), S. 58 (c) — Question whether document was a mortgage by conditional sale or was an outright sale accompanied by an agreement for reconveyance — Burden of proof — (Evidence Act (1872), Ss. 100, 101).

Once the condition is incorporated in the same document and the terms of the document are covered by S. 58 (c) of the T. P. Act, the transaction will be considered to be a mortgage only unless the person who asserts it is not a mortgage is able to prove, either from the language contained in the document or from the attendant circumstances, that the transaction was intended to be an outright sale. The same can be shown by two means; one, by establishing that there are express words in the document itself which will be indicative of the character of the document not as a mortgage by conditional sale and establish it to be an outright sale; and secondly, by establishing the attendant circumstances which will necessarily lead to the inference that the transaction was meant to be an outright sale only. AIR 1954 SC 345, Foll. (Para 4)

Cases Referred: Chronological Paras

AIR 1954 SC 345 4

D. Ramaswamy Iyengar and R. Krishnamachari, for Appellants; T. R. Rajagopalan and T. R. Rajaraman, for Respondents.

JUDGMENT:— It is unfortunate that this matter has to be remanded again to the lower appellate Court, and a suit which was instituted in 1965 has yet to be kept pending. The plaintiffs in O. S. No. 598 of 1965 on the file of the Court of the District Munsif, Erode are the appellant herein. The suit was one for redemption of Ext. B-2 mortgage and for recovery of possession. The case of the appellants was that Ext. B-2 was a mortgage by conditional sale and therefore they were entitled to redeem the mortgage. As against this, the case of the respondents was that Ext. B-2 constituted an absolute sale accompanied by an agreement for re-purchase and therefore, the suit for redemption would not lie. The trial Court decreed the suit. On appeal preferred by the defendants in the suit, the lower appellate Court, on an earlier occasion reversed the conclusion of the learned Principal District Munsif who decreed the suit. The matter came up to this court in Second Appeal No. 667 of 1969. By judgment and decree dated 7th Oct., 1971, I allowed the second appeal and remanded the first appeal for fresh disposal. The reason for my remand order was that one of the tests to find out whether a particular transaction was an absolute sale or a mortgage by conditional sale is the ade-

*(Against decree of Principal Sub. J., Erode in Appeal Suit No. 232 of 1966).

quacy of the price having regard to the value of the property and with reference to that, the learned Subordinate Judge had made a mistake which would have influenced him in coming to the conclusion as to whether the price was adequate or not. After the remand, the matter was disposed of by the learned Principal Subordinate Judge, Erode on 8th March, 1972. In this case, there was no oral evidence at all. In the absence of oral evidence, the learned Subordinate Judge expressed his difficulties in arriving at the value of the property for the purpose of showing that the consideration mentioned in Ext. B-2 was adequate or inadequate, on the basis that the transaction was a sale. However, he recorded a definite finding that Ex. B-2 was not a mortgage by conditional sale and that it was an out-and-out sale and that the plaintiffs were not entitled to maintain the suit for redemption treating Ex. B-2 as a mortgage by conditional sale. The result was, the learned Subordinate Judge dismissed the suit for redemption instituted by the appellants herein. It is this dismissal that is being challenged in the present Second Appeal.

2. The learned counsel for the appellants contends that the language or Exhibit B-2 fulfills the requirements of Section 58 (c) of the T. P. Act and consequently, the transaction under Ex. B-2 must be construed to be only a mortgage by conditional sale unless there are express words in the document or other attendant circumstances to establish that the parties intended to treat the transaction as an absolute sale accompanied by an agreement for reconveyance. I am of opinion that this contention is well-founded. Section 58 (c) of the T. P. Act states:

"Where the mortgagor ostensibly sells the mortgaged property—

On condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or

On condition that on such payment being made, the sale shall become void, or

On condition that on such payment being made, the buyer shall transfer the property to the seller,

the transaction is called a mortgage by conditional sale, and the mortgagee a mortgagee by conditional sale:

Provided that no such transaction shall be deemed to be a mortgage, unless the conditional sale is embodied in the document which effects or purports to effect the sale."

The proviso was introduced, for the first time, by the amending Act XX of 1929. Prior to that, there was no stipulation as to whether the condition for re-purchase should be embodied in the same document or not.

3. It is not in dispute that Ex. B-2 prima facie satisfies the requirements of S. 58 (c) of the T. P. Act, because the document ostensibly is a transaction of sale and contains all the terms which will be contained in a document of sale. Ex. B-2 contains a condition that on the executants of the document paying the sum of Rs. 1,000/- which was the consideration for the transaction within two years from the date of Ex. B-2, the vendees should reconvey the property to the executants of the document.

4. With reference to such a situation, the Supreme Court, in Chunchun Jha v. Ebadat Ali, AIR 1954 SC 345, has observed, at page 347.

"The legislature has made a clear cut classification and excluded transactions embodied in more than one document from the category of mortgages; therefore it is reasonable to suppose that persons who, after the amendment, choose not to use two documents, do not intend the transaction to be a sale, unless they displace that presumption by clear and express words, and if the conditions of S. 58 (c) are fulfilled, then we are of opinion that the deed should be construed as a mortgage".

The Supreme Court further observed, at page 348:

"Now, as we have already said, once a transaction is embodied in one document and not two and once its terms are covered by S. 58 (c) then it must be taken to be a mortgage by conditional sale unless there are express words to indicate the contrary, or, in a case of ambiguity, the attendant circumstances necessarily lead to the opposite conclusion".

As I pointed out already, the condition is embodied in the same document and it is not embodied in a separate document. The terms of Ex. B-2 are covered by Section 58 (c) of the T. P. Act. Therefore, according to the observation of the Supreme Court referred to above, the transaction under Ex. B-2 must be taken to be a mortgage by conditional sale unless there are express words to indicate the contrary, or, in the case of ambiguity, the attendant circumstances necessarily

lead to the opposite conclusion. In this case, the learned Subordinate Judge has unfortunately committed a mistake. In para. 6 of his judgment he has stated, "The plaintiffs have to prove that Exhibit B-2 is a mortgage by conditional sale and not an outright sale". This statement of the learned Subordinate Judge, on the face of it, is erroneous and runs counter to the law laid down by the Supreme Court. From the law laid down by the Supreme Court it will follow that once the condition is incorporated in the same document and the terms of the document are covered by S. 58 (c) of the T. P. Act, the transaction will be considered to be a mortgage only unless the person who asserts it is not a mortgage is able to prove, either from the language contained in the document or from the attendant circumstances, that the transaction was intended to be an outright sale. By throwing the burden wrongly on the appellants herein, the learned Subordinate Judge has committed an error and, as a matter of fact, the conclusion of the learned Subordinate Judge would appear to be based upon his view that the appellants had failed to prove that Ex. B-2 was a mortgage by conditional sale. On the face of it, such a concludion is erroneous. Therefore, I have no alternative but to set aside the judgment and decree of the learned Subordinate Judge and remand the matter for fresh disposal again by the lower appellate Court by finding out whether the respondents herein had shown that the transaction under Ex. B-2 is not a mortgage by conditional sale, but an outright sale. As a matter of fact, from the extract from the judgment of the Supreme Court referred to already by me, it will be clear that the same can be shown by two means: one, by establishing that there are express words in the document itself which will be indicative of the character of the document not as a mortgage by conditional sale and establish it to be an outright sale; and secondly, by establishing the attendant circumstances which will necessarily lead to the inference that the transaction was meant to be an outright sale only. If, in the document itself, express words are to be found to show that the transaction was intended to be only an outright sale, there would be no need for me to remand the matter and therefore, I gave an opportunity to Mr. T. R. Rajagopalan, learned counsel for the respondents, to draw my attention to any term in Exhibit B-2 which will lead to the inference that the transactions under Ex. B-2 was only an outright sale. Apart from referring to certain statements and words contained in the document showing that the transaction was a sale, the learned counsel was not able to draw my attention to any express words which will preclude the transactions being a mortgage by conditional sale and establish that the same is only an outright sale. As a matter of fact, with regard to the reliance on the recitals and words contained in Ex. B-2 as showing the transaction as a sale, the Supreme Court itself, in the judgment referred to already, has given an answer. The Supreme Court pointed out at page 348 as follows:

"The only weakness in this argument is that when a mortgage is by conditional sale, this is the form it has to take, because S. 58 (c) postulates that there must be an 'ostensible sale' and if a sale is ostensible it must necessarily contain all the outward indicia of a real sale. The question we are considering can only arise when the word 'sale' is used and, of course, a sale imports a transfer of title. The use of the words "absolute proprietor in our places" carries the matter no further because the essence of every sale is to make the vendee the absolute proprietor of what is sold. The question here is not whether the words purport to make the transferee an absolute proprietor, for, of course, they must under Section 58 (c), but whether that is done 'ostensibly' and whether conditions of a certain kind are attached".

Thus, the recitals contained in Ex. B-2 to show that the transaction was a sale were consistent with the sale being an ostensible one, and therefore, from those recitals, no inference can be drawn that the transaction was not intended to be a mortgage by conditional sale, but was intended to be only an outright sale.

5. It is in view of the above position it has to be found now whether there are attendant circumstances which will necessarily lead to the conclusion that the transaction under Ex. B-2 was an outright sale as pointed out by the Supreme Court. It is only for this purpose I am allowing the second appeal and remanding the matter to the lower appellate Court to find out whether there were any attendant circumstances which necessarily lead to the conclusion that the transaction under Ex. B-2 was only an outright sale.

6. Accordingly, the second appeal is allowed, the judgment and decree of the learned Subordinate Judge are set aside and the appeal, A. S. No. 232 of 1966, is itself remanded to him for fresh disposal in the light of this judgment. Since the matter has been pending for a very long time, the learned Subordinate Judge is directed to dispose of the appeal within a period of three months from this date. The appellants will be entitled to refund of the court-fee paid on the memorandum of second appeal. There will be no order as to costs in the second appeal. No leave.

Appeal allowed

AIR 1978 MADRAS 78

P. GOVINDAN NAIR, C. J., AND RAMANUJAM, J.

Doraiswami, Appellant v. Rathnammal and others, Respondents.

L. P. A. No. 20 of 1975 and C. M. P. Nos. 5067 and 5821 of 1975, D/- 28-9-1977.*

(A) Evidence Act (1 of 1872), S. 69 — Secondary evidence as to execution of will — When admissible.

Section 69 comes into play only when no attesting witness can be found. Where such a person is available, S. 69 can have no application. (Para 11)

(B) Evidence Act (1 of 1872), S. 71 — Proof of execution of document — Identification of signature of executor — Not sufficient.

The identification of signature of the testator by a person knowing him will only mean that the document contains the signature of the executor; that will not amount to proof of the execution of document by a person it purports to have been executed, as there is possibility of executor's signature having been taken on blank paper or on a misrepresentation that the document represents a different transaction. (Para 12)

(C) Evidence Act (1 of 1872), Ss. 67, 68 — Proof of execution of will — Only one attesting witness who was alive, denying execution — Effect — (Succession Act (1925), S. 63).

A will was alleged to have been made by a deceased testatrix before her death. Only one attesting witness was alive who deposed that he did not attest any will as alleged. Amongst other witnesses examined to support execution of will was sub-registrar whose evidence was to the effect that one woman purporting to be testatrix of document in question came before him and admitted correctness of contents of will and that she was in good health mentally and physically. The other witness simply identified the signature of his dead father who was one of the attesting witnesses to will. Rest of the witnesses also were not such who could depose to have seen actually the executrix signing will, on the contrary they were interested witnesses.

Held, in the circumstances, the will could not be said to have been duly executed as alleged.

(Paras 7, 8, 9, 10, 11, 12)

(D) Civil P. C. (5 of 1908), O. 41, R. 27 — Production of additional evidence — Appellant failing to call for document in trial Court — Due diligence not exercised — Held, production of additional evidence could not be justifiably allowed in appeal. (Para 16)

M. Kalyanasundaran and Md. Naimuddin, for Appellant; M. Venkatechalapathy, R. Muthukumaraswami and D. Raju, for Respondents.

RAMANUJAM, J.:— This appeal is directed against the judgment of N. S. Ramaswami J. in A. S. No. 435 of 1969 confirming the decision of the Sub Court, Coimbatore in O. S. No. 345 of 1964.

2. The suit O. S. No. 345 of 1964 has been filed by one Rathnammal, the first respondent herein, for partition and separate possession of her 1/5th share in the suit properties consisting of a house in Coimbatore and certain lands in Peria Godiveri village in Gobichettipalayam taluk. The plaintiff and defendants 2 to 4 are the children of the first defendant through his wife Annammal who died in December 1952. The suit properties belonged to Annammal. On the ground that Annammal died intestate the plaintiff has claimed her one-fifth share in the suit properties. The fourth defendant who is another daughter of Annammal also claimed her one-fifth share by paying the necessary court-fee on her written statement. During the pendency of the suit the first defendant died. Thereafter the plaintiff and the fourth defendant each claimed one-fourth share.

*(Against judgment of N. S. Ramaswami J., in Appeal No. 435 of 1969, D/- 5-11-1974).

3. Defendants 2 and 3 who are the sons of Annamal had set up a will dated 15-2-1952, as the last will and testament left by Annammal. Under that will Annammal's two daughters, namely, the plaintiff and the fourth defendant got only a sum of Rs. 1,000 each and all the other properties are to be taken by defendants 2 and 3 with a life interest to the first defendant. The plaintiff has questioned the validity, truth and genuineness of the said will and her specific case is that the will is a forged document. She also alleged that in any event the will should be taken to have been brought about by undue influence and coercion on the part of the first and third defendants.

4. The trial court on a due consideration of the entire evidence on record held that the execution of the will Exhibit B-1 has not been duly proved. In that view the trial court passed a preliminary decree for partition. The decision of the trial court was challenged in appeal before this court by the third defendant. N. S. Ramaswami J. dismissed the appeal holding that though the will has been registered there was no evidence on the basis of which one can safely conclude that Annammal herself did appear before the Sub Registrar and admitted the execution of the said document, that the evidence of D. W. 1, the Sub Registrar will merely establish that a person calling herself Annammal appeared before him and that she admitted the execution of the will, but that it is quite inconclusive to show that Annammal, the mother of the plaintiff admitted the execution of the document before the Sub Registrar, that in view of the continued illness of Annammal it is possible that some one else impersonated her before the Sub Registrar and that, therefore, it is not possible to hold that the execution of the will Ex. B-1 has been duly proved. He also held that the provisions of S. 69 of the Evidence Act have not been satisfied and D. W. 3 the only attesting witness alive who is said to have attested the document has denied the same. The said decision of the learned Judge has been challenged in this appeal by the third defendant.

5. Thus the only question that arises in this appeal is as to whether the execution of the will Ex. B-1 has been duly proved. The question as to whether Ex. B-1 is proved has to be decided in the light of Ss. 67 and 68 of the Evidence Act and S. 63 of the Indian Succession Act. Under S. 67 of the Evidence Act, if a document is alleged to be signed by any person the signature of that person must be proved to be in his handwriting and for proving such a handwriting the opinions of experts and of persons acquainted with the handwriting of that person are made relevant under Ss. 45 and 47 of the said Act. Section 68 deals with the proof of the execution of the document required by law to be attested and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. Section 63 of the Indian Succession Act provides for special requirements of attestation of wills and it says that a will shall be attested by two or more witnesses each of whom has seen the testator sign or affix his mark in the will and each of the witnesses had signed the will in the presence of the testator. We have to, therefore, consider the evidence adduced by the parties in this case in the light of the above statutory provisions.

6. In considering the question whether the will Ex. B-1 has been duly proved, certain admitted facts have to be noted. The agricultural lands covered by the suit are in Peria Kodiveri village and the first defendant was living there. Annammal has been living with him till 1951, when she left him and went over to Coimbatore, and had been living with the plaintiff since then. Annammal was suffering from cancer even before 1951 and she had been taken to Vellore and Madras for treatment by the plaintiff. The plaintiff would allege that ever since 1951, the first defendant has been living in the said village with a mistress by name Malaikari and that the will has been forged by the first defendant and that it has been created using her as a tool. This is however disputed by the first and third defendants. But the fact that Annammal continued to live with the plaintiff in Coimbatore and that she was suffering from cancer has not been disputed. As a matter of fact, the evidence of P. W. 1, in this regard has not been challenged in cross-examination though a faint allegation was made on behalf of the third defendant that Annammal went over to Coimbatore only just two months prior to her death. In fact the third defendant as D. W. 3 did not follow up the above suggestion made to the plaintiff that her mother went to

Coimbatore only two months prior to her death but gave an entirely different version that his mother came to Coimbatore about four months before her death. It is in this background we have to see whether the execution of the will Exhibit B-1 has been proved.

7. The will Ex. B-1 has been attested by 3 persons apart from the scribe, one Krishna Rao of Satyamangalam. It is said that out of the said four persons only one is alive and the rest are dead. The only attestor who is alive is one Ranga Naicken who has been examined as D. W. 3. The evidence of D. W. 3 is that he did not attest any will as claimed by the third defendant. In fact D. W. 3 is not a signatory to Ex. B-1 and Ex. B-1 contains only a mark said to have been made by D. W. 3 in token of attestation. D. W. 3 who is said to have made the mark when confronted with the mark found in Ex. B-1 denied having made any such mark. He also denied any knowledge about the document Ex. B-1. He is categorical in his statement that he was not present when Annammal is alleged to have executed the will Ex. B-1. Thus, the will Ex. B-1 cannot be said to have been proved through any of the attestors or the scribe. Therefore, the third defendant has examined the other witnesses to prove the execution of the will.

8. The other witnesses examined are D. W. 1 who was the Sub Registrar of Satyamangalam from 1951 to 1955, and who has registered the will Ex. B-1. D. W. 2, Chinna Naichi Navithan, son of the second attestor, Palani Navithan, and D. W. 5 one Arogiasami. It is the evidence of D. W. 1 the Sub Registrar, that the testatrix Annammal presented Ex. B-1 for registration on 15-2-1952, that he adopted the usual procedure in registering Ex. B-2, that he had also asked the testatrix whether the will was written according to her wishes and the particulars found in Ex. B-1 were correct and that the testatrix answered these questions in the affirmative. He has also deposed that the testatrix was in good health physically and mentally, at the time of the registration and he took her thumb impression and signature in the course of the registration of the document Ex. B-1.

9. D. W. 2 has deposed that his father Palani Navithan died in 1953, that he is the second attestor as in Ex. B-1 and that he knew his father's signature. He however admitted that he does not know personally about his father signing the will. D. W. 5 has deposed that he is acquainted with Annammal's signature and that the signature found in Exhibit B-1 was that of Annammal and that Annammal's physical condition at the relevant time was normal. He however admits that his paternal aunt is the mother-in-law of the third defendant and that he came to know about the details of the will through Annammal when negotiation took place for the 3rd defendant's marriage in May 1952. This witness also admits that he has not seen Annammal signing Ex. B-1. He further stated that he could recognise the signature of Annammal, as he had received two or three letters from Annammal in connection with the marriage of the third defendant. The question is whether the evidence of D. Ws. 1, 2 and 5 even if accepted is sufficient to prove the execution of the will Ex. B-1.

10. No doubt, D. W. 1, the Sub Registrar has deposed that one person called Annammal appeared before him and presented Ex. B-1 for registration and that he followed the usual procedure in registering the document. D. W. 1 does not know Annammal personally. Therefore his evidence can only prove that one person styling herself as Annammal appeared before him and presented the document for registration and answered his questions and put her signature and thumb impression in the document Exhibit B-1 in his presence. This evidence is quite insufficient to show that Annammal has in fact presented the document for registration. There is absolutely no evidence that Annammal did go to the Sub Registrar's Office for registering Ex. B-1 or that the person who appeared before the Sub Registrar and presented the document is Annammal herself. Since there is a possibility of someone else impersonating Annammal, the third defendant should prove conclusively that Annammal was the person who appeared before the Sub Registrar and presented the document for registration, especially when a suggestion has been made by the plaintiff that one Malaikari, the mistress of the first defendant, was made to impersonate Annammal before the Sub Registrar. Thus the evidence of D. W. 1, the Sub Registrar is quite inadequate to prove that Annammal herself appeared before him and presented the document for registration.

11. D. W. 2 merely identifies the signature of Palani Navithan found in Ex. B-1 as that of his father. The mere fact that the signature of Palani Navithan is proved, in our opinion, is not sufficient to prove the due execution of the will. The evidence of this witness is relied on for proving the signature of one of the attesting witnesses and thus enable the third defendant to adduce secondary evidence regarding the due execution of the will. The evidence of D. W. 2 will be relevant only for purposes of S. 69 of the Evidence Act. Section 69 will come into play only when no attesting witness can be found. In this case, as already stated, an attesting witness D. W. 4 has been examined and he has denied his attestation of the document. Therefore S. 69 can have no application. The evidence of D. W. 2, therefore, even if accepted, will not help the third defendant.

12. The only attesting witness examined before the Court has denied his attestation and any knowledge of the execution of the document by the testatrix. The execution of Ex. B-1 may, therefore, be proved by other evidence in view S. 71 of the Evidence Act. It is in this connection the evidence of D. W. 5 becomes material. He claims that he has known the signature of Annammal as she had written two or three letters to him in connection with the third defendant's marriage. The said letters have not been produced. Admittedly the third defendant was married in May 1952. But as already noticed, from 1951 onwards Annammal has been living in Coimbatore (Sowripalayam). D. W. 5 also is a resident of Sowripalayam, Coimbatore. When D. W. 5 and Annammal live in the same place, (Sowripalayam) it is not possible that Annammal had been writing letters to him regarding the marriage of his son, the third defendant. Admittedly D. W. 5 is a person interested in the third defendant inasmuch as the third defendant has married his paternal aunt's daughter and he was instrumental in bringing about the marriage. In these circumstances, it is not possible to accept the version of D. W. 5 that he can identify the signature of Annamal in the disputed document Ex. B-1. Even assuming that the signature found in Exhibit B-1 is that of Annammal, it cannot automatically follow that Annammal had executed the will Ex. B-1. The identification of the signature of Annammal in the document will only mean that the document contains the signature of Annammal. That will not amount to proof of the execution of the document, as there is a possibility of Annammal's signature having been taken on blank paper or on a misrepresentation that the document represents a different transaction. We have to therefore agree with the view of N. S. Ramaswami J. that the due execution of the will Exhibit B-1 has not been proved in this case.

13. Since the learned Judge in his judgment had commented upon the non-production of the mortgage deed said to have been executed by Annammal for comparison of her signature found in the will with that in the mortgage deed, the appellant has chosen to file an application for reception of additional evidence in this Letters Patent Appeal. But we are of the view that in view of the provisions of O. 41, R. 27 it is not possible to permit the appellant to adduce additional evidence. The appellant could have called for the documents which are now sought to be marked as additional evidence given at the time of the trial of the suit by exercising due diligence and there is no reason as to why these documents could not have been called for at the stage of the trial. We do not, therefore, see any justification for permitting the appellant to mark the documents as called for in C. M. P. Nos. 5067 of 1975, nor are we satisfied that there is any justification for sending the documents to an expert for comparing the alleged thumb impression and signature of Annammal found in the documents with the thumb impression and signature found in the will Ex. B-1. In the circumstances the appeal fails and is dismissed with costs. The petition for the appointment of receiver is dismissed.

Appeal dismissed.

AIR 1978 MADRAS 81

P. GOVINDAN NAIR, C. J. AND VARADARAJAN, J.

Raghavaveera Sons and others, Appellants v. Mrs. Padmavathi, Respondent.

O. S. Appeal No. 50 of 1977, D/- 5-9-1977.*

*(Against judgment of V. Ramaswami J. in Appln. No. 1176 of 1977).

KU/KU/E177/77/AS/VBB

(A) Partnership Act (9 of 1932), Section 19 (1) — Implied authority of partner — Partner of a non-trading firm has no implied authority to bind the firm by his individual act.

In law, every one of the partners in a mercantile firm of ordinary trading partnership is liable upon a bill drawn by a partner in the recognised trading name of the firm for a transaction incidental to the business of the firm, although his name does not appear on the face of the instrument and although he be a sleeping or a secret partner. In order to take a case out of this principle of general law, it must be shown that the holder of the bill knew, at the time he received it, that the transaction was the private affair of a single person. In the case of partnerships which are not of a mercantile character namely, non-trading firms, there is no implied authority of a partner to bind the firm by his individual act. The partnership, constituted for the purpose of carrying on business as engineering contractors is different from a commercial or a trading firm. Whether any of the partners has or should have the authority to bind the firm by his individual act is a question of fact which has to be decided on the materials to be made available to the Court. "Lindley on Partnership" 13th Edition, pages 168 to 170, Referred. (Para 9)

(B) Madras High Court (Original Side) Rules, O. 7, R. 6 (1) — Civil P. C. (1908), O. 37, R. 3 — Suit on promissory note — Leave to defend — Defendant raising triable issues, held entitled to leave — Appln. No. 1176 of 1977 (Mad), Reversed; AIR 1977 SC 577 and AIR 1958 SC 321, Referred. (Para 13)

Cases Referred: Chronological	Paras
AIR 1977 SC 577	10
AIR 1965 SC 1698 : 68 Bom LR 36	12
AIR 1958 SC 321 : 1958 SCR 1211	12
AIR 1950 Mad 226 : ILR (1950) Mad 251	12
(1945) 49 Cal WN 246	10
AIR 1935 Mad 43	12
AIR 1931 Mad 825	12
AIR 1924 Bom 260 : ILR 48 Bom 176	11
(1912) 1 KB 364 : 82 LJ KB 512	11

I. Subramanian and K. C. Ramamurthy, for Appellants; V. R. Bhikshesweran and K. Raghunathan, for Respondent.

VARADARAJAN, J.:— This appeal is against the order of V. Ramaswami J. dismissing Appln. No. 1176 of 1977 which had been filed for setting aside the Master's order dated 7-2-1977 made in Appln. No. 3826 of 1976 in C. S. 152 of 1976.

2. C. S. 152 of 1976 had been filed for recovery of a sum of Rs. 50,000 with subsequent interest at 12 per cent per annum, from the date of the plaint on the basis of the promissory note dated 27-7-1973, alleged to have been executed by S. R. Swami, the second defendant, a partner of the first defendant-firm, for and on behalf of the first defendant-firm of which defendants 3 to 6 also are said to be partners. It was alleged in the plaint that defendants 1 and 3 to 6 (the appellants) are not only well aware of the lending of the amount by the respondent (plaintiff) but were also promising to pay the amount due under the promissory note before they changed their attitude later and chose to make all sorts of false and frivolous allegations. The suit was filed as an under Chapter suit under the provisions of O. VII, R. 1 of the Original Side Rules of this Court.

3. The appellants filed Appln. No. 3826 of 1976 before the Master under O. 37, R. 3, C. P. C. and under O. VII, R. 6 (1) of the Original Side Rules of this court, for leave to defend the suit. The allegation made in the third defendant's affidavit filed in support of that application for grant of leave was that though the second defendant was in charge of the effective running of the affairs of the firm' and 'looking after the affairs of the firm, he was never empowered either explicitly or impliedly to borrow any amount singly and bind the firm for the unauthorised borrowing'. The further allegations made in that affidavit are—

"A reading of the Deed of Partnership clearly shows that he was not at all authorised to borrow any amounts on behalf of the firm. Suffice it to say, the firm or the defendants 3 to 6 are not liable for the alleged borrowing by the second defendant from the plaintiff. If at all the second defendant had borrowed any amount from the plaintiff it could only be in his individual capacity and hence cannot bind the firm or the defendants 3 to 6. I further submit that I have reasons to believe that the consideration for the alleged borrowing was not utilised for the benefits of the firm and I have reasons to believe that the consideration, if at all any, received by the second defendant from the plaintiff, was appropriated by the second defendant."

4. The respondent opposed the application for grant of leave to defend, contending inter alia that she was not aware of the recitals in the partnership deed and was not, in any event, concerned with the same 'as the amount borrowed under the suit promissory note was utilised by the first defendant-firm for its own benefit and in any event the same was ratified by the first defendant-firm by issuing account payee cheques towards payment of interest.'

5. The Master took note of the allegation made in the reply notice dated 17-5-1976 sent by the appellants that the second defendant had misused his position both as a partner and as a power-of-attorney agent and executed a number of promissory notes in favour of third parties, purporting to do so for and on behalf of the first defendant-firm. He observed that there was no whisper in that reply notice that the second defendant was not authorised explicitly or impliedly to borrow any amount for and on behalf of the firm and that the contention that the second defendant had no implied authority to borrow any amount for and on behalf of the firm had been trotted out only in the application for grant of leave, and he dismissed the application holding that no triable issue arises.

6. The appellants took the matter before V. Ramaswami J. on appeal in Appln. No. 1176 of 1977. The learned Judge dismissed the application observing—

"The contention of the applicants was that the second defendant was not empowered expressly or impliedly to borrow any money on behalf of the firm. The applicants did not produce any partnership deed before the Master showing any restriction on the authority of the second defendant in borrowing money. As a partner the second defendant is entitled to borrow money on behalf of the firm and that is authorised under the provisions of the Partnership Act. The only provision which the learned counsel for the applicants would rely on in support of his contention that the second defendant had no authority to borrow under the Partnership Act is S. 19 (2) (e) of the Act. Under that provision it is stated that, in the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to admit any liability in a suit or proceeding against the firm. I am wholly at a loss to find what this clause has to do with the defence taken by the applicants. The plaintiff is not suing the firm on the basis of any admission of liability by the second defendant. The suit is filed on the basis of the promissory note executed by the second defendant on behalf of the firm. The second defendant, as already stated, is entitled to execute a promissory note unless there is a prohibition with regard to his power in the deed of partnership. As already stated, the applicant did not produce the document. Nor any application is filed even on this day to receive additional documents, any partnership deed, if there is one".

7. Order VII of the Original Side Rules of this court relates to special procedure in respect of certain suits. In any case in which the plaint and summons are in the form prescribed in that Order, the defendant shall not defend the suit unless he obtains leave to defend the suit from the Master as provided in R. 5 of the Order. Under R. 6 (1) an application for leave to defend the suit has to be made to the Master, supported by such evidence by way of affidavit as the defendant desires to place before the court. Order 37, C. P. C. provided summary procedure for the disposal of certain class of cases. Rule 3 of that Order lays down that in a suit to which that Order applies, the plaintiff should, together with the summons under R. 2, serve on the defendant a copy of the plaint and annexures thereto and the defendant may, at any time within ten days of such service, enter an appearance either in person or by pleader. Sub-rule (5) of R. 3 lays down that the defendant may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the court or the Judge to be just. The proviso to that sub-rule lays down that leave to defend shall not be refused unless the court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious.

8. If the defendant does not appear on proof of service of summons on him,

or the leave to defend is not granted, a decree for the amount with costs has to be passed in favour of the plaintiff under R. 3 of O. VII of the Original Side Rules.

9. In law, every one of the partners in a mercantile firm of ordinary trading partnership is liable upon a bill drawn by a partner in the recognised trading name of the firm for a transaction incidental to the business of the firm, although his name does not appear on the face of the instrument and although he be a sleeping or a secret partner. In order to take a case out of this principle of general law, it must be shown that the holder of the bill knew, at the time he received it, that the transaction was the private affair of a single person. In the case of partnerships which are not of a mercantile character namely, non-trading firms, there is no implied authority of a partner to bind the firm by his individual act. The partnership in this case had been constituted for the purpose of carrying on business as engineering contractors and is different from a commercial or a trading firm. Therefore, we are of the opinion that the observation of V. Ramaswami J. in the order under appeal that as a partner the second defendant was entitled to borrow money on behalf of the firm and that he is authorised under the provisions of the Partnership Act so to do and that he is entitled to execute a promissory note unless there is a prohibition in regard to his power in the deed of partnership, is too wide. No doubt, S. 19 (1) of the Partnership Act lays down that subject to the provisions of S. 22 of that Act, the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm. This authority of a partner to bind the firm conferred by that section is called his implied authority. We find the following passages in 'Lindley on Partnership' 13th Edition pages 168 to 170—

"Every member of an ordinary trading partnership had implied power to bind the firm by drawing, accepting or endorsing bills of exchange, or by making and endorsing promissory notes in its name and for the purpose of the firm in the ordinary course of business, but not otherwise ... ... With respect to partnerships which are not trading partnerships, the question whether one partner has any implied authority to bind his co-partners by putting the name of the firm to a negotiable instrument, depends upon the nature of the business of the partnership. In the absence of evidence showing usage, the power had been denied to one of several mining adventures, quarry workers, farmers, solicitors, and auctioneers ... ... If, however, a member of a non-mercantile firm concurs in drawing, or authorises his partner to draw, a bill in the name of the firm, he impliedly authorises its endorsement in the same name for the purpose for which it was drawn".

As already stated, the partnership in the present case had been constituted for carrying on business as engineering contractors. Where the nature of the business carried on by the firm is such that any of the partners has or should have the authority to bind the firm by his individual act is a question of fact which has to be decided on the materials to be made available to the court.

10. The learned counsel for the respondent invited our attention to the decision of the Supreme Court in M/s. Mechalec Engineers and Manufacturers v. M/s. Basic Equipment Corporation, AIR 1977 SC 577, where the principles applicable to cases covered by O. 37, Civil P. C. as stated by Das J. in Sm. Kiranmoyee Dassi v. Dr. J. Chatterjee, (1945) 49 Cal WN 246. 253, have been extracted. They are—

"(a) If the defendant satisfies the court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence, the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he had a defence, yet shows such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defence to the plaintiffs claim the plaintiff is not entitled to sign judgment and the defendant is entitled to leave to defend but in such a case the court may in its discretion impose conditions as to

the time or mode of trial but not as to payment into court or furnishing security.

(d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence."

11. The learned counsel for the respondent relied upon the decision in Saremal Punamchand v. Kapurchand Puramchand. ILR 48 Bom 176 : (AIR 1924 Bom 260), in which the defendants 1 and 2 had entered into a partnership for carrying on the business of buying and selling copper and brass utensils in March 1920. On 23-5-1930, defendant 1 borrowed Rs. 6,000 from the plaintiff on promissory note passed by him in the name of the firm for purposes of the business. The partnership came to an end on the 28th of that month (March 1920) and in April 1923, the plaintiff sued both the defendants on the promissory notes. It has been held that the partnership in question having been one of a commercial nature, defendant 1 had an implied authority to borrow money for the firm, and that, therefore, defendant 2 was also liable for the loan. The firm in that case was a trading firm. The other decision relied upon by the learned counsel for the respondents is of the Court of Appeal in Reversion Fund and Insurance Co. Ltd. v. Maison Cosway Ltd., 1912-1 KB 364. In that case the Managing director of the defendant-company had been prohibited by the terms of his appointment from borrowing money on behalf of the company, unless specially authorised to do so by the Company. However, he borrowed money on behalf of the company from the plaintiff-company without authority from the defendant-company. But the money was applied by him in discharging existing legal debts of the defendant-company. The plaintiff-company knew through its officers, when the advance was made, that the Managing director of the company had no authority to borrow on its behalf. However, it has been held by Bucklay L. J. and Kennedy L. J., Vougham Williams L. J. dissenting, that the plaintiff-company was entitled to recover from the defendant-company the amount borrowed, notwithstanding its knowledge as before mentioned. The appellants have alleged in the third defendant's affidavit filed in support of the application for grant of leave that the consideration for the alleged borrowing by the second defendant was not utilised for the benefit of the firm. No doubt the respondent had contended in the counter affidavit of her son that the amount borrowed under the suit promissory note was utilised by the first defendant firm for its own benefits, and in any event, it was ratified by the first defendant firm by issuing account payee cheques towards payment of interest. Therefore, the question whether the money borrowed by the second defendant under the promissory note was utilised for the purpose of the firm had to be decided on the evidence to be made available to the court during the trial. In these circumstances, we are of the opinion that the aforesaid two decisions relied upon by the learned counsel for the respondents do not help the respondent.

12. The other decision relied upon by the learned counsel for the respondent is of Curgenven J. in Ramanathan Chettiar v. Annamalai Chettiar, AIR 1931 Mad 825 where the learned Judge has observed—

"The only reasonable way of reading O. 7, R. 14 with O. 11, R. 15. is to hold that the expression 'referred to' is equivalent to 'entered in the list'. It seems to me that for this purpose the list must be deemed to be part of the plaint, as for instance would be a schedule of property".

While conceding that his contention is not that any evidence must be taken into consideration for deciding the question whether the appellants are entitled to grant of leave, the learned counsel for the respondents sought to rely upon the notice and reply notice exchanged between the parties to substantiate his contention that money borrowed had been utilised for the business of the firm. We are of the opinion that it is not open to the respondent to request

the court at this stage to look into any evidence at the stage of considering the question whether the appellants are entitled to grant of leave to defend the suit before ever there could be any trial of the suit. The Supreme Court has observed in Santosh Kumar v. Bhai Mool Singh, 1958 SCR 1211 : (AIR 1958 SC 321) thus (at p. 324 of AIR)—

"It is always undesirable, and indeed impossible to lay down hard and fast rules in matters that affect discretion. But it is necessary to understand and the reason for a special procedure of this kind in order that the discretion may be properly exercised. The object is explained in Kesavan v. South Indian Bank Ltd., ILR (1950) Mad 251 : (AIR 1950 Mad 226), and is examined in greater detail in Sundaram Chettiar v. Valliammal (AIR 1935 Mad 43) to which we have just referred. Taken by and large, the object is to see that the defendant does not unnecessarily prolong the litigation and prevent the plaintiff from obtaining an early decree by raising untenable and frivolous defences in a class of cases where speedy decisions are desirable in the interests of trade and commerce. In general, therefore, the test is to see whether the defence raises a real issue and not a sham one, in the sense that, if the facts alleged by the defendant are established, there would be a good, or even a plausible defence on those facts.

Now, what is the position here? The defendants admitted execution of the cheque but pleaded that it was only given as collateral security for the price of goods, which the plaintiff supplied to the defendants. They said that those goods were paid for by cash payments made from time to time and by other cheques and that therefore the cheque in suit had served its end and should now be returned. They set out the exact dates on which, according to them, the payments had been made and gave the numbers of the cheques.

This at once raised an issue of fact, the truth and good faith of which could only be tested by going into the evidence and, as we have pointed out, the learned trial Judge held that this defence did raise a triable issue. But he held that it was not enough for the defendants to back up their assertions with an affidavit; they should also have produced writings and documents which they said were in their possession and which they asserted would prove that the cheques and payments referred to in their defence were given in payment of the cheque in suit; and he said "In the absence of those documents, the defence of the defendants seems to be vague consisting of indefinite assertions... ... ..." This is surprising conclusion. The facts given in the affidavit are clear and precise. the defence could barely have been clear. We find it difficult to see how a defence that, on the face of it, is clear becomes vague simply because the evidence by which it is to be proved is not brought on file at the time the defence is put in.

The learned Judge has failed to see that the stage of proof can only come after the defendant has been allowed to enter an appearance and defend the suit, and that the nature of the defence has to be determined at the time when the affidavit is put in. At that stage all that the court has to determine is whether 'if the facts alleged by the defendant are duly proved' they will afford a good, or even a plausible, answer to the plaintiff's claim. Once the court is satisfied about that, leave cannot be withheld and no question about imposing conditions can arise; and once leave is granted, the normal procedure of a suit, so far as evidence and proof go, obtains".

Even in the subsequent decision of the Supreme Court in Milkhiram (India) Pvt. Ltd. v. Chamanlal Bros., 68 Bom LR 36 : (AIR 1965 SC 1698), where reference has been made to the earlier decision in Santosh Kumar v. Bhai Mool Singh, 1958 SCR 1211 : (AIR 1958 SC 321), the Supreme Court has observed (at p. 1702 of AIR)—

"The trial Judge being already satisfied that the defence raised a triable issue was not justified in imposing a condition to the effect that the defendant must deposit security because he had not adduced any documentary evidence in support of the defence. The stage for evidence had not been reached. Whether the defence raises a triable issue or not has to be ascertained by the court from the pleadings before it and the affidavits of parties and it is not open to it to call for evidence at that stage".

13. In these circumstances, we do not agree with the learned counsel for the respondent that the notices which passed between the parties and had been produced by the respondent along with the

plaint, should be looked into to ascertain whether the defence raised is bona fide. For the same reason we think, that V. Ramaswami J. erred in drawing an inference against the appellants as regards their plea that reading of the deed of partnership will clearly show that the second defendant was not at all authorised to borrow any amount on behalf of the firm, from the mere fact that the appellants have neither produced the partnership deed nor made any application, even by the date of his order, to receive as additional document any partnership deed. We find, on the pleadings and the affidavit of the third defendant filed in support of the application, that triable issues arise and that the appellants are entitled to the leave.

14. The appeal is accordingly allowed with costs and the leave is granted. The sum of Rs. 15.000 directed to be deposited into court by the appellants by 7th Sept. 1977, will continue to be in deposit and will abide the result of the suit.

Appeal allowed.

AIR 1978 MADRAS 87

P. GOVINDAN NAIR, C. J. AND VARADARAJAN, J.

T. C. Peter, Petitioner v. The Union Public Service Commission by its Secretary, New Delhi, Respondent.

W. A. No. 140 of 1977. D/- 10-8-1977.*

Constitution of India, Art. 226 — Natural justice — Principles of — Requirements — Use of unfair means at an examination — Enquiry of — Nature of enquiry is quasi judicial — Procedure to be observed at such enquiries stated — Order passed without observing principles of natural justice vitiates the enquiry. AIR 1966 SC 875; AIR 1969 SC 198 and AIR 1962 SC 1110, Applied. W. P. No. 576/77 dated 29-3-1977 (Mad), Reversed. (Paras 7, 8)

Anno. AIR's Commentary Constitution of India (2nd Edn.), Art. 226, Note 5 (o).

Cases Referred: Chronological	Paras
AIR 1973 All 537	9
AIR 1969 SC 198	5
AIR 1966 SC 875	3
AIR 1962 SC 1110	6
(1960) 1 All ER 631 : (1960) 1 WLR 223	
University of Ceylon v. Fernando	5
(1958) 2 All ER 579 : (1958) 1 WLR 762	5, 7
1915 AC 120 : 84 LJ KB 72, Local Govt. Board v. Arlidge	6

*(Against order of Mohan J. in W. P. No. 576 of 1977, D/- 29-3-1977).

P. N. George, for Petitioner; P. Chengalvaroyan, for Respondent.

P. GOVINDAN NAIR, C. J.:— This appeal raises, if we may so term it, a vexed question, which had arisen several times before courts, including the Supreme Court. The question is, when action is taken against a student-examinee, for alleged malpractice in the examination hall, what is the nature of the enquiry that is contemplated by the authority entitled to punish the student by either withholding his result of the examination for which he sat or by withholding his result of the examination as well as by debarring him from future examinations.

2. In the case before us the appellant, an engineering graduate, sat for the Engineering Service examination. On 4-8-1976, one of the days on which the examination was held, the invigilator in charge of the row in which the appellant sat, suspected that the appellant was using unauthorised manuscripts, hidden under the handkerchief held by him and so questioned the appellant. It is the case of the invigilator that before he could get at the manuscripts the appellant managed to transfer the manuscript into his mouth and went out of the hall, and, though he returned to the examination hall, he had by that time swallowed the papers. The appellant was asked about this incident and he denied what the invigilator stated as having taken place. Nevertheless the invigilator sent up a report about the incident as indicated above. There was a further report from another invigilator and also by a supervisor in the examination hall. The appellant was informed of the alleged malpractice by a show cause notice and he gave his reply totally denying the incident. The show cause notice and the reply, as well as the statements of the invigilators and the supervisor were sent to the Union Public Service Commission. In his reply to the show cause notice the appellant had stated that the points made by him "may be strictly considered at the time of enquiry, if any, before arriving at any decision."

3. Learned Government Pleader, who appeared, made available to us the file

pertaining to the action taken against the appellant. From page 40 of the file, we find the decision of the Union Public Service Commission stated in these terms—

"Agreed business for mentioned in Commission's meeting to be held on .... Engineering Services Examination, 1976. Shri T. C. Peter (Roll No. 1252)— Used unfair means and misbehaved in the examination hall. Candidate over 21 years of age. Decided to debar him for 10 years from Commission's examination and selections and to cancel his candidature for the current examination".

Counsel on behalf of the appellant contended that in matters of this nature the action to be taken must result from a quasi-judicial enquiry and that therefore the principles of natural justice should be followed. According to the appellant the authority had not acted in a quasi-judicial manner, not only because no opportunity was granted to the appellant, but also because the decision which we have extracted in full did not indicate that the authority had applied its mind to the questions involved before taking the drastic action of not only cancelling his candidature for the examination for which the appellant sat but also of debarring the appellant for a long period of ten years, which would practically ruin his entire career in regard to seeking betterment of his lot by sitting for competitive examinations such as that applicable to Engineering Services Examination.

4. The questions arising in such cases have always been difficult ones to decide, and we cannot do better than quote from a decision of the Supreme Court in Board of High School and Intermediate Education, U. P. v. Bagleshwar, AIR 1966 SC 875, where Gajendragadkar J. (as he then was) observed thus—

"In dealing with writ petitions against the orders of the Universities or Education Boards, cancelling the examination results of candidates who were declared to have been passed, it is necessary to bear in mind that educational institutions like the Universities or the Boards set up Enquiry Committees to deal with the problem posed by the adoption of unfair means by candidates and normally it is within the jurisdiction of such domestic tribunals to decide all relevant questions in the light of the evidence adduced before them. In the matter of the adoption of unfair means, direct evidence may sometimes be available, but cases may arise where direct evidence is not available and the question will have to be considered in the light of probabilities and circumstantial evidence. This problem which educational institutions have to face from time to time is a serious problem and unless there is justification to do so, courts should be slow to interfere with the decisions of domestic tribunals appointed by educational bodies like the Universities. In dealing with the validity of the impugned orders passed by the Universities under Article 226, the High Court is not sitting in appeal over the decision in question; its jurisdiction is limited and, though it is true that, if the impugned order is not supported by any evidence at all, the High Court would be justified to quash that order. But the conclusion that the impugned order is not supported by any evidence must be reached after considering the question as to whether probabilities and circumstantial evidence do not justify the said conclusion. Enquiries held by domestic tribunals in such cases must, no doubt, be fair and students against whom charges are framed must be given adequate opportunities to defend themselves and in holding such enquiries the tribunals must scrupulously follow rules of natural justice; but it would not be reasonable to import into these enquiries all considerations which govern criminal trials in ordinary courts of law."

5. A few years later, Hegde J. dealing with a similar case in Suresh Kosey v. University of Kerala, AIR 1969 SC 198, relied on the well-known decision in Byrne v. Kinematograph Renters Society Ltd., 1958-2 All ER 579 where Lord Harman J. observed—

"What then are the requirements of natural justice in a case of this kind? First I think that the person accused should know the nature of the accusation made; secondly that he should be given an opportunity to state his case; and thirdly, of course, that the tribunal should act in good faith. I do not think that there really is anything more."

After quoting the above passage in paragraph 11 of the decision referred to above, the learned Judge (Hegde J.) remarked—

"The decision of the Judicial Committee in University of Ceylon v. Fernando, 1960-1 All ER 631, appears to go much further than what was laid down in the aforementioned cases".

The learned Judge, however, did not consider it necessary on the facts of that case to decide whether the rule enunciated in Byrne v. Kinematograph Renters Society Ltd., 1958-2 All ER 579, or the rule in University of Ceylon v. Fernando, 1960-1 All ER 631, should govern matters of this type. No other decision of the Supreme Court laying down emphatically what is the particular form of procedure to be followed in order that the requirements of natural justice may be said to have been satisfied has been brought to our notice.

6. In Board of High School and Intermediate Education U. P. v. Ghanshyamdas Gupta, AIR 1962 SC 1110 Wanchoo J. (as he then was), made the following observations (para. 12):—

"As to the manner in which it should give an opportunity to the examinee concerned to be heard, that is a matter which can be provided by Regulations or bye laws, if necessary. As was pointed out in Local Government Board v. Arlidge, 1915 AC 120, all that is required is that the other party should have an opportunity of adequately presenting his case. But what the procedure should be in detail will depend on the nature of the Tribunal. There is no doubt that many of the powers of the Committee under Chapter VI are of administrative nature; but where quasi-judicial duties are entrusted to an administrative body like this, it becomes a quasi-judicial body for performing these duties and it can prescribe its own procedure so long as the principles of natural justice are followed and adequate opportunity of presenting his case is given to the examinee".

7. The decisions cited at the Bar clearly establish that enquiries of this type are definitely of a quasi-judicial nature and that therefore the principles of natural justice would be attracted. But what exactly is the procedure to be followed would depend upon the rules laid down, if there are rules, regarding the procedure, and, if there are no rules, it must depend upon what has been decided by the Tribunal to follow, provided what has been decided by the Tribunal satisfied the essential requirements of law. The minimum certainly required is what has been laid down in Byrne's case, 1958-2 All ER 579, which we have quoted above. Circumstances will, however, vary from case to case depending upon the facts of each case, and it may often be necessary to examine witnesses or to allow the examinee to cross-examine the witnesses, who have given statements against him or have deposed against him. This is a matter in which the authority empowered to take action against a student, which would have very far-reaching consequences of very prejudicially affecting his future, should take every care to follow the procedure that would be free from blemish, guaranteeing to the examinee the freedom to state his case fully and also to disprove what is stated against him if he seeks permission to do so.

8. We do notice that in this case the invigilator has clearly stated about the action of the student. The statements of the other invigilator and the Supervisor do not support fully or to a substantial extent the statements made by the particular invigilator. The appellant has denied the whole incident and has given a totally different version. In these circumstances, we are certainly entitled to be satisfied that the authority, with the power to punish the student, has applied its mind to the relevant facts of the case before taking a decision, especially a decision of such a drastic nature as the one in this case. We have extracted the minutes of the meeting which merely states the decision. Whether the authority had applied its mind to the solitary statement of the invigilator, which has been denied by the appellant, and chose, notwithstanding the denial, to rely on his statement, and whether, in the circumstances of the case, a further probe or scrutiny or even an enquiry was necessary in the interests of justice and to satisfy the requirements of the principles of natural justice, we are not able to discern, in view of the manner in which the matter has been dealt with and apparently closed.

This we consider is unsatisfactory, and the decision taken in this manner cannot stand. Principles of natural justice will not exhaust themselves merely by granting an opportunity to the person charged to state his case. Judicial process continues till the end and judicial mind must be applied to the relevant facts in a judicial manner, and we must be able to discern from the records made available to us that this has been done. Then only principles of natural justice will be satisfied. We are not so satisfied in this case and therefore we set aside the decision arrived at by the respondent (Union Public Service Commission).

9. We need hardly state that, whether the matter should be pursued further notwithstanding the fact that the appellant has lost one examination and one year, or perhaps two examinations, because the second examination has already started this month, or whether the appellant has been sufficiently punished by this action and therefore need not be proceeded with against him further, excepting to limit to punishment to the debarring for two years if there is justification for it is a matter for the Union Public Service Commission to consider in the light of the decisions to which we have referred above, and also to the decision in Mushtaq Hussain v. Secy., Board of High School and Intermediate, Education U. P., AIR 1973 All 537. We allow the appeal on the above terms with costs to the appellant. Counsel's fee Rs. 250.

Appeal allowed.

AIR 1978 MADRAS 90

P. GOVINDAN NAIR, C. J. AND VARADARAJAN, J.

Vincent Antony Jabamalai Fernando and others, Appellants v. S. A. Thomas Fernando and others, Respondents.

Second Appeal No. 2085 of 1975, D/- 4-8-1977.*

Partnership Act (9 of 1932), S. 48 — Dissolved partnership — Suit for accounts — Interest when allowable from date of plaint.

No interest from date of plaint is allowable where the suit is filed for dissolution of a going concern — Where, however, the suit is for settlement of accounts of a dissolved firm interest can be allowed from the date of plaint. AIR 1942 PC 61, Foll.; AIR 1930 PC 185, Dist.

(Paras 4, 5)

Cases Referred: Chronological Paras

AIR 1942 PC 61 4, 5

AIR 1930 PC 185 : 59 Mad LJ 121 4

T. Raghavan and T. K. Seshadri, for Appellants; V. Shanmugham and Riaz Ali Khan, for Respondents.

P. GOVINDAN NAIR, C. J.:— This is an appeal by defendants 1 to 5 in a suit instituted for a declaration that the firm of which the plaintiff as well as the appellants were partners stood dissolved with effect from 31-3-1963, for rendition of accounts and for a decree in favour of the plaintiff for the sum found due from the defendants as his share in the assets and profits of the firm. A preliminary decree was passed in the year 1970, as prayed for and a final decree has been passed by the trial court for a sum of Rs. 63,727-73, as the amount due to the plaintiff and the court further granted interest on that amount at 6 per cent from the date of the plaint. On appeal, this decree has been affirmed by the lower appellate court.

2. In this second appeal before us, counsel for the appellants has raised three points, namely—(1) having allowed a sum of Rs. 23,727-73 as the share due to the plaintiff as representing the capital assets of the firm, a further sum of Rs. 40,000 as representing the share capital contributed by the plaintiff should not have been allowed; (2) no interest should have been awarded on the amount fixed from the date of plaint, and (3) the decision to treat Rs. 5,31,681-88 as representing the assets of the firm is not sustainable.

3. The first point cannot be sustained. After having taken the total of the assets which included the sum of Rs. 1,40,000 contributed by the partners, that amount was deducted as a liability of the firm and it was only the balance that was taken into account for determining the value of the capital assets of the firm. The share of the plaintiff in that regard came to Rs. 23,727-73. Apart from that, the plaintiff is certainly entitled to the contribution that he made to the firm towards the capital, no part of it having been included in the sum of Rupees 23,727-73. It is not disputed that the share capital contributed by the plaintiff was Rs. 40,000 and the assets of the firm were sufficient to direct the payment of this amount. We see no merit in this contention.

4. Regarding the question of interest, counsel for the appellants relied on the decision of the Privy Council reported in Suleman v. Abdul Latif, 59 Mad LJ 121 : (AIR 1930 PC 185). The observations in that decision seemingly support the appellant's contention. The general remarks in the judgment stated that no interest should be awarded in a suit for dissolution till the person suing for dissolution gets the amount due determined by the decree passed in the case. Their

*(Against decree of Sub. J., Tuticorin in A. S. No. 117 of 1974).

Lordships, therefore, granted interest only from the date of the decree. This decision came up for consideration in a later decision reported in Hakim Rai v. Gangaram AIR 1942 PC 61. The last paragraph therein referred to the earlier decision of the Privy Council and dealt with the same question of interest. The earlier decision related to a suit that was filed for dissolution of a going concern. The latter one was with reference to a suit in regard to a firm that had been dissolved, the suit having been filed two years after the date of the dissolution. Their Lordships ruled therein that the principle of the earlier decision will apply only to cases where the suit has been filed for dissolution of a going concern.

5. The case of the plaintiff in the suit that was instituted in 1964 was that it must be declared that the firm got dissolved on 31-3-1963, and one of the prayers in the plaint was that a declaration be made to that effect. The plaintiff succeeded and the relief was granted and the preliminary decree passed in 1970 declared that the firm got dissolved on 31-3-1963. The suit, therefore, was clearly a suit instituted, after the firm got dissolved, for a share due to the plaintiff and the principle of the decision in Hakim Rai v. Gangaram, AIR 1942 PC 61, squarely applied. The interest awarded was not even from 31-3-1963, but only from the date of suit which was in 1964. The rate of 6 per cent interest does not appear to be high. We see no merit in this contention either.

6. The last of the contentions arose out of the following facts— The firm had business with another firm in Colombo called the 'Morning Star'. The business of that firm was purchased by the firm in question on 31-3-1969 (sic) (31-3-1959). The cash consideration paid for that transaction was Rs. 11,000. Just before the purchase of that firm, the amount that was due from that firm to the firm in question was Rs. 3,72,473-51. A copy of the sale deed has been made available to us. There is no mention about what happened to the amount on the purchase of the business of the firm 'Morning Star' by the present firm for Rs. 11,000. As prudent businessmen and taking ordinary human nature into account and particularly in the absence of any pleadings to the contrary, we have to assume that the firm thought that the assets of the 'Morning Star' firm will cover the amount that firm owed to the suit firm, as well as Rs. 11,000 with duration passed when the purchase was made. After the purchase, it appears that the business in Colombo was continued for sometime until it was wound up on 31-3-1961. As on 31-3-1961, in the account of the firm, it is stated: "Sundry debtors; Morning Star Co., Rs. 5,31,682-88." Counsel for appellants contended that this is an amount of liability which the firm 'Morning Star' owed to the suit firm and that this amount was irrecoverable and should not have been taken into account as has been done by the Commissioner to fix the value of the assets of the firm. In the statement filed by the plaintiff before the Commissioner, it was claimed by the plaintiff that by the closure of firm's business in Colombo, a sum of Rs. 14,74,672 was realised by the firm. In reply to this assertion of the plaintiff, in paras. 8 and 9 of the counter affidavit filed which is exhibited as Ex. P-45, it is stated that the claim of the plaintiff was suitable and that all that was realised was Rs. 5,62,000. In the light of these pleadings, it is idle to contend that the Commissioner should not have taken into account the sum of Rs. 5,31,682-88 as an asset of the firm. This ground taken in the appeal also fails.

7. In the light of the above, we dismiss this appeal with costs.

Appeal dismissed.

AIR 1978 MADRAS 91

BALASUBRAHMANYAN, J.

VOC Industrial Workers Co-operative Housing Society and others, Appellants v. M. Karuppuswami, Respondent.

Second Appeal No. 259 of 1974, D/- 2-8-1977.*

Arbitration Act (10 of 1940), S. 34 — Stay of suit — Nature and purpose of — Failure of arbitration proceedings — Effect — Whether formal application for vacating stay order necessary for proceeding with the stayed suit.

Under the provisions of S. 34 of the Arbitration Act the court has jurisdiction to discharge an order of stay made by it earlier under it. (Para 5)

*(Against decree of Sub. J., Coimbatore in A. S. No. 143 of 1973).

KU/KU/E178/77/AGT/VBB

It is well settled that what the court is called upon to do under S. 34 of the Arbitration Act is to exercise a discretion, one way or the other, when an application is made before it for stay of the suit for ensuring the arbitration to be taken up. The court is by no means under a duty to stay suit even in cases where all the requirements of the section are fulfilled. This being so, to contend that the court could terminate the stay and resume the hearing of the suit only on being so moved by means of a formal application is not only to read a procedural technicality which is not found in the statute, but to mistake the nature and purpose of the whole machinery of stay under the section. (Para 6)

The prime need of our court-system at the present moment is to reduce, as far as possible, the technicalities and refinements of procedure. This may not be possible of achievement in matters where the code or other relevant law lays down the procedure, in black and white. But where the codes are silent, there is, every reason for the courts to eschew procedural technicalities and get on with the job on hand. (Para 6)

The court which granted the stay has every power to discharge the same either on the ground that the arbitration has become infructuous or on the ground that the parties are not intent upon getting their disputes properly decided in arbitration. AIR 1937 Sind 247; (1909) 4 Ind Cas 359 (Sind) and AIR 1921 Bom 458, Considered. (Para 7)

Anno: AIR Manual, 3rd Edn., Vol. I, Arbitration Act (1940), S. 34, Notes 13, 15.

Cases Referred: Chronological Paras

(1953) 1 WLR 1049 : (1953) 2 All ER 727n, Kruger Townwear v. Northern Assurance Co. 5
AIR 1937 Sind 247 5, 7
AIR 1921 Bom 458 5
AIR 1919 Cal 295 5
(1909) 4 Ind Cas 359 (Sind) 5, 7

JUDGMENT:— This second appeal relates to a suit stayed by the trial court under S. 34 of the Arbitration Act. The stay of suit was granted to enable the parties to go to the arbitrator for resolving the dispute which was the subject-matter of the suit. The arbitration, however, became infructuous. The second appeal raises the question as to how the trial court should have proceeded in the circumstances stated above.

2. The suit in this case was filed in the District Munsif Court, Coimbatore, by a building contractor against a co-operative building society and two of its principal office-bearers. The suit was for accounts. The defendants entered appearance in the suit, but did not file any written statement. They moved the court, instead, for an order staying the suit under S. 34 of the Arbitration Act. They invoked the arbitration clause in the suit contract. The learned District Munsif granted the application of the defendants and stayed the suit. That was on 18-3-1966. For a long time thereafter, however, nothing happened in the arbitration. The defendants did not take any initiative in the matter. In fact, contrary to what was said before the learned District Munsif in the application for stay, the Society was neither ready nor willing to refer the matter to arbitration and get on with it. On the contrary, they thwarted the attempts of the plaintiff, in that direction. For instance, the plaintiff, on his own initiative, moved the arbitrator to take up the arbitration. The arbitrator was the Deputy Registrar of Co-operative Societies, Coimbatore, Before the Deputy Registrar, the Society raised all kinds of technicalities. It was contended that the Deputy Registrar had no power to enter into the arbitration under S. 73 of the Tamil Nadu Co-operative Societies Act. The defendants also pleaded before the Deputy Registrar that the plaintiff's motion for arbitration was barred by limitation. These objections brought the arbitration under a stalemate. After adjourning the matter several times, the Deputy Registrar ultimately declined to take up the arbitration.

3. Meanwhile, seeing that nothing served in the arbitration, the learned District Munsif, set down the suit for hearing, but not before granting the defendants society time for filing their written statement. The defendants, however, excused themselves from filing their written statement, on the technical ground that the earlier order of the court granting stay of suit must first be formally set aside, on an application moved specifically for that purpose before the court. The learned District Munsif, however, declined to follow the procedure suggested by the defendants. And, in the absence of any written statement, filed, he proceeded with the trial of the suit and ultimately passed a preliminary decree for accounts as prayed for by the plaintiff. This preliminary

decree was confirmed in appeal by the learned Subordinate Judge, Coimbatore.

4. In the present second appeal, the defendants question the correctness of the procedure adopted by the learned District Munsif in proceeding with the trial of the suit without formally setting aside the earlier order of stay passed under S. 34 of the Arbitration Act. Mr. Vanchinathan, appearing for the appellants, did not seriously contend that the trial court had no jurisdiction at all to get on with the trial of the suit when it became clear to it that the arbitration, for the purpose of which the suit had been earlier stayed, had become infructuous. All the same, I think it necessary to consider the legal position. For this has a bearing on the other contention raised by the learned counsel regarding procedure. Section 34 of the Arbitration Act expressly gives a discretion to the court to grant stay of trial of a suit on its file to enable the parties to go to arbitration. Where the court exercises the discretion in favour of the defendant, the court passes an order staying the suit. But once that happens, there is no express provision in S. 34 or elsewhere in the Act enabling the court to cancel or set aside the order of stay at a subsequent point of time. Nonetheless, the position would seem to be one of construction of the scope of the court's jurisdiction. The power of the court under S. 34 to grant stay of suit must, in my opinion, necessarily include, by implication, the power to modify, vary, rescind or set aside the order of stay. It cannot be the intention behind the section that a stay once granted cannot thereafter be set aside. The position of the court as a trier of the suit is such that an irrevocable order of stay would stultify its own jurisdiction. The court under S. 34, never completely puts it out of its power to direct the course which the suit should take at any given moment of time. The very conception of stay of suit in the context of the powers of the trial court excludes any idea of a permanent tying down by the court of its own hands. There is yet another consideration which has relevance to cases of this kind. The stay of suit under S. 34 is for a special purpose, to wit, to enable the parties to go to arbitration. Once the fulfilment of that purpose is found to have become impossible, the very basis for the continuance of the stay also disappears. In such situation, the trial court not only may proceed with the suit; it is its duty to do so.

5. The position in law would seem to have been the same under the law relating to arbitration before the Arbitration Act of 1940 was enacted. Cases had arisen before courts in India in regard to stay of suits under para. 18 of the second schedule to the Civil P. C. It has been held that if arbitration becomes impossible for any reason, the court ought to proceed to decide the suit itself. It has also been held that the stay order may be discharged if the parties are unable to obtain a satisfactory arbitrator or to bring the arbitration proceedings to a satisfactory and speedy conclusion—See Laxman v. Manjunatha, AIR 1921 Bom 458; Bava Chattagir v. Matanomal, (1909) 4 Ind Cas 359, 361 (Sind); Kishinchand v. Ramchand, AIR 1937 Sind 247 and Bhasimukhi v. Parbati Sunkar, AIR 1919 Cal 295. The power to discharge a stay order and to get on with the suit sometimes traced in some decisions to the inherent powers of the Court is saved by S. 151, Civil P. C. In England also the procedure is available whereby the parties to an arbitration agreement who had once obtained an order of stay of the suit between them from the court may move the same court for getting the stay vacated on finding that the arbitration has not borne fruit. See Kruger Townwear Ltd. v. Northern Assurance Co. Ltd., 1953-1 WLR 1049. It therefore seems to be that the court does have jurisdiction to discharge an order of stay made by it earlier under S. 34 of the Arbitration Act.

6. Mr. Vanchinathan concentrated his argument not as much on the jurisdictional aspect, but on the procedural one. He said that the procedure followed by the District Munsif in this case was not proper. It has already been noticed that no application was before the District Munsif in and by which he was invited to set aside the earlier order of stay. This, according to learned counsel, was a caution that the court should have left the stay untouched. He pointed out that when S. 34 contemplated an application to be moved by the defendants for stay of suit, it was meet and proper that the same procedure should be adopted by the trial court for later setting aside the stay and resuming the hearing of the suit. I do not, however, accept this argument as sound. It is well settled

that what the court is called upon to do under S. 34 of the Arbitration Act is to exercise a discretion, one way or the other, when an application is made before it for stay of the suit for ensuring the arbitration to be taken up. The court is by no means under a duty to stay suit even in cases where all the requirements of the section are fulfilled. This being so, to contend that the court could terminate the stay and resume the hearing of the suit only on being so moved by means of a formal application is not only to read a procedural technicality which is not found in the statute, but to mistake the nature and purpose of the whole machinery of stay under the section. When once it is found that the court's power to take up the hearing of the suit is always there, as I have shown above, on a construction of the section, there is no scope at all for putting the court under a strait-jacket of procedure, especially where there is no express provision prescribing that procedure. The prime need of our court system at the present moment is to reduce, as far as possible, the technicalities and refinements of procedure. This may not be possible of achievement in matters where the Code or other relevant law lays down the procedure, in black and white. But where the Codes are silent, there is, in my view, every reason for the courts to eschew procedural technicalities and get on with the job on hand. I, therefore, feel that the learned District Munsif acted quite sensibly in cutting the cackle of procedure and straightway proceeding with the trial of the suit. The defendants cannot complain of this course, considering that they were given ample opportunity of filing their written statement. This opportunity was deliberately refused to be availed of by the defendants. They cannot now seek to unsettle everything that subsequently happened at the trial merely on the flimsy thread of technicality pleaded by them, which, as I have shown above, wilts under examination.

7. In Kisinchand v. Ramchand, AIR 1937 Sind 247, it was held that where a court had stayed a suit under para. 18 of Sch. 2 of the Civil P. C., ordinarily speaking, the court should first remove the stay before it revives the suit and then decide the suit on its merits. The learned Judges, however, added that if the court does not write a separate order vacating the original order of stay, but proceeds to hear the suit, the order of stay must be deemed to have been vacated by implication. The same court on an earlier occasion in Bawa Chattagir v. Natanomal, (1909) 4 Ind Cas 359, 361 (Sind), put the matter in proper perspective in the following passage—

"The Act (Arbitration Act, 1899) contemplates a business-like procedure on the part of those desiring to refer, and the whole object of the Legislature will be frustrated if it is to be utilised as a means of prolonging litigation indefinitely ... ... I construe the order staying proceedings for such reasonable time as would enable the defendants to get an arbitration carried through ... ... Defendants have already had an excessive time and I consider that they have shown themselves to be not ready and willing to do all things necessary for the conduct of the arbitration. Having regard to the obstinate attitude adopted by the Bawa towards arbitration, I believe that the difficulty of obtaining a satisfactory arbitrator, and of bringing the arbitration proceedings to a satisfactory and speedy conclusion would be almost impossible."

The position, in my view, is the same under the present Arbitration Act of 1940. The court which granted the stay has every power to discharge the same either on the ground that the arbitration has become infructuous or on the ground that the parties are not intent upon getting their disputes properly decided in arbitration.

8. Mr. Vanchinathan, in conclusion, pleaded that another chance might be given to the parties to pursue the arbitration proceedings. I do not think that this request, coming as it does from the defendants, deserves consideration. It is on record that the Society had opposed the plaintiff tooth and nail when the plaintiff moved the Deputy Registrar of Co-operative Societies to get on with the arbitration and raised all sorts of objections to his entertaining the arbitration. This resulted in a stalemate because, the Deputy Registrar declined to act although he was the arbitrator named in the arbitration agreement and there was no provision for a substitute. In any case, there has been an unconscionable delay — a matter of nearly 11 years — since the time when the District Munsif granted the order of stay. Since then, not only had the learned District Munsif

passed the preliminary decree which has been confirmed by the learned Subordidate Judge and has come up on this appeal, but I learn from the Bar that a final decree has also been passed in the suit. In the circumstances, I must give a quietus to the whole matter, which I do by dismissing the second appeal. But I do so in the circumstances, without costs.

Appeal dismissed.

AIR 1978 MADRAS 95

P. GOVINDAN NAIR, C. J. AND VARADARAJAN, J.

Jayaramachandra Iyer, Appellant **v.** Thulasi Ammal and others, Respondents.

L. P. A. No. 45 of 1976, D/- 26-7-1977.*

Hindu Law — Joint Family — Property joint or separate — Proof of. AIR 1976 Mad 17, Reversed.

Some joint family property sold for Rs. 3,000/- on 15-5-1963. On 20-6-1963 house was purchased in the name of only one of the two brothers for Rs. 1,600/- — Both messing separately but living in the house — Evidence about purchase money coming from purchaser's fund inadequate — Held that the house was joint family property. AIR 1976 Mad 17, Reversed. (Para 4)

P. GOVINDAN NAIR, C. J.:— This is an appeal by the plaintiff in a suit for partition, and the only contest in this appeal is about the partibility of one item of the properties, namely, Item No. 1 of the A schedule, which was acquired in the name of the deceased husband of the first defendant under the sale deed Exhibit B-1, dated 20-6-1963. There were other items of properties scheduled to the plaint, and no dispute arises in this appeal regarding their partibility. As regards item No. 1 of the A schedule, it was held by the trial Court that it belonged to the husband of the first defendant, the deceased Dandapani Iyer, and that the property was his self-acquired property and not joint family property. The appeal by the plaintiff before this court having failed, he has come up before this court by way of Letters Patent Appeal.

2. On behalf of the appellant counsel contended that there was clear evidence available in the case about the existence of sufficient nucleus for the acquisition of item No. 1 of A schedule under Ex. B-1, sale deed. Before we deal with this aspect and the arguments advanced we would like to mention a few facts.

3. The plaintiff is the brother of the deceased Dandapani Iyer. Both of them were married. The plaintiff had two sons and a daughter and Dandapani Iyer had five daughters and two sons. One of the daughters died after marriage. Dandapani Iyer was employed as an advocate's clerk and he was also doing job typing. The plaintiff was also employed as a clerk in a bank and he too was doing job typing. The extent of the income earned by these two persons is not known. Both the families were living in the same house which was bought under Ex. A-1. They were, however, having separate mess from 1956.

4. There was admittedly at least one joint family property of over an acre of wet lands, and that property was sold under Ex. A-4 dated 15-5-1963. This property was sold for a total consideration of Rs. 3,000, Rs. 200 had been received in advance and on the date of registration, the balance was paid to Dandapani Iyer. The vendors were Dandapani Iyer and the plaintiff and the amount was paid before the Sub-Registrar. The Sub-Registrar also has certified that such a payment was made. It is said that this amount was paid to Dandapani Iyer with the consent of the plaintiff. It was shortly thereafter, on 20-6-1963, under Exhibit B-1 the house in which the two brothers with their families were staying, was purchased, and the consideration for the sale was Rs. 1,600. On the basis of these facts, counsel for the appellant rightly submitted before us that he has been able to establish not only the existence of nucleus, but the existence of sufficient nucleus from which Ex. B-1 property could have been purchased. This factor taken along with the other circumstances, namely, the relationship of the parties and the sale of an admitted joint family property, leads to the presumption that the acquisition under Ex. B-1 was for the benefit of the joint family. When this presumption is drawn, it is for the first defendant, widow of Dandapani Iyer who claims that the property belonged to Dandapani Iyer, to establish that the property was acquired by Dandapani Iyer, with his own funds.

*(Against judgment of Ismail J. reported in AIR 1976 Mad 17).

Regarding this aspect, the case of the first defendant has not been consistent. In the written statement, she pleaded that the funds for the acquisition of Ex. B-1 property were provided from the earnings of the deceased Dandapani Iyer. At the time when she gave evidence, she deposed that the property was acquired with the amounts received by the sale of her jewellery. This type of inconsistent pleas does not inspire confidence. There is no evidence worth the name to show that Dandapani Iyer had sufficient amounts with him at the time of the acquisition of Ex. B-1 property. We have already mentioned that he had a large family. The income from the family properties is not known. Apparently, the only income was from the property sold under Ex. A-4, and this income must have been utilised for the living of the members of the family. There is, therefore, no evidence in the case from which it is possible to conclude that the acquisition under Ex. B-1 was from the earnings of Dandapani Iyer. On the other hand, as we already pointed out, the proximity of the transactions Exs. A-4 and B-1 and the fact that the amount received under Ex. A-4 was far in excess of what had to be paid for acquiring Ex. B-1 property, and the fact that the two brothers were living amicably in the same house though having separate mess and belonged to undivided joint family, leads us to conclude that the case pleaded by the plaintiff is true and all these factors confirm the presumption that the acquisition under Ex. B-1 was with the joint family funds, and the property acquired must therefore enure to the benefit of the family.

5. Counsel on behalf of the respondents drew our attention to four promissory notes, Exs. B-6 to B-9, which were produced by the first defendant. These promissory notes indicate that there were borrowings by Dandapani Iyer. It is said that these borrowings were for family needs. It is also suggested that these debts have been discharged from the money received under the sale deed Ex. A-4. On a perusal of these promissory notes, we find that only Exs. B-6 and B-7 were discharged at about the time the sale Ex. B-1 took place. Exhibit B-7 was discharged on 24-6-1963, four days after Ex. B-1 sale deed and Ex. B-6 was discharged on 24-7-1963 and the total amount for the discharge of these two promissory notes comes to only Rs. 1,004. Even after paying the sale consideration of Rs. 1,600 for the property under Ex. B-1, there was Rupees 1,400 left with Dandapani Iyer which could very well have been utilised for the discharge of Exs. B-6 and B-7 promissory notes. There is no indication whatsoever of the time at which the other two promissory notes Exs. B-8 and B-9 were discharged. In these circumstances, it is impossible to draw the inference that the entire amounts received under Ex. A-4 were utilised for the discharge of Exs. B-6 and B-9 promissory notes.

6. Our attention was also drawn to a mortgage Ex. A-5 executed by Dandapani Iyer. The consideration for this is Rs. 1,200. There is no evidence as to when this debt was discharged. But the evidence indicates that a suit had been instituted and a decree obtained and that debt has also been discharged. But it is not known when it was done and under what circumstances.

7. Much was sought to be made of the fact that the plaintiff was an attestor to the document Ex. B-1. It was argued that the document was taken in the name of Dandapani Iyer alone and that the attestation by the plaintiff meant that he knew the circumstances, and by attesting the documents, he has accepted the position that the property belonged to Dandapani Iyer exclusively. Assuming that such a proposition can be applied in certain circumstances, we are not satisfied that the said proposition is attracted to the facts of this case. We have already given reasons for presuming that it was the amount received under Ex. A-4 by the sale of the joint family property that went to acquire the disputed property under Ex. B-1. Such a presumption arising in this case has not been rebutted. The property must, therefore, belong to the family irrespective of the fact that the document was taken only in the name of Dandapani Iyer.

8. In the light of the above discussions, we allow the appeal and set aside the judgments of the trial court as well as the appellate court regarding Item 1 of Sch. A. The plaintiff will be entitled to one-half share in the disputed property as well, and there will be a preliminary decree accordingly. There will be no order as to costs in this appeal.

Appeal allowed.

AIR 1978 MADRAS 97

SURYAMURTHY, J.

K. Mohideen Ibrahim, Appellant v. M. Muhammed Abdullah, Respondent.

Second Appeal No. 21 of 1976, D/- 21-7-1977.*

Easements Act (5 of 1882), Ss. 15, 35 — Common wall — Right to light and air through windows in that wall — Whether could be acquired by prescription — Whether one co-owner entitled to mandatory injunction restraining the other from interfering with it. AIR 1916 Mad 718 and (1911) 2 Mad WN 95, held no longer good law in view of AIR 1926 Mad 728 (FB).

A person cannot acquire an easement unless he acts with the knowledge that it is a case of dominant and servient tenement and he is exercising a right over property which does not belong to him. If he enjoys a right under the supposition that he is the owner of the property he does not acquire an easement. He cannot also acquire an easement of light and air over property jointly owned by him with others. (Para 7)

In the case of a common wall, each co-owner is entitled to a reasonable user of the wall owned in common and so long as each co-owner uses it reasonably without interfering with the enjoyment of that wall by the other co-owner or without doing anything which would weaken, damage, increase or diminish the wall enjoyed in common, he is entitled to do what he likes and the other co-owner will have no cause for complaint unless the acts alleged amount to his ouster or to the destruction of the party wall. The opening of the apertures in the common wall by the plaintiff should, therefore, be treated as incidental to the enjoyment of the common property and it does not amount to trespass upon the right of the other co-owner which would entitle him to prevent such trespass by physical obstruction or by an action in a court of law. When there is no scope for such an action, the plaintiff cannot be deemed to have acquired a right of easement by prescription to ancient light and air through those apertures. AIR 1916 Mad 718 and (1911) 2 Mad WN 95, held no longer good law in view of AIR 1926 Mad 728 (FB); AIR 1926 Bom 545 (1); AIR 1938 Bom 215, Applied; AIR 1973 Andh Pra 86, Foll. (Para 8)

Anno: AIR Manual, 3rd Edn., Easements Act, S. 15 Note 18; S. 35, Note 2.

Cases Referred: Chronological	Paras
AIR 1973 Andh Pra 86	9
AIR 1938 Bom 215	7
AIR 1926 Bom 545 (1)	6
AIR 1926 Mad 728 (FB)	7
AIR 1925 Bom 373	6
AIR 1915 PC 131 : 1915 AC 599	7
AIR 1916 Mad 718 : ILR 38 Mad 1	7
(1914) 3 KB 911 : 84 LJ KB 251, Lyell v. Hothfield	7
(1911) 2 Mad WN 95	7

JUDGMENT:— This is an appeal by the plaintiff from the judgment and decree of the learned District Judge, Ramanathapuram at Madurai dismissing A. S. No. 121 of 1975 on the file of this court and confirming the judgment of the learned Subordinate Judge, Ramanathapuram at Madurai, dismissing O. S. 75 of 1973, a suit instituted by the plaintiff for declaration that the suit wall marked AB in the sketch annexed to the plaint is the exclusive wall of the plaintiff, for declaration that the plaintiff is entitled to right of easement for free flow of light and air through the windows marked W-3 to W-7 in the aforesaid sketch, for a permanent injunction restraining the defendant and his men from interfering in any way with the plaintiff's right to light and air through the said windows and for a mandatory injunction directing the defendant to remove the terraced portion of the building immediately west of the windows W-1 and W-2 and the constructions put up by him west of the windows W-3 and W-4.

2. The house bearing door No. 97 in Periappallivasal St, Virudhunagar originally belonged to Kader Mohideen Rowther father of the plaintiff. The father of the plaintiff inherited a portion of the said property from his father and purchased the remaining portion under a registered sale deed dated 22-10-1910. The old constructions were demolished and new constructions were put up in the year 1911 or 1912. According to the plaintiff, it was his father who constructed the western wall as well as the eastern wall for the building bearing door No. 97. At the time of the construction of the walls, the plaintiff's father put up five windows on the ground floor marked as W-1 to W-5 in the plaint sketch and two windows in the upstairs

*(Against decree of Dist. J., Ramanathapuram at Madurai in A. S. No. 121 of 1975).

portion marked as W-6 and W-7. The said windows are ancient windows through which the house was getting light and air from the open space on the western side. The plaintiff's contention is that the western wall of the said door No. 97, which is the subject-matter of the suit, is his exclusive wall and that he has acquired an easementary right for his house through the windows W-1 to W-7.

3. The western house bearing door No. 96 originally belonged to one Ismail Rowther son of Hussain Rowther. According to the plaintiff, originally there was a construction only on the southern portion of the said house and the remaining portion was a vacant site and the owner of that building had absolutely no right whatsoever to the western wall of door No. 97. One Arunachala Nadar purchased the eastern half of door No. 96 from one Abdul Kader Rowther in the year 1958. He removed the terraced portion that was then in existence and which was below the level of the windows W-1 and W-2 in the suit wall and put up a new construction in 1959 at a higher level, thereby obstructing the two windows. He also put up a tiled verandah adjoining the suit wall and sloping towards south. That construction also, according to the plaintiff, obstructed a portion of window No. 4 in the suit wall. The plaintiff contends that as he was at Madurai at the time of the said constructions, he was not aware of them and as soon as he came to know about the constructions, he issued a notice on 21-10-1959, to Arunachala Nadar calling upon him to remove the offending constructions. There was talk of compromise and Arunachala Nadar agreed to remove the offending portions in order to facilitate the free flow of the light and air to the house of the plaintiff through the windows W-1, W-2 and W-4 and removed the tiled construction adjoining the window W-4. However, he did not remove the construction which was causing obstruction to the other two windows. Subsequently, the defendant purchased door No. 96 from Arunachala Nadar under a registered sale deed dated 22-1-1973. In that document, the suit wall is described as a common wall. The contention of the plaintiff is that this recital is false and has been introduced deliberately for the purpose of putting forward a false claim to the suit wall. The defendant applied to the Virudhunagar Municipality for reconstruction of his building. He filed a plan showing the suit wall as a common wall. The plaintiff sent a petition to the Commissioner of Virudhunagar Municipality objecting to the issue of permission to the defendant for putting up constructions in such a manner as to affect his right to the suit wall and also his easementary right of light and air through the windows in the suit wall. He also gave a complaint to the police on 19-4-1973. The police made an enquiry. According to the plaintiff, he and the defendant gave an undertaking to the police not to put up any new construction without settling their disputes either with the aid of mediators or through a competent court. Overruling the objections raised by the plaintiff, the Commissioner of Virudhunagar Municipality granted permission to the defendant to put up constructions. In pursuance of that permission, the defendant started digging up the grounds to lay the foundation of his building close to the suit wall. The plaintiff once again sought the help of the police. On 23-5-1973, the plaintiff received a copy of the order, dated 21-3-1973, passed by the Commissioner of the Municipality granting permission to the defendant to put up constructions. He directed the plaintiff to seek his remedy in a Civil Court. According to the plaintiff, he rushed to Madurai immediately to take necessary legal action against the defendant and taking advantage of his absence from Virudhunagar, the defendant removed the tiled roof adjoining the fourth window from the south and raised the east-west in between the windows W-3 and W-4 to such a height as to obstruct the said windows. He also laid rafters from north to south in order to put up a terrace over them. The contention of the plaintiff is that if the defendant is permitted to construct a building, the passage of light and air through the windows W-3 and W-4 would be completely cut off and his building will become unfit for occupation.

4. The contention of the defendant is that the wall is a common wall, that both the buildings have been in existence even from prior to 1900 that in a Will dated 17-7-1934 in respect of door No. 96 and some other properties, which was attested by the father of the plaintiff, the suit wall has been described as a common wall, that all the windows in the disputed wall had been closed even during the lifetime of the plaintiff's grandfather, that Arunachala Nadar remodel-

ed the then existing building and that the claim of the plaintiff for easementary right of light and air is untenable and has been put forward merely to harass the defendant who has purchased the building despite the attempt of the plaintiff to purchase the same.

5. It has been found by the court below that the suit wall is a common wall and that the plaintiff is not exclusively entitled to the wall. This finding is based on evidence, oral and documentary, adduced by both sides. This finding of the courts below is correct. The trial court has further found that by reason of the construction put up by the defendant, the windows W-1 and W-2 in the southernmost portion of the suit wall had been closed even in the year 1958 when door No. 96 belonged to Arunachala Nadar and that even according to the plaintiff there is no obstruction to the passing of light and air through the window W-5 or the windows W-6 and W-7. It has been further found by the learned Subordinate Judge that even according to the plaintiff there is no offending construction blocking W-3 and W-4. These findings of fact have been concurred in by the learned District Judge. Therefore, on facts, the plaintiff is not entitled to the injunction prayed for. The plaintiff has not established that there was such a substantial deprivation of light and air to his house as to render the occupation of his house uncomfortable, according to the ordinary notions of mankind and as beneficially as before.

6. The question to be considered is whether the plaintiff is entitled to the injunction prayed for in view of the fact that the windows, through which he claims easementary right, are situate in the common wall belonging to the plaintiff and the defendant. This question was considered by a Bench of the Bombay High Court in Rajubai Mohambhai v. Lalbhai Mulchand, AIR 1926 Bom 545 (1) and it was held that—

"There can be no question of easement as regards light and air in the case of joint property. Both parties were entitled to the full ownership of this wall and the plaintiff, after the fire in 1884, repaired the party wall with the consent and acquiescence of the defendants. Then the result would, be, as was decided in Imambhai v. Rahimbhai, AIR 1925 Bom 373 : ILR 49 Bom. 586, that where one of two neighbouring owners raises a party wall, the other owner either giving his consent of acquiescing, the raised portion of the wall assumes the same character as the old party wall on which it stands. If the plaintiff opened apertures in the wall he could not acquire an easement of light and air through these windows over the defendants' premises. It would be open to the defendants to object to the windows being opened, and even if they did not file a suit that would not prevent them from blocking the windows opened by the plaintiff so as to look over the defendants' premises.

The plaintiff therefore was not entitled to the injunction sought for in the plaint ... ..."

7. In Konda v. Ramaswami, ILR 38 Mad 1 : (AIR 1916 Mad 718), Sundara Ayyar and Sadasiva Ayyar, JJ. held that—

"there is no reason why a person who walks along a certain land without the permission of the true owner and in the assertion of a right to walk should not create in favour of the enjoyer a prescriptive right of easement, simply because he mistakenly supposes that he is the owner of the land or asserts that his act of enjoyment is sufficient to give him the ownership by prescription."

Similarly in Venkata Varaha Dikshithar v. Subbarya Pillai, (1911) 2 Mad WN 95 it was held that "a false belief of ownership does not necessarily preclude the acquisition of a right of easement." However, in Attorney General of Southern Nigeria v. John Holt and Co. Liverpool Ld., 1915 AC 599, 618 : (AIR 1915 PC 131) the Privy Council held that—

"An easement, however, is constituted over a servient tenement in favour of a dominant tenement. In substance the owner of the dominant tenement throughout admits that the property is in another, and that the right being built up or asserted is the right over the property of that other ... ..."

Therefore, the learned Judges of the Bench of this Court, who heard an appeal in the first instance in the case reported in Subbarao v. Lakshmana Rao, AIR 1926 Mad 728 (FB) thought that the judgment of this Court referred to earlier may have to be modified in view of the decision of the Judicial Committee which was based not on the Indian Easements Act but on the English law. Odgers J. who was one of the two Judges who made the reference, was of the opinion "that the ruling in Konda v. Ramaswami, ILR 38 Mad 1 : (AIR 1916 Mad

718), with great deference to the opinion of the two eminent Judges who decided it, is wrong and that if a man exercises a right with the animus or consciousness that he is exercising a proprietary right in his own land and not a right over another's land he cannot acquire a right of easement by prescription". In answering the reference, the Full Bench held that—

"The learned Judges in Konda v. Ramaswami, ILR 38 Mad 1 : (AIR 1916 Mad 718), seem to imply that the assertion of ownership during the period of user is not fatal to the success of a claim to an easement. To this proposition we cannot assent. Our opinion is that while the mere putting forward of a wider claim in legal proceedings is not conclusive against the right of easement, yet the question quo animo agerit to what purported character are the acts of user to be ascribed is one which the court must answer, and if Konda v. Ramaswami, ILR 38 Mad 1 : (AIR 1916 Mad 718) implied the contrary we think it is wrongly decided. We agree with the conclusion of Shearmen, J. in Lyall v. Lord Horthfield, 1914-3 KB 911, that acts done during the statutory period which are only referable to a purported character of owner cannot validate a subsequent claim to an easement. The question of animus in this case is one of fact ... ..."

Therefore, a person cannot acquire an easement unless he acts with the knowledge that it is a case of dominant and servient tenement and he is exercising a right over property which does not belong to him. If he enjoys a right under the supposition that he is the owner of the property does not acquire an easement. He cannot also acquire an easement of light and air over property jointly owned by him with others. A Bench of the Bombay High Court in Narayan Balwant v. Shankar Waman, AIR 1938 Bom 215 has held that 'it is not possible for a person to acquire an easement of light and air through window in a joint wall belonging to himself as well as to the owner of the other premises."

8. The ratio behind these decisions is that when one of the owners of a common wall opens windows in that common wall, he does so in exercise of his rights as a co-owner and, therefore, cannot acquire a right of easement in respect of the windows against the co-owner. A right which cannot be prevented from being exercised by physical interference during the period of enjoyment cannot be acquired as an easement. Before time can commence to run under the Easements Act, there must be an invasion of some legal right. Acts which are neither preventable nor actionable cannot be relied upon to found an easement. In the case of a common wall, each co-owner is entitled to a reasonable user of the wall owned in common and so long as each co-owner uses it reasonably without interfering with the enjoyment of that wall by the other co-owner or without doing anything which would weaken, damage, increase or diminish the wall enjoyed in common, he is entitled to do what he likes and the other co-owners will have no cause for complaint unless the acts alleged amount to his ouster or to the destruction of the party wall. The opening of the apertures in the common wall by the plaintiff should, therefore, be treated as incidental to the enjoyment of the common property and it does not amount to trespass upon the right of the other co-owner which would entitle him to prevent such trespass by physical obstruction or by an action in a court of law. When there is no scope for such an action, the plaintiff cannot be deemed to have acquired a right of easement by prescription to ancient light and air through those apertures.

9. In Nageswara Rao v. Ramachandra Rao, AIR 1973 Andh Pra 86, a Bench of the Andhra High Court has held that the co-owner of a joint wall could not acquire an easement in respect of light and air through the windows in the joint wall whatever may be the period of his enjoyment prior to the date of the suit, as the normal method of enjoyment of joint wall also includes the enjoyment by opening windows or ventilators which could not give rise to any trespass so as to give a cause of action for an obstruction or a suit in a Civil Court to prevent it at the instance of the other owner. I follow this view of the Bench of the Andhra Pradesh High Court. Therefore, the plaintiff is not entitled to claim an easementary right by prescription to ancient light and air through the seven windows in the common wall. Hence the judgments and decrees of the courts below are confirmed and this second appeal is dismissed with costs.

Appeal dismissed.

AIR 1978 MADRAS 101

P. GOVINDAN NAIR, C. J. AND VARADARAJAN, J.

R. M. Sundaram, Appellant v. The Board of Revenue, Madras and others, Respondents.

Writ Appeals Nos. 473 and 474 of 1976, (under Cl. 15, Letters Patent (Mad.)) D/- 30-6-1977.*

Tamil Nadu Cinemas (Regulations) Rules (1957), R. 79-A (4) (d) — Rule as to construction of semi permanent cinema theatre — Permission to construct a sound proof semi permanent threatre — No violation of the Rule — Order in W. P. No. 4119 of 1974, D/- 22-6-1976 (Mad), Reversed.

The rule insists only a minimum requirement for a semi permanent theatre. The rule cannot be interpreted to mean that the theatre cannot be made more comfortable or that it cannot be more substantial or ornamental or sound proof or that if the cinema owner is willing to take the risk of losing money, cannot be constructed as required for a permanent theatre. Even if the minimum requirement of the rule is exceeded that would not amount to a violation of the rules. So as a matter of interpretation of the rules, it must be held that it would be possible under the existing rules to establish a sound proof semi permanent theatre, which can be in existence only for five years. Order in W. P. No. 4119 of 1974, D/- 22-6-1976 (Mad) Reversed. (Para 3)

K. Alagiriswami and P. Chidambaram, for Appellant; The Govt. Pleader, for Respondents.

P. GOVINDAN NAIR, C. J.:— This is the final stage of a battle that has been waged before the Collector, before the Board of Revenue and before a single Judge of this court. The question in those appeals is a very simple one and has been posed by the learned Judge in the judgment under appeal in one sentence in the penultimate para. We shall extract that sentence:

"But the question as to whether a semi permanent theatre could be constructed with sound proof system in the face of the existing rules has not been gone into by the Board of Revenue before the objections of the school authorities are really overruled."

*(Against order of Ramanujam J. in W. P. No. 4119 of 1974, D/- 22-6-1976).

KU/KU/E284/77/PNK

2. To understand this question, we shall state the necessary facts. The appellant before us in these two writ appeals applied as envisaged by R. 35 of the Tamil Nadu Cinemas (Regulation) Rules 1957, for a no objection certificate under R. 36 and in form No. B. This application was objected to by the respondent in W. A. 473 of 1976 who runs a convent school in the vicinity of the place where the semi permanent theatre was sought to be established by the appellant, and also by a rival operator of a theatre, who is the respondent in W. A. 474 of 1976. The school contended that the establishment of a semi permanent theatre would disturb the working of the school and cause inconvenience not to say nuisance to the inmates of the school, which consisted of Nuns and the students of the school. The respondent in W. A. 474 of 1976 apparently motivated by the possibility of adverse effect on his income by the coming into existence of yet another theatre also raised his objections. All objections were overruled by the Collector excepting the one raised by the school that disturbance and inconvenience would be caused to the inmates of the school from the sound emanating from the theatre to be established. To prevent this disturbance he imposed a condition in the no objection certificate that the theatre to be constructed must be sound proof. Such a condition could be imposed and the form of the certificate, form B, itself envisages special conditions being imposed. No point was made before us that there is any invalidity in imposing such a condition. Appeals were taken by the respondents in these two appeals before the Board of Revenue and one of the grounds taken in the appeal was whether it was possible to establish a sound proof semi permanent theatre "in accordance with the existing rules." The appeals which contained other grounds as well were dealt with on the merits and were dismissed by the Board of Revenue. But the Board of Revenue did not specifically express any opinion on the ground whether it is possible to establish a sound proof semi permanent theatre in accordance with the rules. It was in these circumstances, that the learned Judge made the observation which we extracted earlier in this judgment. As a result of that lacuna this court ordered—

"The order of the Board of Revenue is, therefore, set aside with a direction to pass fresh order on the appeal after con-

sidering the question whether it is possible to adopt the sound proof system in a semi permanent theatre."

Before us fairly elaborate arguments were addressed by the appellant's counsel and by counsel for the respondents. It is unnecessary to deal with all these arguments for the appeals have to be disposed of on the interpretation to be placed on R. 79-A (4) (d). We shall presently deal with this question. But before doing so, we must mention that the no objection certificate issued to the appellant does not by itself entitle him to a licence in form C and without such a licence he will have no authority or right to establish a semi permanent theatre. Counsel for the appellant is well founded in his submission that the issue of a C form licence is an essential requirement to enable the appellant to establish a theatre. He is also well founded in his submission that the question whether he had complied with the condition imposed in the N. O. C. that the theatre to be established should be sound proof will have to be necessarily gone into before the issue of the licence and it will be open to the appellant to prove to the authorities that he has made the theatre sound proof; and it would be equally open to the respondents in these appeals to try and show to the authority that the condition had not been complied with. We are further inclined to agree with the contention of the appellant that to consider the question whether the theatre to be established would be sound proof in the abstract without there being either a plan or the building itself in existence would be an enquiry in the abstract which can only result in speculations.

3. The scheme of the Act and the rules indicate double procedure. First, there should be a preliminary investigation as to whether a no objection certificate should be issued. This procedure ends with the grant of no objection certificate under form B or a refusal to do so, after a consideration of the points mentioned in S. 5 (1) of the Act, and if and when a no objection certificate is issued the procedure for the issue of a licence in form C would commence on an application with plans and further details of the particular structure to be made in accordance with the rules applicable for the establishment of a semi permanent theatre being presented. At this stage too objections can be raised and those objections will have to be considered by the authorities and the authorities have to be satisfied that the Act and the rules have been complied with before the C form licence is issued. On the facts of this case, the authorities will necessarily have also to be satisfied that the specific condition imposed that the theatre should be 'sound proof' should also be satisfied. This stage has not been reached and the question cannot possibly arise now. We must, therefore, confine our attention now to the question whether the grant of a no objection certificate to the appellant subject to the condition that the semi permanent theatre should have a sound proof system is in order and is in accordance with law and more specifically, whether, as the learned Judge posed the question in the judgment under appeal, a semi permanent theatre could be constructed with sound proof system in the face of the existing rules." The learned Judge apparently had R. 79-A (4) (d) in mind. And no other rule was relied on or referred to in the course of the arguments which would prevent the construction of a sound proof semi permanent theatre. We shall now extract that sub-rule:

"(d) The side walls of the main building shall be dwarf walls 1-05 metres high plastered with lime mortar or mud over which durable black canvas or tarpaulins curtains shall be provided so as to shut off light and afford shelter from rain".

While the respondents' counsel contended that the semi permanent theatre can only have walls 1-05 metres high and cannot therefore be sound proof, the appellant's counsel contended that what is insisted upon by the sub-rule is the minimum requirement of a semi permanent theatre. He highlighted this argument by pointing out that the rule has provided that the walls have to be plastered with lime mortar, or mud and urged that this provision would not prevent the walls being plastered with cement or constructed in any other manner more substantial than by plastering with mortar and lime or mud. It was pointed out that if the walls were cement plastered for instance, it could not be said that the rule has been violated. If his submission on this aspect is correct, he urged that the provision in the clause that the walls are to be dwarf walls of 1-05 metres in height is also a requirement insisted upon as a minimum requirement and that would

not preclude the aspirants for a licence from making the walls higher. We think that the rule insists only on a minimum requirement for a semi permanent theatre. The rule cannot be interpreted to mean that the theatre cannot be made more comfortable or that it cannot be more substantial or more ornamental, or sound proof or that if he is willing to take the risk, of losing money, cannot be constructed as required for a permanent theatre. We are unable to agree with the argument of counsel for the respondents that if the minimum requirement of the rule is exceeded that would amount to a violation of the rules. So as a matter of interpretation of the rules, we have no hesitation in holding that it would be possible under the existing rules to establish a sound proof semi permanent theatre, which can be in existence only for five years. The licence granted under R. 79-A would automatically cease to exist at the end of five years. This is the most important feature of a semi-permanent theatre.

4. With great respect we are unable to agree with the learned Judge. Naturally, the question will depend on the nature of the structure that is constructed. This question cannot be answered in the abstract. We have no doubt that this can be considered only at a later stage after the plans and the details of the building are furnished or even after the building is constructed, but before the issue of a licence. We make it clear that it will be open to the parties to raise this question as to whether the theatre proposed to be established or constructed could be or is 'sound proof' as required by the no objection certificate. We have already held that the rules do not stand in the way of a semi permanent theatre being made 'sound proof'.

5. In the light of the above discussion, we allow the appeals, set aside the judgment under appeal and dismiss the writ petitions subject to the condition that it will be open to the appellant to establish before the authorities that the theatre that he has constructed or proposes to construct is or will be sound proof and it will be equally open to the respondents in these appeals to try and show that the theatre is not 'sound proof'. The authorities will have to consider specifically and deal with their contentions and it would certainly be open to the authorities either to grant or refuse the C form licence depending on the question whether the theatre is sound proof or not.

6. We direct the parties to bear their own costs throughout.

Appeal allowed.

AIR 1978 MADRAS 103

RAMAPRASADA RAO AND RATNAVEL PANDIAN, JJ.

Muniammal, Appellant v. Raja, Respondent.

Appeal No. 165 of 1973, D/- 4-3-1977.*

(A) Contract Act (9 of 1872), S. 23 — Public policy — Agreement by wife not to claim any maintenance in consideration of lump sum payment — Held not opposed to public policy. (Para 10)

(B) Hindu Adoptions and Maintenance Act (78 of 1956), S. 25 — Claim for enhanced maintenance on change of circumstances — Agreement by wife not to claim higher maintenance in consideration of lump sum payment — No bar to claim enhanced maintenance.

The obligation to maintain the wife is personal in character and arises from the very foundation of the existence of the relationship between the parties. The party who stands benefited by this Act can keep that right and enforce the same or throw it away. If the right is relinquished completely in consideration of a lump sum or consolidated payment, the maintenance holder cannot agitate her claim over again unless the contract of relinquishment is attacked as vitiated by undue influence or fraud. (Para 9)

However, if the right to maintenance is given up in receipt of a consolidated amount under an agreement with a stipulation not to ask for more, but without relinquishing her subsisting right, the position will be different. In such contingencies the subsisting right of the wife or the widow to claim enhanced maintenance has not ceased and she can ask for it in view of changed circumstances justifying her claim despite the fact that there was an agreement prior to the commencement of the Act for a fixed maintenance without the right to ask for more. Case law discussed. (Paras 9, 15)

*(Against decree of Sub. J., Tirupattur, North Arcot Dist. in O. S. No. 11 of 1968).

Cases Referred: Chronological Paras

AIR 1973 Andh Pra 319 (FB) 13, 15
(1970) S. A. No. 432 of 1968, D/- 31-3-1970 (Andh Pra) 13
(1970) C. M. A. No. 252 of 1970 (Mad) 13
AIR 1969 Andh Pra 213 11
(1968) 1 Andh WR 429 13
AIR 1966 Mad 428 12
AIR 1964 Mad 217 : (1963) 2 Mad LJ 403 12
AIR 1959 Andh Pra 269 11
AIR 1921 All 152 : ILR 43 All 650 10
(1904) 14 Mad LJ 339 11

R. S. Venkatachari, for Appellant; V. Shanmugham for G. Annamalai, for Respondent.

RATNAVEL PANDIAN, J.:— The plaintiff in O. S. No. 11 of 1968 on the file of the Court of the Subordinate Judge of Tirupattur, North Arcot, who failed before the trial Court, is the appellant herein. She filed the said suit against her husband, the defendant, for maintenance at the rate of Rs. 250/- per mensem and for the recovery of Rupees 24,000/- as arrears of past maintenance and for a charge over the plaint schedule properties. According to the plaint allegations, she was married to the defendant in 1931 and begot a child in 1940 which, of course, died. Thereafter, differences arose between them, which led to the plaintiff filing O. S. 15 of 1943 in the trial Court for maintenance, in which she also obtained a decree dated 4-3-1944 for maintenance at the rate of Rs. 10/- per mensem, Rs. 2/- for residence and Rs. 20/- per annum for clothing, along with arrears of maintenance coming to Rs. 457-3-0. On a fresh trial after remand, a charge over the defendant's 1/12 share of the joint family properties (coming to 44½ cents) was also granted in her favour. The plaintiff filed E. P. 6 of 1952 for recovery of Rs. 1,936-11-0 and in the said execution proceedings, the charged properties were sold for Rs. 401/-. With a view to prevent the plaintiff from realising the balance of the decree amount, the defendant's father executed a registered will on 27-6-1953 under the original of Exhibit A-2, conveying all the properties nominally in the name of his son-in-law, one R. K. Gopalakrishna Gounder, thereby putting the plaintiff in a destitute position. Because of the deadlock created by the defendant, his brothers, his brother-in-law and his father and due to her helpless position, she was on 6-8-1954 made to compound her claim with them and receive Rs. 500/- in full quit of the entire decree debt of Rs. 2,000/- and also reconvey the 1/12 share purchased in Court auction in favour of the defendant's father. Thereafter, the defendant's father, on 20-3-1955 under the original of Ex. A-3 has cancelled the will under the original of Ex. A-2. On his death, the defendant and his brothers and their mother divided all the family properties on 2-7-1958 under the original of Ex. A-4 and this conduct of theirs really proves the real character of the properties as joint family properties. On 5-11-1964 the defendant has sold an extent of 49 cents out of 1 acre 28 cents comprised in S. No. 206/2 in favour of one Meda Krishna Chettiar. In the above circumstances, the plaintiff is entitled to maintenance under S. 18 of Act 78 of 1956, as he had abandoned her without reasonable cause and neglected her. He is also afflicted with leprosy. Hence the suit for maintenance at the rates mentioned above. The plaintiff claimed that her suit is not barred because of the proceedings in the previous suit which ended in 1954. The arrears of maintenance have been claimed from 21-12-1956 when Act 78 of 1956 came into force.

2. The defendant filed a written statement contending as follows: He admits that the plaintiff was married to him and that there were misunderstandings. But, he denies that he or anybody in his family wanted to get rid of the plaintiff or that they ill-treated her or drove her out of the house. As the defendant was afflicted with leprosy, the plaintiff did not want to live with him and she resorted to questionable ways of living, which the defendant's family resented. Due to a mediation effected at the instance of the relations, the plaintiff entered into full satisfaction of the decree in O. S. No. 15 of 1943 under the original of Ex. B-2 dated 6-8-1954 after receiving a sum of Rs. 500/- having regard to the circumstances, and she agreed not to claim any future maintenance from the defendant and thus she is estopped from making the present suit claim. Now, in order to grab the property which fell to the defendant's share in the partition after his father's death, the plaintiff has filed this suit at the instance of the defendant's enemies. The suit properties are worth Rs. 10,000/- the net annual income therefrom being not more than Rs. 500/- or Rs. 600/- out of which he has to spend for his treatment. Because of the lumpsum payment in full quit of

her past and future claim of maintenance, her right has become extinguished. In view of the said full satisfaction of the decree in O. S. No. 15 of 1943, Ss. 18 and 25 of the Hindu Adoptions and Maintenance Act, 1956 are not applicable. The suit without seeking to set aside the full satisfaction memo is not maintainable. The suit is also barred by limitation. There is no cause of action for the suit and it should be dismissed. In any event, the maintenance claimed is excessive.

3. On the above pleadnigs the following issues were framed by the trial Court:

1. Whether the plaintiff was defrauded and compelled by fraud and misrepresentation, to enter satisfaction of the decree in O. S. No. 15 of 1943?

2. Whether the plaintiff is estopped from claiming future maintenance?

3. Whether the plaintiff's claim, even if true, is barred by limitation?

4. In any event, whether the amount claimed is far too excessive?

5. What is the value and income from the suit properties?

6. Whether the plaintiff is entitled to any, if so, what maintenance?

7. Whether the plaintiff is entitled to any charge and if so on what properties?

8. To what relief, if any, is the plaintiff entitled?

The plaintiff marked Exs. A-1 to A-6 and examined herself as P. W. 1, her brother as P. W. 2, and two other witnesses. The defendant marked Exs. B-1 to B-5 and examined himself as D. W. 1 and six other witnesses. The learned Subordinate Judge found that the plaintiff had failed to prove that the full satisfaction memo in O. S. 15 of 1943 under Ex. B-2 was vitiated by fraud, misrepresentation or coercion, that the plaintiff did not have any subsisting right to claim future maintenance, that she was estopped from making such claim and that the said claim is barred by limitation under Art. 59 of the Limitation Act. The Court also held that even if the plaintiff be entitled to any past maintenance, her claim for any period beyond three years prior to suit was barred by limitation. On Issues 4 and 5, it was found that the defendant gets Rs. 3,000/- from his lands in Peddur village and Bheemkulam Village and that therefore the amount claimed by the plaintiff is excessive. Thus, the plaintiff was held not entitled to any maintenance and even if she is so entitled, she was entitled only at Rs. 100/- per mensem. On Issue 7, it was held that if at all the plaintiff was entitled to any charge, she was entitled to such a charge over the plaint schedule properties less 1-95 acres sold to strangers. The suit was therefore dismissed with costs. Aggrieved by this dismissal, the plaintiff has filed the present appeal.

4. Mr. R. S. Venkatachari, learned Counsel appearing for the appellant, would contend that the appellant's claim for maintenance against the respondent is a statutory right of maintenance arising under the Hindu Adoptions and Maintenance Act, 1956 (Central Act No. 78 of 1956), that the appellant is not estopped from making her claim on the basis of the said Act, that the trial Court has failed to see the overriding effect of S. 4 of the said Act and that the maintenance right under S. 18 read with Ss. 26 and 27 of the Act cannot be defeated by reason of Ex. B-2 or Ex. B-3 dated 6-8-1954, which documents were prior to the commencement of this Act. He would attack the finding of the lower Court that the appellant has no subsisting right to claim maintenance by reason of Exs. B-2 and B-3, on the ground the said finding is erroneous by virtue of the Hindu Adoptions and Maintenance Act. According to the appellant, Exs. B-2 and B-3 have been executed by her, being a victim of circumstances, coercion and fraud and compelling events, and the said documents have not been executed by her of her own free will and volition. At any rate, according to the learned Counsel for the appellant, the appellant cannot be precluded from claiming maintenance for subsequent periods, due to change of circumstances, under the said Act. He would attack Ex. B-2, urging that the said document is opposed to public policy, offending the provisions of S. 23 of the Indian Contract Act.

5. There cannot be any dispute, and indeed there is none, that the plaintiff is the legally wedded wife of the defendant and their relationship as husband and wife still subsists, their marriage having taken place in or about 1931. It is the case of the plaintiff that there arose some misunderstanding in the year 1948 and on account of that, her husband, the defendant, her father-in-law and other members of their family obviously imputed infidelity and ultimately abandon-

ed her. Whilst it is the case of the defendant that it was the plaintiff who left the house of her own accord due to the fact that the defendant is inflicted with leprosy, and that she resorted to questionable ways of living, which was resented to by the defendant's family. The fact that the defendant is suffering from leprosy is mentioned by the plaintiff also in her plaint. The plaintiff admittedly instituted the suit in O. S. 15 of 1943 on the file of the Court of the District Munsif, Tirupattur, for maintenance, which was decreed on 4-3-1944, awarding a sum of Rs. 10/- per mensem for maintenance, Rs. 2/- per mensem for residence and Rs. 20/- per annum for clothing, and a sum of Rs. 437-3-6 towards arrears of maintenance. The plaintiff claimed a charge over the family properties; but that claim was resisted by the defendant, his father and brothers. The father of the defendant set up a plea that the properties were his self-acquisitions. The charge claimed by the plaintiff was refused. On appeal, in A. S. 44/1946 (Ex. A-11), the matter was remanded and at the re-hearing, a charge was granted over a 1/12 share of the first defendant, her husband, in S. No. 409/1 extending to 2 acres 3 cents in S. No. 408 extending 1 acre 83 cents and S. No. 407 extending to 1 acre 48 cents, subject to a prior mortgage in favour of a Co-operative Society. This was under Ex. A-13 dated 29-11-1945 and is evidenced by Ex. A-12 also. That decree was put in execution in E. P. 6 of 1952 for realising a total sum of Rupees 1,936-11-10, and a 1/12 share of the property coming to 44½ cents was sold in execution for Rs. 401/- to P. W. 2, the brother of the plaintiff. Part satisfaction to this extent was recorded, leaving a balance of Rs. 1,500/- still due under the decree. Ex. A-1 is the copy of the sale certificate issued by the Court on 20-10-1952 for the sale of the charged property. On 27-6-1953, the defendant's father, who was the second defendant in O. S. 15/53, bequeathed his properties under the foot of a will in favour of one of his sons-in-law, viz., R. K. Gopalakrishna Gounder, examined in this case as D. W. 5. So, according to the plaintiff, the surrounding circumstances became so precarious that she, being a helpless lady, felt that she could not recover the past maintenance of Rs. 1,500/- and the future maintenance from the defendant as the 1/12 share belonging to her husband was already sold to her brother. In these circumstances, according to her, she was compelled by force of circumstances, to enter into a compromise with the other side. The pleading in para. 5 of the plaint, on this aspect, reads thus:

"The plaintiff, being helpless to get over this deadlock, and irrevocably subdued and defeated, was compelled by force of circumstances on the context to compound her claim with the other side. So, she was made to receive a mere Rs. 500/- in full quit of the entire decree debt of Rs. 2,000/- and also as part of the same bargain, reconvey back the 1/12th purchased as stated above, in court auction to Ramaswami, the father of the defendant. This was on 6-8-1954. The defendant and his collaborators had thus successfully defrauded plaintiff and liquidated plaintiff's rights for nothing and the plaintiff was compelled by fraud and misrepresentation to enter up satisfaction of the decree in O. S. No. 15 of 1943."

5-A. The defendant would state in his written statement that at the intervention of some panchayatdars a decision was arrived at and as per the said decision and after getting the advice of the close kith and kins, the plaintiff entered into full satisfaction of the decree, agreeing not to claim future maintenance against the defendant and that the said memo of satisfaction, was filed by the plaintiff in the above said suit and therefore the plaintiff is now estopped and prevented from putting forward the present claim for further maintenance in the suit. Further, the defendant would submit that the plaintiff having received a lump sum payment in full quit of her claim towards past and future maintenance and given an undertaking that she would not demand any further maintenance, her right to such maintenance has become extinguished and the said right is no longer alive for the purpose of sustaining the suit.

6. The document, Ex. B-2, on the construction of which the main issue centres round, is the "full satisfaction memo" filed on the side of the plaintiff in O. S. No. 15 of 1943. We have to examine whether the agreement fixing maintenance for the whole of her life with the specific understanding not to ask for increased maintenance will be a bar for the plaintiff from claiming increased maintenance in view of changed circumstances. On this aspect, there are judi-

cial pronouncements making a fine distinction between the agreement fixing the amount of maintenance and an agreement relinquishing the right of maintenance itself.

7. Ex. B-2 reads that as per the decision of the panchayatdars, the plaintiff in O. S. No. 15 of 1943 (Plaintiff herein) had received a sum of Rs. 500/- from the first defendant (defendant herein also) in full quit of past and future maintenance as per the decree and as the plaintiff agreed that she would not lay any more claim for maintenance and as such the entire decree amount has been satisfied, the Court was requested to record the full satisfaction memo. This memo contains the left thumb impression of Muniammal, the plaintiff and the signature of her pleader Mr. Srinivasa Rao. Thereupon, the Court recorded the said full satisfaction memo.

8. It may be recalled that at the time when this lump sum of Rs. 500/- was paid towards the past and future maintenance of the plaintiff, the plaintiff would have been aged about 30 years. It is not disputed that this full satisfaction memo was given in full quit of the entire decree debt of Rs. 2,000/- (when the decree was put in execution in R. E. P. No. 6 of 1952 the total arrears were Rs. 1,936-11-10) and also as part of the same she had to reconvey back the 1/12th share of the limited interest of the first defendant purchased by her in Court auction in favour of the father of the first defendant. The plaintiff would, therefore, contend that the first defendant and his collaborators had carefully defrauded her and liquidated her right for a mere pittance of Rs. 500/- and thus she was compelled by fraud and misrepresentation to enter into the full satisfaction of the decree in O. S. No. 15 of 1943 and that the circumstances under which this full satisfaction memo has been entered into would lend support to her present case.

9. Before going into the question whether she was compelled by fraud and misrepresentation to enter into this full satisfaction memo, Ex. B-2, we will examine the legal position as to whether this memo of satisfaction is a legal bar to the plaintiff for asking an increased or enhanced maintenance in view of the present change of circumstances. Section 18 of the Hindu Adoptions and Maintenance Act, 1956 (hereinafter referred to as the Act) reads that "subject to the provisions of this section, a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her lifetime". Sub-section (2) of S. 18 enumerates the circumstances under which a Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance, one of such circumstances being that if the husband is suffering from a virulent form of leprosy. The object of this section is based on the obligation to maintain the wife which is personal in character and arises from the very existence of the relation between the parties. Section 23 gives discretion to the Court to determine the quantum of maintenance to be awarded having regard to the considerations set out in sub-s. (2) or sub-s. (3) of S. 23 as the case may be, so far as they are applicable. Section 25 of the Act, which is material for the consideration of this case, reads thus:

"The amount of maintenance, whether fixed by a decree of court or by agreement, either before or after the commencement of this Act, may be altered subsequently if there is a material change in the circumstances justifying such alteration."

A plain reading of the section would leave no doubt that a decree or agreement fixing maintenance will not bar a wife from claiming increased maintenance if the circumstances justify such alteration. This section confers ample powers on the Court to alter either by varying or modifying any order fixing the amount of maintenance made by a decree of the court or by agreement subsequently if there is a material change in the circumstances justifying such alteration. It would seem that the circumstances justifying alteration would principally be changed in the pecuniary circumstances of the parties. By now it is well-settled that a decree or agreement fixing maintenance in favour of a wife or widow or other claimant is no bar to a claim for increased maintenance under this section if the circumstances justify such alteration and it is immaterial whether the decree or agreement was before or after this Act, notwithstanding the fact that the claimant had agreed not to claim higher maintenance even in changed circumstances. In other words, the right conferred under this section supersedes any contract to the contrary. But there are also judicial

pronouncements to the effect that where a maintenance holder under an agreement has completely relinquished her right of maintenance prior to the coming into force of the Act, she cannot claim any enhanced amount under S. 25 on the ground that there are material changes in the circumstances.

No doubt, the right of maintenance is a personal right and it is an incident of of the status of matrimony and a Hindu is under a legal obligation to maintain his wife. The obligation to maintain the wife is personal in character and arises from the very foundation of the existence of the relationship between the parties. The party who stands benefited by this Act can keep that right and enforce the same or throw it away. If the right is given up or relinquished completely in consideration of a lump sum or consolidated payment, the maintenance holder cannot agitate her claim over again unless the contract of relinquishment is attacked as vitiated by undue influence or fraud. But if the right to maintenance is given up in receipt of a consolidated amount under an agreement with a stipulation not to ask for more, but without relinquishing her subsisting right, the position will be different and, therefore, in such contingencies we have to see whether after this Act coming into force the wife or the widow can claim enhanced or increased maintenance in view of the changed circumstances justifying her claim.

10. Now coming to the contention of the learned counsel that Ex. B-2 is opposed to public policy offending the provisions of S. 23 of the Indian Contract Act, it may be noted that in Muhammad Muin-ud-din v. Jamal Fatima, (ILR 43 All 650) : (AIR 1921 All 152) it has been pointed out that an ante-nuptial agreement entered into between the prospective wife on the one side and the prospective husband and his father on the other (the parties being Muhammadans) with the object of securing the wife against ill-treatment and of ensuring her a suitable amount of maintenance in case such treatment was meted out to her, was not void as being against public policy. This agreement in question, namely, Ex. B-2 is only an undertaking given by the plaintiff not to ask for any maintenance in future in consideration of a lump sum of Rs. 500/- paid to her towards her past and future maintenance. After going through the recitals of the document, we are of the view that it cannot attract S. 23 of the Indian Contract Act since it cannot be said to be against public policy. Therefore, we reject the contention of the learned counsel that this agreement is opposed to public policy.

11. Then we come to the question whether the plaintiff can now lay a claim for enhanced maintenance after she having relinquished her right by Exhibit B-2 dated 6-8-1954, and whether the said document would be a bar to her present claim. There is, indeed, a plethora of authorities upon this aspect of which we think it would be sufficient to refer the following leading pronouncements. A Division Bench of this Court in a decision reported in Subramaniam Patter v. Vembammal, ((1904) 14 Mad LJ 339) examined the question whether an agreement with reference to the payment of maintenance operates as a release of the right of the party entitled to maintenance to have the amount raised and held that where maintenance is awarded under a particular instrument and there were no words of release of the right to claim increased maintenance under a change of circumstances, there was no release of such a right at all, and that the mere fact that the maintenance is expressed to be paid for life does not show such a release. Subba Rao, C. J. (as he then was) speaking for the Bench of Andhra Pradesh in a case S. Kameshwaramma v. Subramanyam (AIR 1959 Andh Pra 269) has observed thus:

"The Act both amended and codified the law relating to maintenance among Hindus. The word "agreement" is admittedly comprehensive enough to take in an agreement of either description. The Legislature does not expressly or by necessary implication exclude any category of agreements fixing maintenance, from the operation of the section. If there was a valid reason for binding the parties to the terms agreed upon between them, there would also be equal justification for protecting the widow from being bound by an unjust agreement precluding her from claiming enhanced maintenance in changed circumstances. (Underlining by us). We do not, therefore, see any justification not to give the widest meaning to the word "agreement" which it can bear. We hold that, notwithstanding the agreement by the widow not to claim higher rate of

maintenance in the changed circumstances, she would be entitled to enhanced maintenance under the provisions of the Act, if there was a material change in the circumstances."

In another case reported in C. Ambayamma v. C. Ganapathi (AIR 1969 Andh Pra 213), Jaganmohan Reddy, C. J. (as he then was) speaking for the Bench has referred to other various cases on this aspect including S. Kameshwaramma v. Subramanyam (AIR 1959 Andh Pra 269) and held that a decree or agreement fixing maintenance will not bar a widow from claiming increased maintenance if the circumstances justify such alteration in view of the plain provisions of S. 25 of the Act and it is immaterial whether the decree or agreement was before or after the Act. Then having regard to the facts of the case, the Division Bench held in that case that even where the widow had agreed under the terms of a compromise decree passed in 1927, not to ask for increased maintenance she was held entitled to ask for the increase under S. 25 of the Act.

12. In Seshi Ammal v. Thaiyu Ammal, (1963-2 Mad LJ 403 : ILR (1964) 1 Mad 107) : (AIR 1964 Mad 217), there arose a question for determination of the issue whether a Hindu wife who had agreed to receive maintenance at a particular rate, binding herself not to claim a higher rate even if the circumstances were to change, could maintain a suit for increase of maintenance under S. 25 of the Act. The facts in that case were that the respondent was the widow of one Rama Ayyar and she sued her husband for maintenance in O. S. No. 329 of 1924 on the file of the District Munsif, Tiruvarur on the ground that he took a second wife and later adopted a son. There was a compromise of that suit, by which the defendants therein agreed to pay her a sum of Rs. 85/- per year. It was also stipulated in the said agreement that the respondent had no right to ask for anything more. A decree was passed in terms of the compromise, which charged certain properties for the due performance of the maintenance. After the passing of the Hindu Adoptions and Maintenance Act, 1956, the respondent came forward with a claim that the maintenance awarded in that suit was insufficient to meet her needs, having regard to the changed circumstances and that she should be paid something more. On a contest being raised by the second wife and the adopted son of the respondent's deceased husband, the respondent lost her claim in the trial Court as well as in the first appellate Court. But on a further appeal to this Court, that decree dismissing the suit has been set aside by Ananthanarayanan, J. (as he then was) and the case was remanded for fixing proper maintenance. This appeal came as Letters Patent Appeal. A Division Bench consisting of S. Ramachandra Ayyar, C. J. and Venkataraman, J. held that "notwithstanding the existence of a compromise decree under which a Hindu wife agreed to receive a fixed maintenance without the right to ask for more, the terms of S. 25 of the Act are very clear and would supersede any contract disabling the wife from asking for more. If there was a material change in the circumstances, the Hindu wife has the right to ask for enhancement of the amount of maintenance". They also further held:

"The terms of the section are very clear; the right given thereunder would supersede any contract disabling the wife from asking for more. After all the true principle is that a person liable to maintain must do so and it will be indeed inequitable for that obligation to be whittled down by technical rules like res judicata and binding nature of a contract. The statute has therefore provided for the agreed maintenance to be enhanced if need be in conformity with the changed circumstances in the case."

In Rangamma v. V. Venkatarajulu (AIR 1966 Mad 428) Kailasam, J. (as he then was) referring to Seshi Ammal v. Thaiyu Ammal, (1963-2 Mad LJ 403) : (AIR 1964 Mad 217) held that a suit for enhanced maintenance due to change of circumstances is maintainable in spite of a family settlement between the parties stipulating fixed amount for maintenance. Now it is made clear that the claimant would be entitled to increased maintenance if there is a material change in the circumstances notwithstanding the fact that the claimant had agreed not to claim higher maintenance even in changed circumstances, and the fact that a fixed amount of maintenance was stipulated by a compromise decree makes no difference.

13. Lastly, our attention was drawn to a judgment reported in Kondamma v. Seethamma (AIR 1973 Andh Pra 319) (FB) wherein a Full Bench of Andhra Pradesh High Court, after elaborately discussing the scope of S. 25 of the Hindu

Adoptions and Maintenance Act, 1956, has observed as follows:

"We do not think the introductory words of S. 25 can be so extended as to take within their fold even the cases where right to maintenance had come to an end and was not subsisting on the date of the Act. We have noticed that the distinction between an agreement fixing the amount of maintenance and an agreement extinguishing the right itself is plain and unmistakable. It is obvious that S. 25 will apply only to cases where right to maintenance is subsisting on the day of the Act. If the right had ceased or extinguished S. 25 has no application."

After going very carefully through this judgment, we find that the Full Bench had made a distinction by that ruling between an agreement fixing the amount of maintenance and an agreement relinquishing the right of maintenance itself. They have made reference to the decision reported in Mutyalamma v. China Appanna (1968-I Andh WR 429) wherein a single Judge of the Andh Pradesh High Court held: "Where, however, a person entitled to be maintained compromises and accepts a definite sum in lieu of her right to be maintained from the joint family property and relinquishes her right, I have no doubt that section 25 will not apply to such a case." But in that case there were no allegations that the settlement entered into by the plaintiff was unfair or unjust and there was a concurrent finding that the plaintiff had relinquished her right of maintenance under the settlement in question. This view has been subsequently overruled by a Division Bench of the Andhra Pradesh High Court in a judgment D/-31-3-1970 in S. A. No. 432 of 1968 (Andh Pra), Seetharamaiah v. Padmavathi wherein it was held that the agreement contemplated in S. 25 includes also an agreement where the claim for maintenance was permanently settled by paying a lump sum amount. (See para 5 in Kondamma v. Seethamma (AIR 1973 Andh Pra 319) (FB)). Because of this controversy the case in Kondamma v. Seethamma (AIR 1973 Andh Pra 319) (FB) was referred to the Full Bench and the Full Bench after going into the question made the observations which we have already extracted. The Full Bench, agreeing with the view taken by the single Judge in Muthvalamma v. Chinna Appanna's case ((1968) 1 Andh WR 429), pointed out that the observation of the single Judge in that case was made having regard to the facts of that case that there was an agreement relinquishing the right of maintenance itself whereas in other appeal which came up for consideration before a Division Bench, the Division Bench overruled that decision stating that there was really no question of relinquishment of right to maintenance and finally the Full Bench made a distinction between the agreement fixing the amount of maintenance and an agreement relinquishing the right of maintenance itself and held that where a maintenance holder under an agreement has relinquished her right of maintenance prior to the coming into force of the Act, she cannot claim any enhanced amount under S. 25 on the ground that the income from the family has increased and that S. 25 applies only to cases where right to maintenance is subsisting on the day of the Act. This crucial point whether S. 25 of the Act would apply to a case in which a consolidated payment has been made and the widow's claim settled, coupled with a relinquishment by her of all her claims for maintenance by reason of such a settlement, was considered by Ramamurti J. in C. M. A. No. 252 of 1970 (Mad) of this Court and the learned Judge made the following observations:

"My attention was drawn to the statement of law in Raghavachari's Hindu Law (VI Edition) at pages 248 and 1203 supporting the contention that if there has been a consolidated payment in full settlement of the claim for maintenance, the widow would not be entitled to claim enhancement of maintenance by reason of a material change in the circumstances. I examined the cases referred to by the learned author and I find that those decisions cannot be regarded as authorities for such a position that the final settlement of the claim for maintenance by payment of a consolidated sum would be a total bar to the claim of the widow." ....

"It must also be borne in mind that so long as there is a recurring and continuous liability to pay in kind or in cash, the liability is a liability to pay maintenance and the fact that a fixed recurring payment has been fixed does not alter the character of the liability which is essentially a liability to pay maintenance."

The learned Judge in that case has also made the distinction between the two agreements, namely, an agreement fixing

a consolidated payment and an agreement of the relinquishment of right to maintenance and receipt of such consolidated amount. S. 25 of the Act enacts a beneficial social legislation and, therefore, there cannot be any dispute that it must be given a liberal and benevolent construction. The object of introduction of this section is to protect helpless widows and others entitled to maintenance against the abuse of their position in the family, and the provisions of this section are aimed at preventing starvation and vagrancy.

14. Now coming to the facts of the case in question we have already indicated that the total amount of Rs. 500/- given to the plaintiff in full quit of her past and future maintenance as per the decree of the Court was much less than the amount payable to the plaintiff as per the decree of the Court as on the date when Ex. B-2 memo was filed. A plain reading of Ex. B-2 makes it clear that the intention of the parties was to fix a consolidated payment without the right of the plaintiff to ask for more. But it is seen from the said document that she has not expressly relinquished her right to maintenance. In other words, the pith and substance of Ex. B-2 is that the plaintiff had given up only her privilege to claim maintenance in lieu of a receipt of a pittance of Rs. 500/- while she was actually entitled to a sum of Rs. 2,000/- as on the date towards her maintenance besides her right of claim for future maintenance on the basis of the decree given in O. S. No. 15 of 1943. A lump sum or a consolidated payment in the actuarial sense is a sum fixed by an agreement as the estimated amount required to maintain the Hindu wife or the maintenance holder for life. Such an estimate being the result of a discussion inter partes may err on a right side or on a wrong side. The primary intendment of such an agreement is to bar the maintenance holder from asking any more maintenance in future. Therefore, S. 25 of the Act has been enacted only to help the maintenance holders so that they may not be deprived of their right to ask for increased maintenance when there is a material change in the circumstances on the ground that the amount of maintenance has already been fixed either by a decree of Court or by an agreement. This Section is only a complement to S. 18 of the Act which gives a statutory right to a Hindu wife to claim maintenance. As we have indicated more than once, the words, in Ex. B-2 cannot be understood as an emphatic release or relinquishment of the plaintiff's claim to maintenance but it is only an agreement evidencing temporary satisfaction of her right of maintenance or temporary discharge of the obligation of her husband to pay any more maintenance to her. The surrounding circumstances appearing in this case, namely, the past history of the helpless and pitiable plaintiff and the hardship that she has suffered by going to the Court for her maintenance and the persistent conduct of her husband in not complying with the decree awarding maintenance to her, would certainly justify the case of the plaintiff that she had not relinquished her right to maintenance but has been forced to enter into the satisfaction memo agreeing not to ask for maintenance in future and her subsisting right to claim enhanced maintenance has not ceased.

15. For the reasons mentioned above, we are of the view that the observation made by the Full Bench in Kondamma v. Seethamma (AIR 1973 Andh Pra 319) (FB) that a maintenance holder cannot claim any enhanced amount under S. 25 of the Act when she has relinquished her right of maintenance, is not applicable to the facts of this case since we have come to the conclusion that there is no relinquishment in this case. In fact, the Full Bench in the discussion of its judgment has made a distinction between the agreement fixing the amount of maintenance and an agreement relinquishing the right of maintenance. The decisions referred to above, which are to the effect that a Hindu wife can ask for enhanced maintenance despite the fact that there was an agreement for a fixed maintenance without the right to ask for more, would also fortify our conclusion in this case. Leave apart we feel that equity in the present case goes only in favour of the plaintiff and we have no hesitation in extending the arms of sympathy of this Court to help the plaintiff having regard to the pathetic condition of the plaintiff who has suffered untold agony for all those years in finding difficulty to maintain herself in the present hard days.

16. The lower Court on issue No. 2 has found that the woman is estopped from claiming future maintenance since issue No. 1 was answered against her. But in view of our finding that her right

is still subsisting, we set aside the finding of the lower Court on issue No. 2. Coming to issue No. 3, the lower Court has concluded that, in any event, the plaintiff cannot lay a claim for maintenance for more than three years prior to the date of suit. This finding in our view is well-founded and hence we confirm this finding and hold that the plaintiff will be entitled to the past maintenance only for a period of three years. As regards the quantum of maintenance, the lower Court on issue No. 6 has found that the plaintiff would be at best entitled to maintenance at the rate of Rs. 100/- per month. Of course there is no cross-appeal as against this finding. But after hearing both parties and having regard to the status of the parties and the probable income that the defendant is expected to derive from the landed properties, we feel that it would be just and proper to fix the quantum of maintenance at Rs. 75/- per month instead of Rs. 100/- per month. Hence we modify the finding of the lower Court on issue No. 6 to the extent that the quantum of maintenance shall be fixed at Rs. 75/- per mensem. As regards the plaintiff's claim to have a charge over the suit properties, the finding of the lower Court on issue No. 7 is confirmed.

17. In the result, we hold that the right of the plaintiff to ask for enhanced maintenance is still subsisting and she is entitled to get maintenance at the rate of Rs. 75/- per month and also a right to claim past maintenance for a period of three years prior to the filing of the suit. Further, she will be entitled to a charge over the suit properties less the land of 1.95 acres sold to strangers, prior to the suit. Accordingly, we allow this appeal with costs. The respondent will pay the court-fee due to the Government.

Appeal allowed.

AIR 1978 MADRAS 112

RAMAPRASADA RAO AND RATNAVEL PANDIAN, JJ

Bandi Chalapathi Rao and another, Appellants v. The Official Assignee, Respondent.

O. S. A. Nos. 50 of 1973 and 75 of 1975, D/- 17-8-1977.*

*(Against order of Gokula Krishnan J., in Appln. No. 54 of 1972).

KU/LU/E423/77/DVT

(A) Presidency Towns Insolvency Act (3 of 1909), S. 7 — Matters arising out of insolvency — Jurisdiction of Court — Objection as to — Not raised before Insolvency Court — Maintainability in appeal.

Where in a proceeding under S. 7 of the Act no party have raised a preliminary objection that the Judge sitting in insolvency ought not to have enquired into the Judge's summons taken out by the Official Assignee under S. 7 of the Act and given a judgment on the merits and not only this; the parties had participated in the enquiry, filed documents, let in oral evidence and ultimately took the decision of the learned Judge, it is not open to any party to raise once again in appeal the preliminary objection about the maintainability of the Judge's summons and the expediency of the hearing of such Judge's summons by the insolvency court. (Paras 3, 6)

The Judge's summons can only be in matters when the Official Assignee or other persons authorised in law take out an application under S. 7 requesting the insolvency court to adjudicate upon summary claims, claims which are not difficult and claims which could be adjudicated summarily. But once a claim which was brought up to the court has suffered a trial, and in that trial the parties who are aggrieved at such a trial did participate and saw through the end of the same, they cannot be allowed to approbate and reprobate and thereafter complain that such a trial was neither expedient nor necessary and ought not to have been undertaken. AIR 1950 Mad 410 (FB) and AIR 1929 Mad 705 (FB). Disting. (Para 4)

(B) Contract Act (9 of 1872), S. 148 — Contract of carriage — Nature of.

A contract of carriage has certain peculiar ingredients in-built in it. No doubt, for all outward purposes it is a contract for the carriage of goods which were entrusted by one party to the other. But a contract of carriage is not an equation of a contract of bailment, nor is the carrier liable as a bailee. On the other hand, there is in-built in such contracts the element of an insurance contract for it could reasonably be said that the carrier is equitable to an insurer who undertakes the carriage of the goods with all the attendant risks of such carriage. (Para 11)

(C) Presidency Towns Insolvency Act (3 of 1909), S. 47 — Mutual dealings

and set-off — Contract of carriage — Alternate claim against carrier for recovery of goods or refund of its money value — Dealing is mutual — Carrier entitled to set off transport charges — Appln. No. 54 of 1972 (Mad) and Appln. No. 513 of 1971 (Mad) Reversed.

Where a contract of carriage provides inter alia that the transport charges are only to be withheld until the carrier satisfactorily accounts for goods entrusted or accounts for the loss of such goods or damage or pilferage done to it and the contract does not even say that the transport charges are not payable if the goods are lost, it is clear that the intention of the paties when they forged the contract of carriage is not only to recover the goods if they are lost but alternatively also to recoup themselves with the value of such goods in case of such loss. And when in the proceedings under S. 7 of the Act the Official Assignee seeks two alternate reliefs of recovery of goods in specie or refund of money value of the goods in the alternative from the carrier, then it is evident that the dealings between the insolvent company and the carrier are mutual within the meaning of S. 47 of the Act. The carrier, therefore, is entitled to claim a set-off in respect of the transport charges due from the company as against its claim for recovery of the value of goods from the carrier. When the substantial relief of recovery of the value of goods was granted, the Official Receiver could not at appellate stage ask for the return of goods in specie. Appln. No. 54 of 1972 (Mad) and Appln. No. 513 of 1971 (Mad), Reversed. Case law discussed. (Paras 11, 12)

(D) Civil P. C. (5 of 1908), O. 7 R. 7 — Alternative reliefs — Trial Court granting one relief — Relief not granted cannot be claimed in appeal.

Once a litigant who is in the position of a plaintiff and who is therefore the dominus litis in a litigation seeks for two reliefs one as an alternative to the other, then he cannot throw overboard such an express request made by him and in the appellate court ask for the relief not granted to him which he only asked for in the alternative. (Para 11)

(E) Presidency Towns Insolvency Act (3 of 1909), Ss. 7, 8 — Matters arising out of insolvency — Court's jurisdiction — Scope of — Proper stage to file appeal.

Expediency, necessity or obligation to render complete justice for the purpose of making equitable distribution of the insolvent's property are all matters which the insolvency court can look into for purpose of considering whether the question before it has to be decided by it or such questions have to be relegated to a civil court for a fuller adjudication of the subject-matter. If once the insolvency court decides that the matter could be dealt with by it, may be on the ground of expediency or necessity, may be also on the ground that it was to entertain and decide upon it so as to render justice, all such incidents reflecting upon exercise of jurisdiction by the court are pointers to the fact that the court exercised its discretion one way or the other. It is not obligatory for a court to look into a Judge's summons filed by the Official Assignee and brought before it, in other case adjudicate upon by it. It may reject it as well on the ground that in its opinion it is neither expedient nor necessary to decide such matter in summary way. But there may be cases also wherein the Court in the exercise of its discretion as a well-instructed institution takes up such matters on file for decision and ultimately decide it for itself. If after the exercise of such jurisdiction may be a discretionary jurisdiction, the court calls upon the parties before it which in an insolvency court will invariably be the Official Assignee on the one side and the debtor of the insolvent on the other, then it is for the aggrieved party namely the insolvent's debtor to take such necessary steps to see that the further progress of hearing of the subject-matter by the insolvency court is stemmed by taking up the matter further in appeal. Section 8 of the Act provides for appeals in insolvency. (Para 2)

Cases Referred: Chronological Paras

AIR 1977 Ker 68 : (1977) 47 Com Cas 264 12
AIR 1977 Mad 223 : 90 Mad LW 110 11
(1967) 1 All ER 397 : (1967) 2 WLR 241, Rolls Razor Ltd. v. Cox 12
AIR 1950 Mad 410 (FB) 5
AIR 1940 Mad 266 : 1939 Mad WN 1231 12
AIR 1935 Cal 225 12
AIR 1929 Mad 705 : ILR 52 Mad 717 (FB) 4, 5
(1818) 129 ER 477 : 8 Taunt 499, Rose v. Hart 12

P. Sivaramakrishnaiah Aiyar, Dolia and P. B. Krishnamurthy, for Appellants; The Official Assignee, in person.

RAMAPRASADA RAO, J. (26-7-1977) :— When these two appeals were taken up, Mr. Sivaramakrishnaiah appearing for the appellant in O. S. A. No. 50 of 1973 as also Mr. Dolia in O. S. A. 75 of 1975 have raised a preliminary objection that the Judge sitting in insolvency ought not to have enquired into the Judge's summons taken out by the Official Assignee under Section 7 of the Presidency Towns Insolvency Act and given a judgment on the merits. Their contention is that this is a case in which the appellant in each of these appeals did not admit the liability as set out in the report of the Official Assignee and as claimed by him in the Judge's summons and at all material times there was a contest by the appellants regarding their liability to the claim made by the Official Assignee. Mr. Sivaramakrishniah arguing on the preliminary objection would say that the proviso to S. 7 of the Act having been introduced with a distinct purpose has a meaning and a significance to serve. He would invite our attention to the history of Ss. 7 and 36 of the Presidency Towns Insolvency Act and would contend that the Parliament was prompted to amend S. 36, Cls. 4 and 5 and introduce the proviso to S. 7 of the main Act only with the definite purpose and objective to avoid a summary investigation of claims by the insolvency Court without going through the process available under the common law. He would in the main rely upon the Full Bench decision of our court and would say that the Insolvency Court not having adopted or followed the ratio in that decision the ultimate conclusions rendered by the said court cannot taken to be an enforceable judgment and, therefore, this appeal has to be allowed on that ground after upholding the preliminary objection. The Official Assignee on the other hand would say that such an objection was taken at the trial stage before the insolvency Judge and the said objection was negatived and overruled and it was only thereafter that the parties entered upon the Judge's summons and went into a trial on the triable issues arising therein and that the parties willingly let in oral and documentary evidence in support of their respective contentions and that in the circumstances therefore it is not still open to the appellants to raise once over the objections that the Judge's summons is not investigable by the Insolvency Court. One other point that was also stressed before us was that it was in the discretion of the insolvency Judge after a prima facie examination of the material touching upon the Judge's summons to decide whether he should take up the cause and investigate it and ultimately decide it or direct the Official Assignee to file an independent suit under the provisions of the common law. In the instant case the Insolvency Court having exercised such a discretion and the parties having by necessary implication surrendered to it and waived their objections after their preliminary objection was overruled cannot, in this court as an appellate court, reopen the question and canvass once again the position that the Judge's summons is not maintainable.

2. No doubt, it is true that S. 7 of the Presidency Towns Insolvency Act, hereinafter referred to as the Act, as it stood without the proviso added to it in 1927, gave plenary powers to the court to decide on questions whatsoever whether of law or of fact which may arise in any case of insolvency coming within the cognisance of the said court. There was also the ancillary powers to the insolvency Court under the said provision to decide any question if in its opinion it was necessary or expedient to do so for doing complete justice or making a complete distribution of the property in any such case. The latter portion of S. 7, therefore, reflects the discretionary power in the court to decide such matters. Expediency, necessity or obligation to render complete justice for the purpose of making equitable distribution of the insolvent's property are all matters which the insolvency court can look into for purpose of considering whether the question before it has to be decided by it or such questions have to be relegated to a Civil Court for a fuller adjudication of the subject-matter. If once the Insolvency Court decides that the matter could be dealt with by it, may be on the ground of expediency or necessity, may be also on the ground that it was to entertain and decide upon it so as to render justice, all such incidents reflecting upon the exercise of jurisdiction by the court are pointers to the fact that the court exercised its discretion one way or the other. It is not obligatory for a court to look into a Judge's summons filed by the Official Assignee and brought before

t, in other case and adjudicate upon it. It may reject it as well on the ground hat in its opinion it is neither expedient nor necessary to decide such matter in summary way. But there may be cases also wherein the Court in the exercise of its discretion as a well-instructed institution take up such matters on file for decision and ultimately decide it for itself. If after the exercise of such jurisdiction may be a discretionary jurisdiction, the court calls upon the parties before it which in an insolvency court will invariably be the Official Assignee on the one side and the debtor of the insolvent on the other, then it is for the aggrieved party namely the insolvent's debtor to take such necessary steps to see that the further progress of hearing of the subject-matter by the insolvency court is stemmed by taking up the matter further in appeal. Section 8 of the Act provides for appeals in insolvency. It is not in dispute before us that any order made by an insolvency court on a preliminary objection taken by the aggrieved party before it regarding the exercise of its discretionary jurisdiction under S. 7 is appealable. In fact in O. S. A. 50 of 1973, Gokulakrishnan J. in Appl. No. 391 of 1972 (Mad) passed the following order:—

"This is an application for deciding the issue regarding jurisdiction of this court under S. 7 of the Presidency Towns Insolvency Act as a preliminary issue. I do not consider it proper to dismiss the application filed by the Official Assignee as not being maintainable under S. 7 of the Act. The matter can as well be considered in the main petition and a comprehensive order may be passed. Time and unnecessary proceedings can be saved if this application is dismissed at this stage relegating the consideration of the issue in the main petition. In that view, this application is dismissed."

3. Mr. Dolia would also represent before us that it was about this time that he wanted to raise additional grounds and wanted that his preliminary objection should also be noted by the Insolvency Judge. But it is common ground that the parties never interdicted the further progress of the hearing of the Judge's summons by challenging the order of Gokulakrishnan J. in any manner known to law. In this view, therefore, the parties had waived their objection after having been notified that their objection is not sustainable and not only this; the parties had participated in the enquiry, filed documents, let in oral evidence and ultimately took the decision of the learned Judge. In such circumstances we are afraid that it is not open to the appellants before us to raise once again the preliminary objection about the maintainability of the Judge's summons and the expediency of the hearing of such Judge's summons by the Insolvency Court. It is too late in the day to do so.

4. We however entirely agree with Mr. Sivaramakrishniah that Official Assignee, Madras v. Narasimha Mudliar, ILR 52 Mad 717 : (AIR 1929 Mad 705) (FB) is an authority for the proposition that 'no money claim in which any difficult questions arise should be dealt with by way of motion, nor should large claims, only simple cases capable of easy and speedy proof should be so dealt with". We respectfully adopt the observations of Beasley J. who spoke for the Full Bench in the main. In fact this was the opinion of the Full Bench also as is seen from the observations of Sir Murray Coutts Trotter C. J. who said:

"I have had the advantage in this case of perusing the judgment about to be delivered by Beasley J. It sums up the results arrived at after a long discussion between him, Odgers J. and myself and it may be taken to be the judgment of the court" (the underlining is ours). The Full Bench therefore laid an embargo as to investigation on claims which are complicated and not simple. Of course the learned Judge whose judgment is challenged before us has characterised the claim before him as a simple money claim. But we have not adverted to the merits. Therefore we refrain from making any observation on the content of the claim. But suffice it however to say that the Judge's summons can only be in matters when the Official Assignee or other persons authorised in law take out an application under S. 7 requesting the insolvency court to adjudicate upon summary claims, claims which are not difficult and claims which could be adjudicated summarily. But once a claim which was brought up to the court has suffered a trial, and in that trial the parties who are aggrieved at such a trial did participate and saw through the end of the same, they cannot be allowed to approbate and reprobate and thereafter complain that such a trial was neither expedient nor necessary and ought not to have been undertaken.

5. In our view, it is not necessary to consider the import of the Full Bench decision reported in Lakshmi v. Official Assignee, Madras, AIR 1950 Mad 410 (FB). That was a case which revolved upon the interpretation of S. 36 of the Act and the adding up of the proviso to S. 7 of the Act. The majority of the Judges, nay, all the Judges were of the view that it is not necessary that there should be an application under S. 36 made by the Official Assignee or the person authorised so as to argue whether the subject-matter would come under S. 36 or not. Having said this the learned Judges did not go into the question whether the ratio in Official Assignee, Madras v. Narasimha Mudaliar, ILR 52 Mad 717: (AIR 1929 Mad 705) (FB) is correct or not. We are not inclined at this stage to go into the further question as was attempted by Mr. Dolia whether the subject-matter in this case would squarely come under S. 36 or not. This is again because the appellants when they were asked to act and called upon to speak failed to do so and did not even prefer an appeal against the order of the insolvency court which called upon them to proceed with the trial on the foot that it had the discretion to enquire into the subject-matter under S. 7 of the Act.

6. Primarily for the reason that the parties have actively participated in the enquiry before the insolvency court and as the judgment in question is not challenged as one rendered without jurisdiction, and as the decision is the resultant of the discretionary jurisdiction of the insolvency court, we are unable to uphold the preliminary objection. The appeal will be therefore set for further arguments on merits.

(17-8-1977):— 7. We have already dealt with in our judgment rendered on 26-7-1977, the preliminary objection raised by the appellants that the court exercising jurisdiction under Section 7 of the Presidency Towns Insolvency Act, 1909, could not in such proceedings enquire into the subject-matter in controversy and held that the insolvency court did have the jurisdiction and even otherwise as the parties before it participated in the enquiry and the decision is the resultant of the discretionary jurisdiction of the insolvency court, it is too late in the day to harp upon the preliminary objection. In these circumstances, preliminary objection raised by Mr. Sivaramakrishniah and Mr. Dolia was not sustained by us.

8. We shall therefore proceed to deal with the merits in each of these cases. O. S. A. No. 50 of 1973 (Mad) is against the order of Gokulakrishnan J. passed in Appln. No. 54 of 1972 (Mad). The learned Judge after an elaborate enquiry upheld the contention of the Official Assignee that the carrier is bound to account for the value of the goods entrusted to him for carriage. In the result, the learned Judge directed the appellant before us and the carrier to pay to the Official Assignee a sum of Rs. 29,474 with interest thereon at the rate of 6 per cent per annum from 6-7-1973 till date of payment. O. S. A. No. 73 of 1975 is against the order of Mohan J. in Appln. No. 513 of 1971 (Mad). There again the learned Judge after due enquiry into the merits of the case accepted the Official Assignee's case and directed the carrier who is the appellant before us in this appeal to furnish a detailed statement of all the goods in their possession which they have not delivered to the parties at the respective places of destination and to hand over the same to the Official Assignee or pay their value as set out in the schedule to his order. The learned Official Assignee says that the value of such goods as per the schedule as above amounts to Rs. 1,19,398-88. Incidentally the question whether the appellants as carriers were entitled to set off was argued before both the trial Judges but it did not gain favour with them. The appellants having been denied that right to set off the amounts due to them towards hire charges from the company in insolvency and having accepted the judgment on merits rendered by the learned Judges as above, canvassed the only point about their entitlement to a set off as against the decree awarded by both the learned Judges. In O. S. A. No. 50 of 1973, the Official Assignee himself concedes that after the necessary investigations the amounts due and payable by the quondam company in insolvency to the appellant is Rs. 31,684 and that a sum of Rs. 1,47,502 is due by the Company to the carrier in O. S. A. No. 75 of 1975. In the above context of merits in both these appeals and after the disposal of the question on the preliminary point raised by the learned counsel for the appellants in our order dated 26-7-1977 these matters have been set up once again for hearing on the question whether the appellants are entitled to a set off as against the claim of the Official Assignee towards which he

has secured a money decree from the trial Court in both the applications.

9. Before we proceed with the consideration of the relative contentions of parties it is convenient to refer to the prayer of the Official Assignee in the Judge's summons which he took under S. 7 of the Presidency Towns Insolvency Act, 1909 (hereinafter referred to as the Act). The residuary power in the Insolvency Court to decide all questions of priorities and all other questions whatsoever whether of law or of fact which may arise in any case of insolvency coming within the cognisance of the court or which the court may deem expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case is provided for expressly in the statute. We have to some extent in our earlier order referred to the scope and content of the power of the insolvency Court while dealing with such questions arising in insolvency. When the Legislature has vested the insolvency court with a manifest jurisdiction to consider all questions in the name of expediency and convenience, then the very objective which the section serves is obvious. It is not only to afford speedy justice either to the Official Assignee as representing the body of creditors or to a creditor of the insolvent estate under certain circumstances, but the way in which it runs through the process created by a special provision in this Act reflects on the main concept viz, that the insolvency court is expected to render complete justice or a substantial justice while adjudicating the matters which come before it for a decision. The Official Assignee bearing this in view has sought in the Judge's summons for a relief which runs thus: "Why the respondent herein should not be directed to hand over the goods described in the schedule to the report filed hereto or in the alternative to pay its value." Even at the threshold therefore the Official Assignee was conscious that the status quo ante should be restored by the redelivery of the goods handed over to the carrier for transit or if the carrier is unable to return or redeliver such goods or otherwise explain their absence, the carrier should be made liable for the loss in the sense that he should reimburse the estate with all the loss attendant upon such non-delivery of the goods entrusted for carriage. It is not also in dispute in this case that the appellants in each of the appeals were the accredited carriers of this insolvent company and it is in this sense that a regular account appears in the books of account of the insolvent showing the quantum of the amount due and payable by the estate to the carrier as and towards hire charges. Obviously this account shows a money debt. The claim in the alternative made by the Official Assignee was also for money in case the carrier was unable to return the goods in specie. With this necessary facts we shall now consider the forcible objection taken by the Official Assignee against the claim for set off asked for by the appellants.

10. After referring to S. 47 of the Act, the main contention of the learned Official Assignee is that in the instant case it cannot be said that there have been 'mutual dealings' between the insolvent and the appellants and in the absence of such mutuality, the claim for set off cannot be upheld. On the other hand, Mr. Sivaramakrishniah and Mr. Dolia, appearing for the appellants, contending contra, would say that the mutuality of dealings is inherent in the contract itself and if once it is established that 'on account' the insolvent had to pay the carrier for prior carriage of goods, then such a money claim could be set off against the value of the goods not delivered and which were admittedly handed over to the carrier for carriage by the insolvent.

11. A contract of carriage has certain peculiar ingredients in-built in it. No doubt, for all outward purposes it is a contract for the carriage of goods which were entrusted by one party to the other. But a contract of carriage is not an equation of a contract of bailment. nor is the carrier liable as a bailee. On the other hand, there is in-built in such contracts the element of an insurance contract for it could reasonably be said that the carrier is equitable to an insurer who undertakes the carriage of the goods with all the attendant risks of such carriage. If therefore the carrier is not a bailee but for all legal purposes an insurer, then the question arises whether the entrustment of goods by the insolvent in the instant case was with the sole and only purpose of the return of the goods so entrusted and no more. The Official Assignee vehemently contends that the primary intention of this contract of carriage was that the carrier was expected to take the goods to the

ultimate destination and if he fails to do it he is expected to return such goods in specie. Prima facie, this argument is attractive. But the contract of carriage, in the instant case, provides for certain terms and conditions of carriage. One such term could be extracted for the purpose of convenience and ready reference. The carrier agrees as follows—

"I hold myself responsible for the goods given to my care and am liable for all or any loss, damage and pilferage, caused in transit and upto the time of delivery and owing to exigencies of weather, break-down or accident, such as fire, explosion etc., and will make good the loss sustained by your company and you can not only withhold my transport charges but also take such steps as you deem fit in every way to recover the loss from me, which I accept to pay; in this... ... ..."

On a fair reading of this express term of the contract of carriage, it is clear that there is only a postponement of the right to recover the transport charges until the reciprocal obligation on the part of the carrier to account for the goods entrusted to him is satisfied. The contract does not even say that the transport charges are not payable if the goods are lost, but it is only to be withheld by the insolvent company until the carrier satisfactorily accounts for the goods entrusted or accounts for the loss of such goods or damage or pilferage done to it. When this is the express term of the contract then it is clear that the intention of the parties when they forged the contract of carriage is not only to recover the goods in specie if they are lost but alternatively also recoup themselves with the value of such goods in case of such loss. It is this intention which ran through the fibre of this contract of carriage which was responsible for the Official Assignee when he sought for the alternative relief, in the Judge's Summons, as pointed out above earlier. It is also well accepted that once a litigant who is in the position of a plaintiff and who is therefore the dominus litis in a litigation seeks for two reliefs one as an alternative to the other, then he cannot throw overboard such an express request made by him and in the appellate court ask for the relief not granted to him which as already stated he only asked for in the alternative. We have discussed this question in detail in Sakkubai Ammal v. Babu Reddiar, 90 Mad LW 110 : (AIR 1977 Mad 223). We have said that 'Alternative is an expression, which indicates a choice of the person and if that choice is exercised by him, then he cannot afterwards blow hot and cold and seek for reliefs as he desires by throwing overboard the benefits which he has secured on a full trial in the trial court". The Official Assignee therefore cannot, in the appeal before us, ask only for restitution of the goods in specie which was a relief which he has asked for in the alternative in the trial court and which court granted him the other relief of money instead of the return of the goods in specie. In the decree drafted as a result of the judgment of Mohan J. both the alternative reliefs asked for have been granted. We are of the view however that having regard to the circumstances of this case the substantial relief asked for by the Official Assignee under S. 7 of the Act was only for the money equivalent of the goods lost and he cannot therefore now at the appellate stage ask for the return of the goods in specie.

12. If this were the main purpose of the Judge's summons and if the judgment and the decree which followed after investigation of the Judge's summons, was mainly for the refund of the money value of the goods entrusted to the carrier, then it is not difficult for us to hold that the dealings between the insolvent company and the carrier are mutual within the meaning of S. 47 of the Act. Section 47 of the Act runs as follows :—

"Where there have been mutual dealings between an insolvent and a carrier proving or claiming to prove a debt under this Act, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from one party shall be set-off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively;

Provided that a person shall not be entitled under this section to claim the benefits of any set-off against the property of an insolvent in any case where he had at the time of giving credit to the insolvent notice of the presentation of any insolvency petition by or against him."

We could do no better than to follow the apposite observations of a Division Bench of the Calcutta High Court in Krishna

Chandra v. Dhanabhandar Co., AIR 1935 Cal 225. After tracing the history of the section on 'mutual dealings' the learned Judges said— "This statutory extension is that where there are mutual dealings between an insolvent and a creditor an account has to be taken of what is due from the one to the other in respect of such mutual dealings and the balance of the account and no more is to be paid by the one to the other. These provisions are based on manifest justice; otherwise the receiver in insolvency would be able to recover the full amount due to the insolvent leaving the other person to take a pro rata dividend only". In a case decided by the Company Court of this court, a similar question arose to which one of us was a party. In that case reference was made to the decision in Sundaravaradan v. Official Liquidator, T. N. B. Subsidiary Co., 1939 Mad WN 1231 : (AIR 1940 Mad 266), where Gentle J. observed—

"It would be very harsh if the Official Assignee or the Official Liquidator of a company could demand in full, moneys due by a debtor and at the same time that person being a creditor for an equal or a larger sum, of the company must be content with a dividend dependent on the distribution which can be made from the assets".

A reference was also made to a decision of a Division Bench of the Kerala High Court in Gokul Chit Fund v. T. K. O. Vareed, (1977) 47 Com Cas 264 : (AIR 1977 Ker 68). We are extracting the relevant passage in that case for a continuous appreciation of the aspect we are dealing with, which is as follows (at page 73)—

"The 'mutual dealings' referred to in (S. 47 of) the Insolvency Act may consist of several distinct or independent transactions entered into between the same parties functioning in the same right or capacity. It is not therefore necessary that the debts or claims sought to be set off against each other should have arisen out of one and the same transaction".

Having regard to the pronouncements as above, we are of the view that the appellants are entitled to claim a set-off as against the counter-claim, if we can use that expression made by the Official Assignee as against them for recovery of the value of the goods entrusted to the appellants for carriage and which have been lost or unaccounted for by them. One interesting argument, however, which the Official Assignee raised in the course of his argument, was that the contract of carriage notwithstanding the specific clause already excerpted by us would not enable the carrier to set off the amount due by the insolvent towards hire charges. Strong reliance is placed upon two English decisions. One is Rose v. Hart, (1818) 129 ER 477. A comment on this case was made by the well-known author in 'Williams on Bankruptcy' 18th Edition. Dealing with Rose v. Hart the author said—

"The previously wide interpretation of 'mutual credit' was considerably narrowed, in Rose v. Hart, to mean such 'credits' only as must, in their nature, terminate in 'debts'; as, where a debt is due from one party and credit given by him, on the other hand, for a sum of money payable at a future day, which will then become a debt; or ... ..."

The trend of the later decisions even in the United Kingdom when they were asked to interpret the expression 'mutual credit' was an elaborate and wide interpretation of the same. The courts in England thought that it was enough that the transaction which is sought to be put against a claim so as to gain a set-off is one which would most likely end in a debt. Again the learned author has incidentally referred to the right of the Official Assignee in a given case to subject the other party who is guilty to a process under the criminal law or for tort or in the alternative for damages arising out of the breach of contract. It is this which the learned author in the above edition at page 174 refers to by quoting Lord Kenyon. The quotation runs thus—

"In Parker v. Norton, Lord Kenyon said — I understand Buller J. to have meant this — that if a person has his election of two remedies, and may bring either trover or any other action, the possibility of his electing to bring trover shall not prevent his proving his debt, if he will waive the tort."

The possibility of the two remedies based on tort as well as a claim for damages cannot co-exist. The author repeats the same principle at page 216 thus—

"Generally a claim which is capable of being set off by one side will afford a 'mutual credit', against which the other side could, if necessary, set off their provable claims. In other words, claims must generally be within the mutual

credit clause for both debtor and creditor, or for neither; and a claim cannot both be and not be subject to the mutual credit clause. But to this rule there seems to be one exception arising from the rule that a man shall not take advantage of his own wrong. A depository without power of sale cannot, if he wrongfully sells, treat the pawnor's right to recover damages for the breach of trust as a credit by the pawnor to him; but the pawnor might nevertheless, set off the damages to which he might be entitled for the breach of trust against a credit given to him by the depository, since, if he chooses, he may waive the tort."

The learned Official Assignee is still not satisfied with the lucid explanation given by the eminent author Williams on Bankruptcy, but he would refer to another decision of Lord Denning presiding in a court of appeal in Rolls Razor Ltd. v. Cox, (1967) 1 All ER 397 : 1967-1 QBD 522 : 1967-2 WLR 241. That was a case where the salesman was entrusted with certain machines belonging to the company which later went in liquidation. The salesman was also supplied with tap-adaptors which he had to return in specie in case the contract of employment is snapped for whatever reason it might be. It appeared that after the company went into liquidation, the liquidator sought for the return of the machinery still with the salesman and which were not sold and also for the return of the tap-adaptors. Lord Denning said that the tap-adaptors were never entrusted to the salesman for sale or to be turned into money, there cannot be any set off in such circumstances. But as regards the right of the salesman to appropriate the value of the machinery towards the salary due from the company to him, the Court of Appeal gave a right of set off to the salesman and in this respect Lord Denning did depart from the rule in Rose v. Hart, (1818) 129 ER 477. The reason for the departure is obvious. If the mutual dealings between the insolvent company or an insolvent and its creditor are such that the creditor could successfully claim certain amount from the estate of the insolvent and the insolvent in turn could ask for an account of the dealings which the insolvent had with the other party prior to the insolvency, then it is but substantial justice to uphold that they are mutual dealings capable of being set off one against the other. We have already prefaced by saying that the entire objective of S. 7 of the Act which though garbed with a discretionary and a summary power, yet it is expected that all the decisions which are the resultant of such investigation could render manifest and substantial justice. We have already referred to the observations of the learned Judges of the Calcutta High Court in Krishna Chandra v. Dhanabhandar Co., AIR 1935 Cal 225. We have also expressed our view that a common carrier is liable practically as an insurer of the goods. The Official Assignee has elected to have the value of the goods entrusted to the carrier and has not chosen to process the criminal law so as to book the carrier for wrongful conversion or trover. In these circumstances, we are of the view that a mutual account has to be taken as regards the dealings of one with the other. Those dealings have been scrutinised by the trial Judge in each of these appeals. We have seen that the Official Assignee is entitled to get a sum of Rs. 29,474-270 from the appellants in O. S. A. No. 50 of 1973. Similarly, the Official Assignee is entitled to obtain an amount of Rupees 1,19,398.88 together with interest from the appellant in O. S. A. 75 of 1975. In the former the Official Assignee concedes that the insolvent has to pay a sum of Rs. 31,684. In the latter appeal, a similar concession is made that a sum of Rupees 1,47,592 is payable to the carrier as and towards hire charges for contracts entered into earlier between the insolvent company and the appellant carrier. One has to be set off as against the other. We therefore direct the Official Assignee to give credit to the sum of Rs. 31,684 towards the amount payable to him in Appln. No. 34 of 1972 and similarly give credit to the sum of Rs. 1,47,502, as against the amount payable to him in the decree in Appln. No. 513 of 1971 and after adjusting mutually the dealings in the nature indicated claim or pay to the appellants the balance amounts, in accordance with the insolvency law. The appeals are allowed. There will be no order as to costs.

Appeals allowed.

AIR 1978 MADRAS 121

RAMAPRASADA RAO AND SURYAMURTHY, JJ.

M. M. Jaffar Kermani, Appellant v. M. M. Hassan Kirmani and another, Respondents.

Letters Patent Appeal No. 35 of 1976, D/- 17-6-1977.*

Wakf Act (29 of 1954), Ss. 15, 44 and 45 — Civil P. C. (1908), S. 92 — Wakf governed by Act — Compromise decree — A and B appointed joint mutawallis — B put in charge of management of wakf property — Suit by A against B for his share of income and rendition of accounts — Maintainability — Effect of Ss. 15, 44 and 45.

Where under a compromise decree A and B were appointed joint mutawallis of the wakf governed by the Act and B was put in charge of general management and rental collections of wakf property and A filed a suit against B for his share of 40% in the net income of the wakf property and for rendition of account of the income,

Held that (1) not only under the terms of the compromise but also in law the co-mutawalli B was obliged to render an account to the mutawalli A who demanded for it and since the wakf was governed by the Act and there was no embargo on the filing of a suit in the ordinary Civil Court for rendition of accounts by one trustee to another under the provisions of the Act and there was no prescription under S. 92, Civil P. C. for the institution of such actions the suit by A against B for accounts was maintainable even in the absence of any allegation of mis-management or negligence on the part of B. AIR 1922 Mad 17 (FB) and AIR 1953 Mad 744 and AIR 1943 Mad 466 (FB) and AIR 1967 SC 781, Rel. on.

(2) the issuance of a suit notice prior to the filing of the suit for accounts would act as a step-in-aid to the furtherance of the cause of A but the absence of such notice could not be viewed as a fatality so as to non-suit A on that ground alone.

(3) in order to quantify the amount due to A an accounting was necessary.

(4) Sections 15, 44 and 45 did not vest authority in the Wakf Board to compel one mutawalli to render an account to the co-mutawalli and therefore A could not have approached the Wakf Board for the relief sought for by him in the suit. (Paras 1, 4, 5, 6, 7, 8, 9, 11)

Cases Referred: Chronological Paras

AIR 1967 SC 781 11

AIR 1953 Mad 744 : (1953) 1 Mad LJ 486 10

AIR 1943 Mad 466 : (1943) 1 Mad LJ 388 (FB) 10

AIR 1922 Mad 17 : 41 Mad LJ 608 (FB) 9

V. Ratnam and T. Srinivasan, for Appellant; K. Chandramouli, for Respondents.

RAMAPRASADA RAO, J.:— The first defendant in O. S. No. 1606 of 1968 on the file of the City Civil Court, Madras, is the appellant, Haji Mirza Ali Naki Sahib Kirmani, executed a wakf deed whereunder he set apart his property bearing door No. 73, Sembudoss Street, for certain religious and charitable purposes. After earmarking a portion of the income from the said property for certain purposes accepted in Muslim Law, he directed that the surplus income be taken over by the Muthavalli. The first Muthavalli was the Wakif himself, and thereafter he constituted his wife and sons as joint muthavallis. He had two sons and the plaintiff is the son through one such son and defendants 1 and 2 are sons of the second son of the wakif. The Wakif died in 1927 and after the death of his wife and his two sons, it transpires that the plaintiff was in possession of the suit property for a considerable length of time. The first defendant initiated proceedings before the Wakf Board and sought for a direction regarding accounting of the income from the wakf property from the plaintiff. The Wakf Board however in the interest of amity directed that the plaintiff and both the defendants should act as joint muthavallies under the supervision of one Amin Khalihi. The plaintiff questioned this order of the Board in a writ petition No. 404 of 1961 on the file of this Court. The writ petition was dismissed. The plaintiff filed W. A. No. 3 of 1963. A compromise was entered into in the said writ appeal and the memorandum of compromise is as follows:—

"MEMORANDUM OF COMPROMISE".

The parties hereby agree to and compromise as follows:—

1. M. M. Hassan Kirmani (Appellant) M. M. Jaffer Kermani (2nd respondent) and M. M. Sadique Kirmani, shall be

*(Against decree of Sethuraman J. in S. A. No. 2478 of 1974, D/- 9-1-1976).

the joint Muthavallis of the Haji Mirza Ali Nacki Kermani Wakf and M. M. Jaffer Kermani shall be the managing muthavalli of the said wakf.

2. M. M. Jaffer Kermani, shall be in charge of the rental collections from the several tenants in occupation of the wakf property and shall be accountable to the wakf for the said collections.

3. The receipts for the rents collected shall be issued by M. M. Jaffer Kermani (Managing Muthavalli) in the name of the wakf.

4. The tenants shall pay the rents only on the production of the receipts signed by the aforesaid, M. M. Jaffer Kermani (Managing Muthavalli).

5. The rental collections so made shall be deposited in a scheduled bank in the name of the wakf and the bank account shall be operated by M. M. Jaffer Kermani (Managing Muthavalli in charge).

6. The Muthavallis shall perform the Majlises every year during Muharram as enjoined under the wakf Deed dated 17th Sept., 1919 for a sum not exceeding Rs. 600/- (Rupees six hundred only).

7. The Muthavalli in charge of rental collections shall pay the Corporation taxes and other public charges for the wakf property and extend a sum not exceeding Rs. 200/- towards incidental charges viz., postage and rental collection charges and Rs. 300/- towards repairs.

8. The balance, after meeting the above expenses shall be divided among the Muthavallies or their respective heirs after them, at the end of every year in the following manner:—

(a) M. M. Jaffer Kermani) 60%
(b) M. M. Sadique Kermani)
(c) M. M. Hassan Kirmani 40%

9. A sum of Rs. 40/- (Rupee Forty) only shall be paid every month to Sri M. M. Hassan Kirmani and a sum of Rs. 60/- (Rupees Sixty only) to Jaffer Kermani and Sadique Kermani on or before the 15th of every succeeding month, and which sum shall be given credit to at the time of taking of accounts as mentioned in para. 8 above.

10. If there is change in the Muthavalliship the balance after meeting the expenses shall be distributed according to the terms of the wakf deed dated 17th Sept., 1919.

11. The accounts shall be audited every year by competent auditor. The account books shall be kept open for inspection to the muthavallis.

12. In the event of any portion falling vacant it shall be let out with the consent of all the muthavallis, preference must be given to the Muthavalli, not in occupation of any portion of the wakf property.

13. The room in the second floor shall be used for keeping the panjas.

14. The Muthavallis are at liberty to put up additional pucca constructions in the open terrace.

15. The rental advance received by M. M. Hassan Kirmani, from the tenants at the time of the commencement of the tenancy shall, when refunded to the tenants at the termination of tenancy and on the production of the receipts issued by M. M. Hassan Kirmani, be debited to the account of M. M. Hassan Kirmani.

16. The accounting between the parties shall commence only from 1st October, 1964. There shall be no accounting by M. M. Hassan Kirmani in respect of the past transactions, during his period of Muthavalliship and no claim shall be made against him in respect thereof.

17. All public charges due on the property upto 30th Sept., 1964 shall be paid only by M. M. Hassan Kirmani and if any payment is made by the wakf in respect of the same, the same shall be debited to the respective shares of M. M. Hassan Kirmani.

18. M. M. Hassan Kirmani shall continue to occupy the following portions (already in his occupation) in the wakf property viz., one hall, and adjoining room, the adjoining kitchen situate on the north-eastern portion and a room on the southern side above the garage, besides the bath room and lavatory in the ground floor.

19. A sum of Rs. 50/- (Rupee fifty per month) shall be debited to the account of M. M. Hassan Kirmani towards the rent payable for the aforesaid portion in his occupation at the time of taking of accounts as stated in para. 8.

20. In case of disputes between the Muthavallis the same shall be referred to the Wakf Board or to Khan Bahadur Ameen Khaleeli if the parties so desire.

21. This compromise shall come into force with effect from 1-10-1964.

Dated Madras this the 20th July, 1964.

Sd. M. M. Jaffer Kirmani, Respondent.

Sd. S. M. Amjad Nainar, Counsel for Respondent.

Sd. M. M. Hassan Kirmani, Appellant.

Sd. K. Chandra Mouli, Counsel for Appellant.

Sd. M. M. Sadique Kirmani, Joint Muthavalli.

The memorandum of compromise to which both the plaintiff and defendants 1 and 2 were parties, was implemented and acted upon by the parties until the plaintiff came to Court in 1968. Under the compromise, the plaintiff and the defendants were constituted as joint Muthavallis and the first defendant was put in charge of rental collections of the wakf property and he was put in general management of the same. A sum of Rs. 600/- was set apart for the purpose of the object of the wakf and the net rental income was to be divided between the parties at the end of each year, the plaintiff being entitled to a 40% and the defendants together to the balance of 60%. The plaintiff was allowed to continue in possession of a portion of the wakf property and he was to be charged a monthly rent of 50/- for such occupation. As is seen from the memorandum of compromise, the accounts were to be audited every year and the plaintiff was to be paid a sum of Rs. 40/- a month and the defendants Rs. 60/- a month. The plaintiff's complaint was that he was not paid the monthly sums as contemplated in the memo. According to the plaintiff, the first defendant did not even perform the ceremonies which he was obliged to perform as per the objects of the wakf and failed to render proper accounts for the collections made by him from the trust property. He alleges that he was not allowed to inspect the accounts and that there was no audit of the same, though the compromise memo provided for such annual audit. He, therefore, filed the present action for a direction to the first defendant to render an account of the income and expenses of the wakf and also for direction against the first defendant to pay the amount due to the plaintiff on ascertainment. The first defendant's case was that he was compelled to enter into the compromise in the writ appellate Court and the compromise itself is not legal or valid and that it is not open to the parties to go behind the terms of the wakf deed. He maintains that he was S. 36 of the Wakfs Act. He refers to various types of litigations indulged in between him and the plaintiff from time to time and would emphatically contend that he never suppressed any accounts from the view of the plaintiff and that he was managing the wakf property diligently and denies that he is liable to render an account of the income from the wakf premises. He sought for a dismissal of the suit. The second defendant adopted the written statement of the first defendant. The trial Judge dismissed the suit. On further appeal by the plaintiff, the appellate court also dismissed the suit but for different reasons. Thereafter the plaintiff carried the suit in second appeal to the High Court, and Sethuraman, J., heard the second appeal, allowed the same and passed a decree for accounting as against the first defendant in the terms asked for. It is as against this, the first defendant has come up in appeal.

2. Mr. Ratnam appearing for the appellant contends that the learned single Judge, who decided the second appeal, was wrong in having directed an account, since there was not even a notice before suit for inspection of the accounts. He relies upon the observation of the first appellate Court to the effect that it is not the case of the plaintiff that the first defendant did not make the account books available for inspection at the premises of the wakf. His second contention was that an accounting is not necessary, as the plaintiff was only interested in the payment of the amount due to him from the trust as per the compromise memo and a general accounting appears to be unnecessary. Thirdly, his contention was that it was not usual for one trustee to seek for accounts from another trustee as they by necessary implication are presumed to be in general management of the wakf property, though for administrative purposes, the first defendant is in charge of the same. He also claims that accounts were being audited and sent to the plaintiff and the plaintiff cannot, therefore, have any complaint. Contending contra, learned counsel for the respondent would say that the litigation and the misunderstandings between the parties as disclosed from their conduct ever since 1961 by itself is a pointer to the fact that the first defendant would not care to the

render an account as called for. Even to grant the second relief asked for in the plaint, namely, a quantification of the amount payable by the first defendant to the plaintiff in accordance with the memo of compromise a general accounting is necessary and, therefore, the judgment of the learned Judge directing such an account is correct and cannot be interfered with. Regarding the third objection, it is contended that even if no negligence is alleged as against a managing trustee, the innocuous prayer for rendering an account of the trust properties in the management of the managing trustee is necessary not only in the general interest of the wakf concerned, but also for the adjustment of equities between the parties. The vague objection raised by the learned counsel for the appellant that under the Wakf Act, the Wakf Board is expected to generally supervise all wakf and this provision by itself is sufficient to non-suit the plaintiff is answered by the fact that in particular circumstances a specific suit for account as between the co-trustees is possible and ought not to be rejected in limine if the circumstances warrant such an accounting.

3. As regards the first contention that there was no warning to the first defendant to render an account before the plaintiff came to Court, Mr. Ratnam is not quite right when he wanted to rely upon the observations of the appellate Judge, who said that it was not the plaintiff's case that the first defendant did not make the account books available for inspection. This is clear from the fact that the plaintiff in para 11 of the plaint after referring to the obligation of the first defendant to get the accounts audited every year, alleged:

"The Ist defendant who is in charge of the Wakf income has not allowed the plaintiff to inspect the accounts or have them audited after giving notice to the other trustees".

4. In the written statement of the first defendant there was of course a denial, but the matter was not pursued further to enable the Court to infer that the plaintiff was kept mostly in the dark about the accounts of the wakf. In a suit for accounts, the cause of action arises de die in diem. A suit notice prior to an action for accounts might help the plaintiff to subserve the benefits of his action. But the absence of such a suit notice cannot be the criteria to hold that such a suit is not maintainable in law or in fact. No doubt, the issuance of a suit notice prior to the filing of a suit for accounts would act as a step in aid to the furtherance of the cause of the plaintiff. But that cannot be viewed as a fatality so as to non-suit him on that ground alone.

5. Coming to the next contention, we are unable to agree with Mr. Ratnam that the grant of the second prayer sought for in the plaint does not necessarily involve a direction to the first defendant for accounting. In order to quantify the amount due to the plaintiff which process involves an ascertainment of such quantum, an accounting is necessary. Such an accounting can only be by directing the first defendant to account for the income and expenses relating to the wakf property. The second prayer is very much inter-linked with the direction sought for against the first defendant to render an account. In this sense both the reliefs are inseparable. Ascertainment of the amount due to the plaintiff is possible only after scrutiny of the accounts and ascertaining the net income available for division as between the plaintiff and the defendants. In order to reckon the amount due to the plaintiff accounting by the first defendant is obviously necessary.

6. The learned Judge after finding that the compromise is binding on both the plaintiff and defendants and after having held that the suit was mintainable went into the question whether a suit for accounts as filed by a co-trustee is possible. Regarding the findings of the learned Judge on the first two points, posed by him, it has not been canvassed before us. Even otherwise, we are of the view that in a Letters Patent Appeal such a concurrent finding cannot be a subject-matter of issue.

7. The last question, therefore, that looms large in this case is that in the absence of any allegation as to mismanagement or negligence on the part of a co-trustee whether a bare suit for accounting by one trustee against another is maintainable. Mr. Ratnam's contention is that such a suit having regard to the provisions of the Wakf Act ought not to be entertained. S. 15 of the Wakf Act, 1954, hereinafter referred as the Act, refers to the functions of the Board. Sub-s. (2) of S. 15 generally refers to such functions without prejudice to the power of general superintendence of all Wakfs in the State which vested in the

Board by reason of S. 15 (1) of the Act. Sub-cl. (b) of sub-s. (2) of S. 15 says that the functions of the Board inter alia shall be to ensure that the income other property of wakfs are applied to the objects and for the purposes for which such wakfs were created or intended. S. 44 enables a person interested in a wakf to make an application to the Board complaining about mismanagement and if the Board is satisfied that there are reasonable grounds for believing that the affairs of the wakf are being mismanaged, it shall take such action thereon as it thinks fit. S. 45 of the Act prescribes the methodology by which such an enquiry can be undertaken by the Board. On the strength of these provisions Mr. Rathnam contends that it is open to the plaintiff to approach the Wakf Board for relief. It should not be however forgotten that the power of general superintendence vested in S. 15 or even the specific power to safeguard the income of wakf property which is also vested in the Wakf Board would not enable the Board to direct a muthavalli to render an account to a co-muthavalli. The powers of general superintendence referred to in S. 15 (1) ought not to be so liberally construed so as to vest in the Board an authority analogous to the power vested in a competent judicial authority to compel one trustee to render an account to a co-trustee as regards the income from the trust properties. The Board has undoubtedly the power not only in exercise of their visitorial jurisdiction contemplated under S. 15 (1) of the Act, but also in exercise of their suo motu powers under S. 45 or in exercise of such powers on invitation of a third party to enquire into the alleged mismanagement of wakf by a particular muthavalli or trustee. Such an enquiry is possible only on reasonable information obtained by them regarding the alleged mismanagement or on a complaint made in writing supported by an affidavit by a person interested in the wakf alleging such acts of omissions and commissions on the part of a muthavalli. We are unable to agree with the learned counsel for the appellant that the powers envisaged in Sections 15 (1) and 15 (2) (b) of the Act would enable the Board to grant the relief to the plaintiff asked for in these civil proceedings.

8. As regards the right of the plaintiff to call for account, clause 16 of the memorandum of compromise which is binding on the parties refers to such accounting between the parties and makes it clear that such accounting shall commence from 1st Oct. 1964. This clause, therefore, expressly provides for inter se accounting. Even otherwise, it is by now well established that if a suit did not fall within the ambit of S. 92 (1) of the Civil P. C. it was not hit by the provisions of sub-s. (2) thereof. In a case where the subject-matter is governed by the Wakf Act, and in the absence of any embargo on the filing of a suit in ordinary civil courts for rendition of accounts by one trustee to another under the provisions of the Act, it is easy to conceive that such a suit for accounts is maintainable by one trustee as against the other and there is no bar to it.

9. We are here concerned with a wakf which does not involve the vindication of the rights of the public in a public charitable trust. The objectives of the wakf are limited and has no wide public application. In such circumstances, a suit by one trustee against a co-trustee praying inter alia for an account of the trust properties in their hands is maintainable, even though the suit is not instituted under S. 92 of the Code of Civil Procedure. This is the dicta of the Full Bench of our Court in Appanna v. Narasingha, (41 Mad LJ 603) : (AIR 1922 Mad 17) (FB).

10. In Thirugnanasambandham Pillai v. Ramachandram Pillai ((1953) 1 Mad LJ 486) : (AIR 1953 Mad 744) Subba Rao, J., as he then was, categorically laid down that a suit by one Managing Trustee for rendition of accounts against the other trustees during the period of his turn would be maintainable without the sanction of the Advocate General. He referred to an earlier decision of Court in Tirumalai Tirupati Devasthanam Committee v. Krishnayya (1943) 1 Mad LJ 388 : (AIR 1943 Mad 466) (FB).

11. In V. L. N. S. Temple v. Pattabhirami (AIR 1967 SC 781) the Supreme Court made it clear to which also Subba Rao, C. J., was a party that no trustee can get discharge unless he renders account of his management and this liability is irrespective of any question of negligence or wilful default. That was a case in which an account was sought for from the Ex-trustees by the present trustees. Even though the Supreme Court said in that case that the present trustee can demand rendition of accounts from the Ex-trustee in respect

of their management without alleging against them any acts of negligence or default, for a greater reason, we are of the view that a co-trustee, who in terms of a compromise decree has obliged himself to render an account to the other trustee, should not only in terms of memorandum of compromise but also in law be obliged to render an account to the trustee, who demands for it. This is so because that failure to render an account which would be a due process for the quantification of the amount due to the "demanding trustee" is likely to prejudice him and affect his rights. Not only for the reason that there is no prescription under S. 92 of the Code of Civil Procedure for the institution of such actions, but also for the reason that failure to give a direction to a co-trustee in management to render an account will affect vested rights and cause prejudice to the person seeking for such an account and thirdly, as in the instant case, the first defendant has obligated himself under the compromise decree to so account, the appellant cannot seek for interference with the judgment of Sethuraman, J.

12. The learned Judge has also found on merits that since 1967-68, the accounts have not been either audited or submitted to the Wakf Board.

13. For all the reasons stated above, this Letters Patent Appeal is dismissed, but there will be no order as to costs.

Appeal dismissed.

AIR 1978 MADRAS 126

P. GOVINDAN NAIR, C. J., AND VARADARAJAN, J.

Dr. M. R. S. Vas, Petitioner v. The Commissioner of Land Revenue, Madras and others, Respondents.

W. P. No. 3169 of 1976 and W. M. P. Nos. 6952 to 6954 and 6975 of 1977, D/-8-11-1977.

Tamil Nadu Cinemas (Regulation) Rules (1957), R. 13 — Licence relating to exhibitions by means of cinematographs — Renewal — Applicant not an owner of the site, building and equipment — Need to produce documentary evidence of his being in lawful possession of the site — Lease of a running business as a cinema theatre — After expiry of lease lessee held was not entitled for renewal of licence in C form. (Tamil Nadu Buildings (Lease and Rent Control) Act (18 of 1960), S. 30 Cl. (iii) introduced by Tamil Nadu Act (23 of 1973)).

Held that the dominant purpose of the lease, as disclosed by the apportionment of the rental of Rs. 1,500 into Rs. 600 being the rental for the theatre building and Rs. 900 being the hire charges for furniture, fans, fittings and also for the goodwill of the business as a running concern, would show that the lease was of the Cinema Talkies as a running concern together with the building in which it was being run by the lessor until the date of the lease and not of the mere building. Therefore, it would follow that the lease was a composite one and that it was not governed by the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. The mere fact that the single projector and the sound equipment which the lessor was using until the date of the lease in favour of the lessee had not been leased but had been replaced by the double projector and sound equipment belonging to the lessee by consent of the parties to the lease would not alter the nature of the transaction. The possession of the lessee after the expiry of the lease as such was not either under any subsisting contract of lease or under any lease coming within the purview of the Tamil Nadu Buildings (Lease and Rent Control) Act. Therefore, the possession of the lessee after the expiry of the lease was not lawful possession and consequently he had not satisfied the requirement of rule 13 of the Tamil Nadu Cinemas (Regulation) Rules 1957 and he was not entitled to have the C form licence granted by the Collector for running the cinema business in the building. AIR 1965 SC 716, Followed. (Para 8)

Held further that the view of the Commissioner of Land Revenue, Prohibition and Excise, Board of Revenue, Madras, that the property leased was a building falling within the definition of 'building' in S. 2 (2) of the Act and not one of a composite nature not governed by the provisions of that Act, was based on an erroneous view of the law, and his order directing the Collector to issue the C form licence to the lessee had exceeded his powers under the law, and the same could be interfered with by the High Court in exercise of its powers under Art. 226 of the Constitution. (1967) 69 Pun LR 377 Rel. on. (Para 9)

Cases Referred: Chronological **Paras**

AIR 1975 SC 1758 6
AIR 1972 SC 2526 7
(1969) 3 All ER 456, Lucy v. W. T. Henleys Telegraph Works Co. Ltd. 6
(1968) W. P. Nos. 1640 and 1641 of 1968 (Mad) 4
(1967) 69 Pun LR 377 9
AIR 1965 SC 414 7
AIR 1965 SC 716 7, 8
AIR 1957 Andh Pra 619 7
(1956) 2 All ER 362 : (1956) 1 WLR 697, Levermore v. Jobey 7

K. K. Venugopal for V. Manivannan and M. Krishnappan, for Petitioner; The Govt. Pleader, V. K. Thiruvenkatachari, S. Ramalingam, P. Chidambaram and N. Thiagarajan, for Respondents.

VARADARAJAN, J.:— This writ petition is by the owner of 'Ramakrishna Talkies' situate in Tennur High Road, Tiruchirapalli, for the issue of a writ of certiorari or any other appropriate order or direction calling for the records relating to the orders of the Commissioner of Land Revenue, Prohibition and Excise, Board of Revenue, Madras, the first respondent herein, and quash the same. The writ miscellaneous petitions are to bring on record the legal representatives of the deceased 3rd respondent as respondents 4 to 7 and to appoint the 4th respondent as the guardian of the minor respondents 5 to 7 and for an injunction restraining the second respondent from further renewing the licence in the name of the 3rd respondent's legal representatives or any other person and to substitute respondents 4 to 7 in the place of the 3rd respondent, respectively.

2. The first respondent's order BP. Rt. 3229/76-L dated 19-7-1976 was passed on the appeal filed by Krishnamurthi, the third respondent (now deceased) the temporary licencee of Ramakrishna Talkies, against the Collector's order refusing renewal of the C form licence for the cinema. The prior regular C form licence had been renewed upto 31-12-1974, and it stood in the name of Krishnamurthi, the deceased 3rd respondent. Further renewal of the C form licence was pending before the Collector for rectification of certain defects and the cinema had been running on temporary permits issued every month. The writ petitioner had constructed the Ramakrishna Talkies and in July 1935 the C form licence was issued in his favour under the Public Resorts Act II of 1888, as also the permit issued by the Electricity Department under the Tamil Nadu Cinemas (Regulation) Rules. Section 12 (1) of the Cinematograph Act 1952, provides for the licensing authority granting the licence under Part III of the Act relating to regulation of exhibitions by means of cinematographs, if it is satisfied that the rules made under that part had been substantially complied with. Section 12 (3) of the Act provides for an appeal to the State Government or to such officer as the State Government may specify in this behalf and the State Government or the officer, as the case may be, may make such order in the case as it or he thinks fit. Under R. 13 of the Tamil Nadu Cinemas (Regulation) Rules 1957, if the applicant for the licence is the owner of the site, building and equipment, he shall produce the licensing authority the necessary records relating to his ownership and possession thereof, and if he is not the owner, he shall, to the satisfaction of the licensing authority, produce documentary evidence to show that he is in lawful possession of the site, building and equipment.

3. The writ petitioner was running the cinema under the name and style of 'Ramakrishna Talkies' in his name from 1935 to 1945, and his brother was running the cinema with the licence standing in his name thereafter until about 1947. There is no dispute between the parties about the facts thus far referred to. Subsequently, the petitioner and the third respondent's father Ramasubramania Iyer entered into an agreement of lease dated 15-10-1947 in respect of the Ramakrishna Talkies for a period of five years from 1-4-1947. The lease deed dated 15-10-1947 has been produced before us. But objection was taken on behalf of the contesting respondents about that document being looked into by this court, on the ground that it has not formed part of the records either before the Collector or before the first respondent. Subsequent to that lease, there was a supplemental agreement between the petitioner and Ramasubramania Iyer for apportioning the rent of Rs. 1,200 per month into Rs. 600 representing the rental for the theatre building and Rs. 600 representing the hire charges for the furniture, fans, bulbs, fixtures, electrical fittings, stage materials and other equipment required for fulfilling the regulations and requirements of District Magistrate's Electrical Inspector's, Fire Brigade Officer's and Public Resort Act's licences needed for a pucca licensed theatre and also for the

goodwill of the business as a going concern run under the name and style of 'Ramakrishna Talkies' covered by all the requisite licences. Thereafter, there was a further lease under the document dated 10-7-1965 by the petitioner in favour of R. Krishnamurthi, the third respondent herein and the son of the previous lessee, of the same property described in the schedule to the document, as a running concern for a sum of Rs. 1,500 per mensem for a period of ten years ending with 30-9-1975. According to Cl. 18 of that agreement out of the sum of Rupees 1,500, Rs. 600 represents the rental for the theatre building and Rs. 900 represents the hire charges for the furniture, fans, fittings and also for the goodwill of the business as a running cinema called 'Ramakrishna Talkies' fully covered by all the necessary licences. The affidavit filed in support of the writ petition discloses that at the request of Ramasubramania Iyer before the expiry of the lease on 30-9-1965, the petitioner had agreed for the transfer of the lease to his son Krishnamurthi, the third respondent and had also given the necessary consent letter for the transfer of the licences and certificates required in favour of Krishnamurthi and that after the expiry of that lease, the subsequent lease agreement dated 10-7-1965, referred to above, was entered into.

4. When the matter of the issue of a regular C form licence was pending before the Collector, after the expiry of the period of the last lease on 30-9-1975, the petitioner raised an objection for the renewal of the C form licence saying that the lease expired on 30-9-1975 and that it was of a composite nature not falling within the purview of the Tamil Nadu Buildings (Lease and Rent Control) Act 18 of 1960, and that on the expiry of the lease, the lessee could not claim to be in lawful possession of the property and, therefore, the requirement of R. 13 of the Tamil Nadu Cinemas (Regulation) Rules 1957, was not satisfied. Therefore, the question for consideration by the Collector, the licensing authority, was whether the lessee was in lawful possession as required by R. 13 of the rules and he thought that the licencee cannot be considered to be in lawful possession unless the tenancy is either covered by the lease document or the tenant continues to be in occupation as a statutory tenant under the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. The Collector found the point against Krishnamurthi, observing—

"It is clear beyond any doubt that the lease has been only of a running business as a cinema theatre and not of the building as such. Thus, S. 30 (iii) of the Tamil Nadu Buildings (Lease and Rent Control) Act directly applies to this case, where the object of the tenant was to run the business or industry and not to use the building as accommodation. In fact, the lessee took over a running cinema theatre and, as admitted by him, only the projector was changed. I am unable to accept the arguments of the lessee that the failure to mention the cinema projector by itself will take the lease outside the purview of S. 30 (iii) of the Act ... ... The theatre was running even before the lessee took it over and the lease taken by him was of the entire business. Just because the projector was changed it does not detract from the nature of a composite lease ... ... I find no reason to doubt the fact that the lease was a composite one. It is also not covered under the Tamil Nadu Buildings (Lease and Rent Control) Act and according to its amended S. 30 (iii). As such, the lessee cannot establish lawful possession after the expiry of the lease as required under R. 13 of the Cinema (Regulation) Rules and his application for renewal of the licence is therefore refused."

As already stated, the third respondent filed an appeal before the first respondent against the Collector's order and it was contended before the first respondent that the lease was not a composite one inasmuch as the projector and the loud-speakers, amplifiers and other cinema equipment had to be provided by the lessee himself. The first respondent accepted that contention and allowed the appeal and directed the Collector to issue the C form licence to the third respondent, observing—

"It has been admitted by the respondent that he has not provided, apart from the fire extinguishers and a cinema screen, any other machinery or equipment. These items are not enough to run the cinema. The essential equipment for running a cinema is the projector together with loud-speakers and amplifier. It is admitted by the respondent that these items have been provided by the appellant himself. In view of this, I cannot accept the argument that the lease is that of the running cinema. The mere mention of the word 'good-

will' in the lease does not make it the lease of a running concern... ... ... The counsel for the appellant has also cited the judgment of the Madras High Court in W. P. Nos. 1640 and 1641 of 1968 (Mad), (K. Kuppuswami Gounder v. The Board of Revenue) in the case of Ambikai Talkies, Karur, Tiruchirapalli Dt., in which it has been held that if the equipment does not belong to the lessor the Tamil Nadu Buildings (Lease and Rent Control) Act 1960 will apply ... ... I, therefore, hold that the lease is purely that of the buildings and it is not a composite lease. As such the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act will be applicable in this case and therefore the lessee will become entitled to protection under the above Act. That being the case, it cannot be said that he was in illegal possession of the building after 30-9-1975."

The petitioner had sent a lawyer's notice dated 2-10-1975 to the Collector, as required by S. 80, Civil P. C., saying that the lease was of the building alone and not a composite lease. The first respondent had taken that circumstance also into consideration, though he had felt that it need not act as estoppel against the petitioner.

5. In the affidavit filed in support of the writ petition, the petitioner has stated thus in para. 3—

"It is necessary to state that until 31-10-1947, my theatre was equipped with a projector which included also the sound equipment. At the request of the lessee, I had consented to his replacing the single projector and the sound equipment with a double projector and sound equipment. This was the only equipment which he replaced, and all the other furnitures, fittings, machinery, equipment etc., which are required for running the cinema theatre, were all part of the lease."

There is no specific denial of this allegation in the counter affidavit filed in the writ petition. Therefore, it has to be taken that it is admitted that at the time of the original lease and until 31-10-1947, the theatre had been equipped with a single projector and sound equipment, that at the request of the lessee Ramasubramania Iyer, the petitioner consented to his replacing the single projector and the sound equipment with a double projector and sound equipment and that it was the only equipment which the lessee replaced, and all other furniture, fittings, machinery, equipment etc, required for the running of the cinema theatre, were all parts of the lease. It is necessary to state in this connection that it was conceded by the learned counsel for the petitioner that there is no reference to the projector and sound equipment in any of the leases in favour of Ramasubramania Iyer and the third respondent. But the fourth respondent has stated in the counter affidavit filed in the writ petition that admittedly the main cinema projector and sound equipment belonged to her. She has further contended that the lease of a cinema business without a projector and sound equipment would be meaningless, that a perusal of the lease deed would show that neither the talkie equipment nor the projector was included in the lease, and that in fact, the petitioner has admitted in the affidavit that the lessee has provided the projector which included sound equipment.

6. Section 105 of the T. P. Act, a Central enactment, governs leases of immoveable property. Transfer of property is in the Concurrent List forming Entry 6 in List 3 of Sch. VII. Therefore, the State can also legislate regarding leases. The Tamil Nadu Buildings (Lease and Rent Control) Act 18 of 1960, was passed to amend and consolidate the law relating to letting of residential and non-residential buildings and the control of rents of such buildings and the prevention of unreasonable eviction of tenants therefrom in the State of Tamil Nadu. Section 2 (2) of the Act defines a building as—

" 'building' means any building or hut or part of a building or hut, let or to be let separately for residential or non-residential purposes and includes—

(a) the garden, grounds and out-houses, if any, appurtenant to such building, hut or part of such building or hut and let or to be let along with such building or hut,

(b) any furniture supplied by the landlord for use in such building or hut or part of a building or hut, but does not include a room in a hotel or boarding house."

Clause (iii) of S. 30, which has been introduced by the Tamil Nadu Act 23 of 1973 and which came into force with effect from 30-6-1973, says that nothing contained in the Act shall apply to—

"any lease of a building under which the object of the tenant is to run the business or industry with the fixtures, machinery, furniture or other articles

belonging to the landlord and situated in such building."

Illustration (2) to this sub-section sets out that—

"Where the lease is of land and building together with fixtures, fittings, cinematograph talkie equipments, machinery and other articles, the Act does not apply to such building."

The learned counsel for the contesting respondents submitted that what does not fall within Cl. (iii) of S. 30 and Illustration (2) to that section would fall within the ambit of the enactment. We are unable to accept this argument. We find the following passage in Lucy v. W. T. Henleys Telegraph Works Co. Ltd., 1969-3 All ER 456 at p. 464—

"The contents of the 'Report of the Committee on Limitation of Actions in cases of Personal injury' cannot, under our present law, be adverted to in construing the Act which followed it within less than a year."

The Supreme Court has observed in Dwarka Prasad v. Dwarka Das Saraf, AIR 1975 SC 1758 that—

"It is settled rule of construction that a proviso must prima facie be read and considered in relation to the principal matter to which it is a proviso. It is not a separate or independent enactment ... ... To expand the enacting clause, inflated by the proviso, runs against the fundamental rules of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso."

We are, therefore, of the opinion that the question whether the lease is protected by the Act or not will have to be decided with reference to the main provisions of the Act itself and not with reference to S. 30 and the Illustration thereto, which are in the nature of provisos.

7. If the lease is governed by the Tamil Nadu Buildings (Lease and Rent Control) Act 1960, the third respondent's legal representatives associated with the business carried on in the building would also be tenants within the meaning of S. 2 (8) of the Act, for, the definition of a 'tenant' in S. 2 (8) of the Act, both before and after its amendment by the Tamil Nadu Act 23 of 1973, includes any person by whom or on whose account rent is payable for the building, and also the surviving spouse, or any son or daughter or the legal representatives of a deceased tenant, who, in the case of non-residential building, had been in continuous association with the tenant for the purpose of carrying on the business of the tenants upto the death of the tenant and continues to carry on such business thereafter. In J. C. Chatterjee v. S. K. Tandon, AIR 1972 SC 2526, it is observed (at p. 2528)—

"It is now settled that after the termination of the contractual tenancy the statutory tenant has only a personal right to continue in possession till evicted in accordance with the provisions of the Act. It is pointed out by this court in Anand Nivas Pvt. Ltd. v. Anandji Kalyanji Pedhi, AIR 1965 SC 414 — 'A person remaining in occupation of the premises let to him after the determination of the expiry of the period of the tenancy is commonly though in law not accurately, called a 'statutory tenant'. Such a person is not a tenant at all; he has no estate or interest in the premises occupied by him. He has merely the protection of the status in that he cannot be turned out so long as he pays the standard rent and permitted increases, if any, and performs the other conditions of the tenancy. His right to remain in possession after the determination of the contractual tenancy is personal; it is not capable of being transferred or assigned, and devolves on his death only in the manner provided by the statute.' "

These observations have been made with reference to the provisions of the Bombay Rents Hotel and Lodging House Rates (Control) Act, 1947. In Uttamchand v. S. M. Lalwani, AIR 1965 SC 716, which arose under the Madhya Pradesh Accommodation Control Act 23 of 1955, the following observation of Jenkins L. J. in Levermore v. Jobey, 1956-2 All ER 362 has been extracted—

"For the purpose of construing the lease and in particular the tenant's covenant (11) it is permissible for the court, and indeed obligatory on the court, to pay regard to the surrounding circumstances with reference to which the lease was entered into, and in particular to look at the nature of the subject-matter of the letting".

Basing himself on that observation, Mr. B. R. L. Iyengar, who appeared for the appellant in that case, contended that in construing the nature of the lease the court must not lose sight of the fact that the lease in that case in terms purports to be of the Dal Mill building and that the machinery comes under the lease only incidentally as having been fixed in

the said building. The Supreme Court has observed in that decision (at p. 719)—

"Mr. Iyengar has also relied on the decision of the Andhra Pradesh High Court in Venkayya v. Thammanna Pada Venkatasubbarao, AIR 1957 Andh Pra 619 at p. 626. Dealing with the question as to the nature of the lease with which the court was concerned in that case, Viswanatha Sastri J. observed that there is an immense variety of structures which could be styled buildings, and added—

'We are unable to accede to the proposition that every enclosure of brick, stone-work or mud walls covered in by a roof irrespective of the purpose for which it is used and let, is a building within the meaning of the Act.'

The learned Judge has also remarked that so to construe the Act would bring within its operation all factories and mills which are invariably located in buildings. The question in each case would be what is the dominant part of the demise and what is the purpose for which the building was constructed and let out ... ... Mr. Iyengar contends that in construing the lease before us, we must apply the test of the dominant intention of the parties. In our opinion, this contention is well-founded; and so, we must determine the character of the lease by asking ourselves as to what was the dominant intention of the parties in executing the document.

As we have already noticed, S. 3 (a) (y) (3) takes within the definition of accommodation any building or part of a building, including any fittings affixed to such building or part of a building for the more beneficial enjoyment thereof. There can be no doubt that the fittings of the machinery in the present case cannot be said to be fittings which had been fixed for the more beneficial enjoyment of the building. The fittings to which S. 3 (a) (y) (3) refers are obviously fittings made in the building to afford incidental amenities for the person occupying the buildings. That being so, it is clear that the fittings in question do not fall under S. 3 (a) (y) (3). If the fittings in question had attracted the provisions of S. 3 (a) (y) (3) there would have been no difficulty in holding that the lease is in respect of accommodation as defined by the said provision. What then was the dominant intention of the parties when they entered into the present transaction? We have already set out the material terms of the lease and it seems to us plain that the dominant intention of the appellant in accepting the lease from the respondent was to use the building as a Dal Mill ... ... The fact that the appellant contends that the machinery which was transferred to him under the lease was found to be not very serviceable and that he had to bring his own machinery, would not alter the character of the transaction ... ... The fixtures described in the schedule to the lease are in no sense intended for the more beneficial enjoyment of the building ... ... The fact that a mill situated in a building is not expressly exempted by S. 2 (1) would hardly make any difference; because no lease can attract the provisions of the Act unless it is shown that it is in respect of accommodation as defined in S. 3 (a) and that must inevitably take us to the question as to whether the present lease falls under S. 3 (a) (y) (3). If the answer to this question is in the negative, it makes no difference at all, because if the lease is not in respect of accommodation, it is hardly necessary to enquire whether it has been exempted from the operation of the Act."

The Supreme Court has observed in Dwarka Prasad v. Dwarka Das Saraff, AIR 1975 SC 1758, referred to above, thus (at pp. 1759-1762)—

"The building covered by the suit is admittedly one built and adapted for screening films. The plaintiff had been carrying on a cinema business in this theatre for a long number of years but, when he discontinued, the defendant approached him in January 1952, for the grant of a lease of the building with all the equipment and fittings and furniture necessary for his operating the cinema ... ... Therefore, once the lease for the entire building and cinema projector, accessories and the like was finalised, the deed of demise was actually executed ... ... The core of the controversy here is (a) whether the lease is of the building, the fittings and other fixtures merely making for the beneficial enjoyment of and ancillary to the building, as urged by the tenant; or whether the building provides a bare, though appropriately designed, enclosure to house an enterprise, the dominant purpose or real subject of the lease being the cinema, apparatus and fittings including subsidiarily and incidentally, though necessarily, the structure of brick and mortar; and (b)

whether the cinema, to fall within the exclusionary clause added by the amending Act, must be actually a going concern with all the licences for showing films and running the theatre being in the name of the lessor ... ... Looking at the three problems posed, unaided by the many decisions cited by counsel, we are inclined to the view that a lease of an 'accommodation' must essentially be of a building — not a business or industry together with the building in which it is situated ... ... where the lease is composite and has a plurality of purposes, the decisive test is the dominant purpose of the demise ... ... The law sought to rescue exploited tenants of buildings. If this be a sound reading of the mind of the legislature it is fair to hold that the protected category of accommodation was residential and non-residential buildings and not business houses ... ... In this statutory context, gardens, out-houses, furniture and fittings mean annexures for the better enjoyment of the building. In this sense, the dominant intention must be to lease the building qua building. If that be the intention, the rent control law protects. On the other hand, if a going undertaking such as a running or ready-to launch and fully equipped cinema house is covered by the provision, the emphasis is not so much on the building but on the business, actual or imminent. There is nothing in the present definition which helps this shift in accent."

The terms of the lease deed in that case were these—

"We have taken a cinema hall known as Dwarka Prasad Theatre Hall ... ... for running a cinema ... ... on a monthly rent of Rs. 200 commencing from 25-3-1953."

On the same day the defendants in the suit executed another lease deed stating that they had taken the Dwarka Theatre hall on a rent of Rs. 200 per month and that in that building there were new furniture fitted for about 500 seats with ceiling and fittings of electric light and fans, complete machinery, ceiling fans and operating machines together with all articles present in the hall of the theatre, a list whereof had been duly signed by the executant and that they had taken that also on a monthly rent of Rs. 1,100 besides the rent of the building. The defendants stated in that lease deed that they had taken the building on rent to continue running a cinema. The Supreme Court has held that the lease sued on does not fall within the scope of the definition of 'accommodation' in the U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947).

8. The inventory taken as per Cl. 15 of the lease deed dated 10-7-1965, in the present case shows that along with the building of Ramakrishna Talkies the petitioner had leased 91 wooden benches, 42 back benches, with iron stand, 50 teakwood arm chairs, 40 iron chairs with back, one teakwood table with drawers, one teakwood telephone table, one wiring diagram plan, one set of framed cinematograph rules, one framed fire-fighting process, 'exit' and 'no exit' boards on doorways and windows, one seating capacity board, two framed Lakshmi and Saraswathi pictures, five fire extinguishers with refills with three spare refills for fire extinguishers, seven fire buckets, two iron stands for fire buckets in auditorium, seven ceiling fans with suspending pipes and separate regulators, one electric calling bell, two big ladders, one projection screen, two G. I. pipes required for the projection screen, one wooden frame border for projection screen, two big main switch boards and complete wiring system throughout the theatre with light points throughout the auditorium, exits, outside walls, cabin room, verandahs, waiting sheds, tea stalls, booking offices etc., and permanent serial lighting points in gable wall in front and in cabin room, verandahs and stair steps with blue cloth curtains for doorways and windows suspended from iron rods fixed to the doorways and windows and celotex fittings and two long benches and back benches. These articles are in no sense intended for the more beneficial enjoyment of the building and would be properly required only for the purpose of running the cinema. The fact that the income from the tea shop, pan shop and cycle stand are also covered by the lease, that the property leased has been described in the schedule to the lease deed as a running concern, that the monthly rental of Rs. 1,500 has been fixed representing Rs. 600 being the rental for the theatre building and Rs. 900 being the hire charges for the furniture and fittings and also for the goodwill of the business as a running concern bearing the name and style of Ramakrishna Talkies fully covered by all the necessary licences and that the lessee has to make his own arrangements

to obtain the renewal of the licences every year for conducting shows, etc., and was bound to hand back the theatre after the lease period was over fully covered by all the necessary licences in favour of the lessor, so that shows can be conducted on the very day of the expiry of the lease in continuation, shows that what had been leased is not the mere Ramakrishna Talkies building but Ramakrishna Talkies business with the necessary licences and all the equipment except the small projector and the sound equipment which belonged to the lessor and by consent of the parties to the lease deed had been replaced by the lessee by a double projector and sound equipment. Great stress was laid by the learned counsel for the contesting respondents on the fact that the cinematograph projector and sound equipment used in the theatre since the date of commencement of the lease belonged to the lessee and not to the lessor and it was contended that it must be sufficient to hold that the lease was not of a running concern but only of a building. In view of the observations of the Supreme Court in Uttamchand v. Lalwani, AIR 1965 SC 716, which we have underlined that the fact that the machinery which was transferred to the lessee under the lease was found to be not very serviceable and that he had to bring in his own machinery would not alter the nature of the transaction, we are of the opinion that the mere fact that the single projector and the sound equipment which the petitioner was using until the date of the lease in favour of Ramasubramania Iyer had not been leased but had been replaced by the double projector and sound equipment belonging to the lessee by consent of the parties to the lease would not alter the nature of the transaction in this case. The dominant purpose of the lease, as disclosed by the apportionment of the rental of Rs. 1,500 into Rs. 600 being the rental for the theatre building and Rs. 900 being the hire charges for furniture, fans, fittings and also for the goodwill of the business as a running concern, would also show that the lease was of the Ramakrishna Talkies as a running concern together with the building in which it was being run by the petitioner until the date of the lease and not of the mere building. Therefore, it would follow that the lease is a composite one and that it is not governed by the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. The possession of the third respondent after the expiry of the lease on 30-9-1975 was not either under any subsisting contract of lease or under any lease coming within the purview of the Tamil Nadu Buildings (Lease and Rent Control) Act. Therefore, the possession of the third respondent after 30-9-1975, was not lawful possession and consequently he had not satisfied the requirement of R. 13 of the Tamil Nadu Cinemas (Regulation) Rules 1957, and he was not entitled to have the C form licence granted by the Collector for running the cinema business in the building.

9. The learned counsel for the contesting respondents submitted that it is not for this court to interfere with the view of the first respondent on facts. The conclusion of the first respondent that the property leased is a building falling within the definition of 'building' in Section 2 (2) of the Act and not one of a composite nature not governed by the provisions of that Act, was based on an erroneous view of the law, and his order directing the Collector to issue the C form licence to the deceased third respondent has exceeded his powers under the law. Where the Executive has exceeded its powers under the law or has abused such powers by exercising them for an ulterior purpose not sanctioned by the law, the action of the Executive can be interfered with by the court and to that extent the position of an executive body and that of a judicial or quasi-judicial body are not different (vide (1967) 69 Pun LR 377). We are, therefore, unable to agree with the learned counsel for the contesting respondents that it is not open for this court exercising powers under Art. 226 of the Constitution to interfere with the view of the first respondent that the lease is of a building to which the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, applies and not a composite lease which is not governed by the provisions of that Act. The order of the first respondent allowing the third respondent's appeal and directing the Collector to grant the C form licence to the third respondent cannot, therefore, be sustained in law and has to be set aside.

10. The petition is accordingly allowed with costs, payable by the contesting respondents. Advocate's fee Rs. 500. The first respondent's order is set aside and the order of the Collector of Tiruchirapalli refusing to grant the C form licence to the third respondent is restored.

11. The learned counsel for the petitioner and the contesting respondents had no objection to the legal representatives of the third respondent being brought on record and the question whether the fourth respondent was associated with the business carried on by the third respondent and was entitled to the licence may be left open for consideration by the authorities below in the event of the petitioner failing in his contention that the lease is a composite one and not governed by the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act 1960, and that the third respondent is not entitled to have the C form licence renewed in his favour. W. M. P. Nos. 6952, 6953 and 6975 of 1976 are allowed and the relations of the third respondent are brought on record as his legal representatives as prayed for and the third respondent's name is directed to be removed from the cause title. W. M. P. No. 6954 of 1976 is dismissed as no longer necessary. There is no need to leave open the question whether the fourth respondent is associated with the third respondent in carrying on the business and is entitled to have the C form licence transfered in her favour, as the petitioner has succeeded in the writ petition. There will be no order as to costs in the writ miscellaneous petitions.

Petition allowed.

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P. GOVINDAN NAIR, C. J. AND VARADARAJAN, J.

Gopilal J. Nichani, Appellant v. M/s. Trac Industries and Components Ltd. Madras and others, Respondents.

O. S. A. No. 49 of 1975 and 68 of 1976, D/- 1-8-1977 and 7-9-1977.*

Tamil Nadu Relief Undertaking (Special Provisions) Act (21 of 1969), Ss. 4 (b) and 6 — Contract Act (1872), S. 128 — Word "Co-extensive" in S. 128 — Meaning — Contract between debtor relief undertaking and creditor suspended under S. 4 (b) — Suit against debtor is barred — But suit against guarantor of debt or petition to adjudge him as insolvent is maintainable. Appln. No. 1849 of 1973 in C. S. 155 of 1973, Reversed.

Section 128 Contract Act provides only that the liability of the guarantor is co-extensive with that of the principal debtor. The word "co-extensive" denotes extent and can relate only to the quantum of the principal debt. A contract of guarantee is a separate contract between the creditor and the guarantor. There is nothing in Act 21 of 1969 and particularly in S. 4 (b) thereof which suspends such a contract or the obligations arising therefrom. Therefore, on the suspension of the contract between the principal debtor namely the relief undertaking and its creditor under Section 4 (b) though a suit against the debtor would be barred but a suit by the creditor against the guarantor of the debt or a petition by him to adjudge the guarantor as insolvent can be proceeded with. Section 4 (b) is no bar. AIR 1974 SC 1183 and AIR 1940 Bom 315, Rel on; AIR 1951 Mad 48 (FB), Dist: AIR 1957 SC 907 and AIR 1970 SC 540 and AIR 1964 SC 1230, Ref: Appln. No. 1849 of 1973 in C. S. 155 of 1973, Reversed. (Paras 6, 7)

Anno: 3 AIR Manual Contract Act (1872), S. 128, Notes 4 and 9.

Cases Referred: Chronological	Paras
AIR 1974 SC 1183	5
AIR 1970 SC 540	4
AIR 1964 SC 1230	5
AIR 1962 SC 764	5
AIR 1957 SC 907	4
AIR 1951 Mad 48 (FB)	7
AIR 1940 Bom 315	6
(1584) 76 ER 637, Heydon's Case	4

G. Ramaswami, P. Sivaramakrishnayya and T. K. Seshadri, for Appellant; M. R. Krishna Iyer, M. R. Narayanaswami for C. Harikrishnan, Bhaskara Shankar, S. Raghavan and R. Mahesh, for Respondents.

P. GOVINDAN NAIR, C. J. (1-8-1977) :— We propose to dispose of these appeals by a common judgment, because the main questions involved in these appeals centre round the interpretation we have to place on Sec. 4 (b) of the Tamil Nadu Relief Undertaking (Special Provisions) Act 1969 (Tamil Nadu Act 21 of 1969) (hereinafter referred to as the Act), and S. 128 of the Indian Contract Act, 1872.

2. The appeal in O. S. A. 48 of 1975 is from the order of Sethuraman J. in Appln. No. 1849 of 1973 in C. S. 155 of 1973, on the file of this Court dismissing the suit filed against a relief undertaking as defined in S. 2 (4) of the Act and against the sureties who guaranteed the debt due from the relief undertaking.

3. O. S. A. No. 68 of 1976 is an appeal by the guarantor of a debt due from a

*(Against judgment of Sethuraman J. in Appln. No. 1849 of 1973 in C. S. No. 155 of 1973).

relief undertaking against whom insolvency proceedings were commenced to adjudge him as insolvent by the creditor. Suryamurthy J. held that the petitioning creditor seeking to adjudge the guarantor is not seeking to recover a debt and therefore S. 4 (b) of the Act has no application. The learned Judge on the preliminary point raised by the guarantor held that the insolvency petition taken against him was maintainable. It is as against this order, the latter appeal has been preferred by the guarantor.

4. The first question we will consider is about the interpretation of S. 4 (b) of the Act. The section is in these terms:—

"The Government may, if satisfied that it is necessary or expedient so to do for the purposes specified in S. 3, direct by notification, that all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force, to which any relief undertaking is a party or which may be applicable to any relief undertaking, immediately before the date with effect on and from which the relief undertaking was declared a relief undertaking, shall be suspended in operation or that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date, shall be suspended or be enforceable with such modifications and in such manner as may be specified in such notification."

It was contended on behalf of the appellant in O. S. A. 68 of 1976 and by the respondents in O. S. A. 49 of 1975, that on the basis of the words in S. 4 (b) of the Act that the Government by notification may direct the suspension of the contracts—one of the matters mentioned in the section—and since the contract is suspended, the sureties who are contended to be parties to the contract could also get the benefit of the suspension of the contract. In other words, it was submitted that a plain reading of the section would mean that the very foundation of the contract has ceased to exist, though temporarily, and on the basis of that contract, no action can be taken against the guarantor. Counsel relied on two decisions of the Supreme Court in support of the contention that the words used in the material provisions of the statute must be interpreted according to their plain meaning and it is only when such words are capable of two constructions that the question of giving effect to the policy or object of the Act can arise. We shall now extract the the judgment in Kanailal v. Paramnidhi, AIR 1957 SC 907. At p. 910, the learned Judges have observed as follows—

"Mr. N. C. Chatterjee, for the appellant, has contended that the object in enacting the relevant Thika Tenancy Acts and Ordinances is absolutely clear. It is a piece of welfare legislation and as such its operative provisions should receive a beneficent construction from the Courts. If the scheme of the Act and the object underlying it is to afford full protection to the Thika tenants, says Mr. Chatterjee, courts should be slow to reach the conclusion that any class of Thika tenants are excluded from the benefit of the said Act."

Counsel also relied on the observations of Barons of the Exchequer in the famous Heydon's case, (1584) 76 ER 637. Referring to this argument, the Supreme Court observed as follows (at p. 910)—

"However, in applying these observations to the provisions of any statute, it must always be borne in mind that the first and primary rule of construction is that the intention of the legislature must be found in the words used by the legislature itself. If the words used are capable of one construction only, then it would not be open to the courts to adopt any other hyothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act."

Similar observations are found in the decision in Tribhuban Parkash v. Union of India, AIR 1970 SC 540. At page 543, the Supreme Court has observed as follows—

"The object and purpose of a preamble to a statute is well settled and at the bar before us there was no serious dispute on this point. A preamble is a key to open the mind of the legislature, but it cannot be used to control or qualify precise and unambiguous language of the enactment. It is only when there is a doubt as to the meaning of a provision that recourse may be had to the preamble to ascertain the reasons for the enactment and hence the intention of the Parliament. If the language of the enactment is capable of more than one meaning, then that one is to be preferred which comes nearest to the purpose and scope of the preamble. In other words, preamble may assist in ascertaining the meaning, but it does not affect clear words in a statute. The courts are

thus not expected to start with the preamble for construing a statutory provision nor does the mere fact that a clear and unambiguous statutory provision goes beyond the preamble give rise by itself to a doubt on its meaning."

5. Counsel on behalf of the respondents invited our attention to the decision of the Supreme Court in B. L. Arora v. State of U. P., AIR 1964 SC 1230, the following observations occur (at p. 1236, para. 9):

"In approaching the question of construction of this clause, it cannot be forgotten that the amendment was made in consequence of the decision of this court in R. L. Arora's case, AIR 1962 SC 764, and the intention of Parliament was to fill the lacuna, which, according to that decision, existed in the Act in the manner of acquisitions for a company; nor can it be forgotton that Parliament when it enacted the Amendment Act was aware of Art. 31 (2) of the Constitution which provides that land can only be acquired compulsorily for a public purpose and not otherwise. It could not therefore be the intention of Parliament to make a provision which would be in contravention of Art. 31 (2), though it may be admitted that if the language used is capable of only one construction and fails to carry out the intention of Parliament when making the amendment, the amendment may have to be struck down if it contravenes a constitutional provision. Further, a literal interpretation is not always the only interpretation of a provision in a statute and the court has to look at the setting in which the words are used and the circumstances in which the law came to be passed to decide whether there is something implicit behind the words actually used which would control the literal meaning of the words used in a provision of the statute. It is permissible to control the wide language used in a statute if that is possible by the setting in which the words are used and the intention of the law making body which may be apparent from the circumstances in which the particular provision came to be made. Therefore, a literal and mechanical interpretation is not the only interpretation which courts are bound to give to the words of a statute; and it may be possible to control the wide language in which a provision is made by taking into account what is implicit in it in view of the setting in which the provision appears and the circumstances in which it might have been enacted".

A similar provision, though not an identical provision, as contained in S. 4 (b) of the Act, came up for consideration and interpretation before the Supreme Court in Inderjit v. B. K. Bhatt, AIR 1974 SC 1183. Their Lordships negatived the argument that was advanced, that the words used therein would cover persons other than the relief undertaking. With reference to the provisions of S. 4 (1) (a) (iv) of the Bombay Relief Undertaking (Special Provisions) Act, 1958, the Supreme Court observed as follows (at p. 1185, para 7)—

"Thus, neither the language of the statute nor its object would justify the extension of the immunity so as to cover the individual obligation and liabilities of the directors and other officers of the undertaking. If they have incurred such obligations or liabilities as distinct from the obligations or liabilities of the undertaking, they are liable to be proceeded against for their personal acts of commission and omission. The remedy in that behalf cannot be suspended nor can a proceeding already commenced against them in their individual capacity be stayed. Indeed, it would be strange if any such thing was within the contemplation of law".

6. We may in this connection also refer to the decision of the Bombay High Court in Ramachandra v. Shapurji, AIR 1940 Bom 315 Beaumont C. J. speaking for the Bench, after referring to the nature of a contract of guarantee and after having said that a contract of guarantee will involve two contracts, namely, one between the creditor and the principal debtor and the second between the creditor and the guarantor, observed that in order that it must become a contract of guarantee as distinguishable from a contract of indemnity, there must be a third contract between the principal debtor and the surety, either express or implied. We shall quote the words of the learned Chief Justice:

"Of course, the contract need not be embodied in a single document, but I think there must be a contract or contracts to which the three parties referred to in S. 126 are privy. There must be a contract, first of all between the principal debtor and the creditor. That lays the foundation for the whole transaction. Then there must be a contract between the surety and the creditor by which the surety guarantees the debt,

and no doubt the consideration for that contract may move either from the creditor or from the principal debtor or both. But if those are the only contracts, in my opinion, the case is one of indemnity. In order to constitute a contract of guarantee, there must be a third contract, by which the principal debtor expressly or impliedly requests the surety to act as surety".

In these cases, we are concerned admittedly with contracts of guarantee. A contract of guarantee is a separate contract between the creditor and the guarantor, and we see nothing in the Act and particularly in S. 4 (b) which either suspends such a contract or the obligations arising therefrom. It is impossible to read S. 4 (b) of the Act, particularly when it is read with reference to the object of the Act, in any other manner. We therefore negative the contention advanced before us that S. 4 (b) is attracted and any application or suit concerning the guarantor cannot be proceeded with.

7. We shall now take the question of interpretation of S. 128 of the Indian Contract Act. No other section of the Contract Act or any general principle has been relied on before us on behalf of the guarantor. We shall extract S. 128 of the Indian Contract Act:—

"The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract."

The section talks of only one thing and that is about the liability of the guarantor as being co-extensive as that of the principal debtor. The word co-extensive is an objective for the word 'extent' and it can relate only to the quantum of the principal debt. This question has been dealt with and discussed at length in a Full Bench decision of this court in Subramania v. Narayanaswami AIR 1951 Mad 48. That was a case arising out of a reference made by Subba Rao J. (as he then was) on the question whether a non-agriculturist surety would be liable for the entire debt even though the principal debt was scaled down under the provisions of the Tamil Nadu Agriculturists Relief Act. In this decision, reference was made to the well-known principle that a guarantee is not put an end to by reason of the debt becoming unenforceable against the principal by reason of matters happening subsequently, and that a surety is liable though the claim against the principal is barred by the statute of limitation or by reason of the bankruptcy of the principal. No doubt, there is the provision in S. 45 (4) of the Presidency Towns Insolvency Act expressly enacting that the fact the principal debtor has become an insolvent did not affect the liability of the surety. But this provision in the statute does not detract from the principle that we have stated above. The liability of the guarantor arising as it doe from an independent contract, even in cases where the guarantor is a privy to the contract between the principal debtor and the creditor, stands on a different footing, and unless we are able to say that by necessary implication that liability is also affected by some conduct of the principal debtor or any agreement between the principal debtor and the creditor, attracting the provisions of Ss. 133, 134 or 135 of the Contract Act, the principle laid down in Subramania v. Narayanaswami AIR 1951 Mad 48, will not extend to a case where temporarily the liability of the principal debtor has been suspended and has therefore become unenforceable. A reference to S. 7 of the Act indicates that it is only a suspension and the liability is not affected at all. S. 7 of the Act specifically provides that in computing the period of limitation for the enforcement of any right, privilege, obligation or liability referred to in Cl. (b) of S. 4, the period during which it or the remedy for the enforcement thereof was suspended, shall be excluded. It is, therefore, clear that there is no extinguishment of the principal debt, and the contract between the guarantor and the creditor stands absolutely unaffected by the passing of the notification under S. 3, declaring a particular undertaking as a relief undertaking. With great respect we are unable to agree with the reasoning of Sethuraman J. in Appln. No. 1849 of 1973 in C. S. 155 of 1973. The suit has been instituted after the notification. S. 6 of the Act provides for a stay of the pending proceedings against the relief undertaking. But the suit as against the relief undertaking having been instituted after the notification is not maintainable. The dismissal of the suit as against the relief undertaking must therefore stand. But the dismissal of the suit as against the guarantors cannot be sustained. The suit as against them must proceed. In the other judgment which is under appeal in O. S. A. 68 of 1976, Suryamurthy J. has held that the action taken to adjudge the surety

as an insolvent is not an action for recovery of the debt, and in this appeal, a determination of this question, is unnecessary. If a suit against the guarantor would lie, we have no doubt that proceedings for adjudging the guarantor as insolvent would equally lie.

8. In the result, O. S. A. 49 of 1975 is allowed to the extent that the suit shall proceed as against the guarantors only. O. S. A. 68 of 1976 is dismissed. We direct the parties to bear their respective costs in these appeals.

(7-9-1977) :—

9. These appeals were disposed of by a common judgment dated 1st Aug. 1977. In O. S. A. 49 of 1975, we held that the suit as against the guarantors was maintainable but it was not maintainable against the relief undertaking and accordingly dismissed the suit as against the relief undertaking. These cases have now been posted before us again at the request of counsel for the appellants in O.S.A. No. 49 of 1975 because of the apprehension apparently felt by him that the dismissal will preclude any action against the relief undertaking if and when the ban imposed by the notification is removed. There is no need for any such apprehension. But we do not mind clarifying the position. We make it clear that the dismissal of the suit as against the relief undertaking is only in the reference to the state of affairs obtaining at the time of judgment. If the ban is ever removed, certainly an action would be maintainable subject to the provisions regarding limitation and in light of the provisions in S. 7 of the Act to which we have referred.

10. The other point raised in the case relates to costs. The matter has been concluded by the judgment and we are unable to make any alteration in the judgment regarding costs.

Order accordingly.

AIR 1978 MADRAS 138

RAMAPRASADA RAO AND RATNAVEL PANDIAN, JJ.

C. Vasantha, Appellant **v.** **S. C.** Pandian, Respondent.

O. S. A. No. 87 of 1974, D/- 26-7-1977.*

*(Against Judgment of Sethuraman J. in Appln. No. 776 of 1973 in C. S. No. 70 of 1968 D/- 10-4-1974).

LU/AV/E528/77/KHA/WNG

Civil P. C. (5 of 1908), O. 20, R. 12 — Application for enquiry into future mesne profits — When can be made. Appln. No. 776 of 1973 in C. S. No. 70 of 1968 D/- 10-4-1974 (Mad), Reversed.

An ex parte decree for possession was passed against the defendant who applied to set it aside. An order was passed setting aside the decree provided that the defendant delivered possession to the plaintiff before a fixed date. The defendant did not deliver possession accordingly and the defendant's application was dismissed. During these proceedings, the plaintiff made an application for enquiry into future mesne profits. The Court dismissed the application on the ground that the suit had terminated and directed the plaintiff to file an independent suit for mesne profits. On appeal therefrom, the question was whether the plaintiff's application could be acted upon.

Held that if an ex parte decree is again brought into the hotchpot of litigation for being challenged as being incorrect the lis which originated by the plaintiff bringing it into the Court is not terminated. It cannot, therefore, be said that the application requesting for an enquiry into the future mesne profits was made at a time when the lis has terminated or ended in a manner known to law. The plaintiff's application on which no order was passed must, therefore, be disposed of by the original court. Appln. No. 776 of 1973 in C. S. No. 70 of 1968 D/- 10-4-1974 (Mad) Reversed. (Para 6)

Cases Referred: Chronological Paras

AIR 1967 SC 155 4

M. R. Narayanaswami for M. S. Venkatarama Iyer, for Appellant; G. K. Damodar Row and G. Natarajan, for Respondent.

RAMAPRASADA RAO, J:— This appeal is against the order of Sethuraman J. dated 10-4-1974. The appellant, as plaintiff in C. S. No. 70 of 1968, filed an application under O. XX, R. 12, C.P.C., and sought for an enquiry into the mesne profits of the suit property admittedly in the possession of the respondent, from the date of occupation till the date of delivery of possession.

2. Certain relevant facts which led to the application may be noticed. Initially there was a controversy as to whether the plaintiff was entitled to the suit property. The plaintiff based her title on the Will of one Solachi dated

4-12-1961. This was resisted by Solachi's husband who set up another Will dated 16-1-1962 of his own wife. A contest therefore ensued between the plaintiff and her sister as legatees under the Will of Solachi dated 4-12-1961, as propounded by them and the claim of Ramiah based on the will dated 16-1-1962 again said to be the Will of the same Solachi. On a full enquiry this court in T. O. S. No. 10 of 1963, granted Letters of Administration with the will annexed, to the plaintiff by its order dated 27-9-1965. In the course of the testamentary proceedings as above, earlier, the husband of Solachi is said to have leased out the property to the defendant for a period of 5 years. After being successful in the grant of Letters of Administration in her favour, the plaintiff instituted the present action (C. S. No. 70 of 1968 on the file of this court) for recovery of possession of the suit property and for mesne profits at the rate of Rs. 1,100 per mensem from 15-8-1964, the date when the defendant was inducted into the property by Ramiah and for other reliefs. On 18-2-1972 an ex parte decree was passed since the counsel appearing for the defendant reported 'no instructions'. On 17-3-1972, the defendant filed an application No. 812 of 1972, for setting aside the ex parte decree and sought for stay of execution of the decree till then. During the pendency of this application to set aside the ex parte decree, the plaintiff (decree-holder), pursuant to her rights, filed an application for an enquiry into the future mesne profits, i. e., for the period subsequent to the original suit till the date of delivery of possession. It is common ground that this application under O. XX R. 12, C. P. C., was filed at a time when the application to set aside the ex parte decree was pending. Thereafter, the court which enquired into the application to set aside the ex parte decree passed certain orders from time to time granting some more time to the defendant to deliver vacant possession, but at the same time, making sure that the plaintiff was paid and compensated for such occupancy by the defendant during the period when he obtained a relief regarding his continuance in the property. The first order which is referable and the gist of which ought to be excerpted so as to understand fully the scope of the contentions between the parties is as follows:—

"The application to set aside the decree is allowed on the above conditions, namely, that the applicant would deliver possession of the premises in accordance with the directions aforesaid to the decree-holder on or before 1-11-1972 failing which the application shall stand dismissed. On the applicant satisfying the above condition, this application, (Appln. No. 812 of 1972), to set aside the ex parte decree would stand allowed and the suit would stand dismissed as settled out of court".

A further application for extension of time was filed before the same learned Judge and he had further extended the time in Appln. No. 2481 of 1972. The last of such extension was upto 21-2-1973. Again, we make it clear that the learned Judge made a provision for the payment of damages for use and occupation of the property by the defendant upto 21-2-1973. Finally, the defendant, again without complying with the orders of the court made earlier regarding delivery of possession sought for an extension of time to do so, in Appln. No. 464 of 1973, which was dismissed by Paul J. on 22-2-1973.

3. The above narration became necessary because it would be useful to refer to them in the course of our judgment while setting out and meeting up the arguments of counsel.

4. The plaintiff, not having secured possession of the property, filed E. P. No. 10 of 1973 and obtained possession of the property on 31-3-1975. In the meantime, however, Appln. No. 776 of 1973, from which the present appeal arises, regarding the direction to enquire into the mesne profits in respect of the suit property for the period of occupation from the date of suit till the date of delivery of possession was not disposed of. It came up for final orders only in April 1974 before Sethuraman J. The learned Judge was of the view that as suit had terminated, an application under O. XX R. 12 C. P. C. was not maintainable and he dismissed the application and directed the appellant-plaintiff to an independent suit to recover such future mesne profits. The learned Judge, however, made one position clear and we are reiterating it here so that it may not be necessary for us to re-advert to it again. While considering the scope and content of the prayer in the petition the learned Judge expressed the view that the prayer of the plaintiff would take in future mesne profits also. But, ultimately, however, he dismissed the application on

the ground already stated. The appeal is against the said order. It has by now become axiomatic so to say that, notwithstanding the absence of a prayer for the grant of future mesne profits, the court has yet the discretion to grant the same under O. XX R. 12 of the Code, when it is asked for by the plaintiff-decree-holder at any time before the termination of the lis. The discretion to grant such a prayer for future mesne profits is only circumscribed and limited to the extent above indicated. That is, even if the plaintiff, by a mistake or by an inadvertent omission, fails to make prayer for future mesne profits the courts are not powerless as to granting the equitable relief for future mesne profits having regard to the circumstances of each case. This is how the discretion that is vested in courts has been interpreted and understood. Gopalakrishna Pillai v. Meenakshi Ayal AIR 1967 SC 155, made this position clear in the following terms (at p. 157):—

"Order XX R. 12 C. P. C. enables the court to pass a decree for both past and future mesne profits but there are important distinctions in the procedure for enforcement of the two claims. With regard to past mesne profits the plaintiff has an existing cause of action on the date of institution of the suit. In view of O. VII, Rr. 1, 2 and 7 C. P. C., and S. 7 (1) of the Court-fees Act a plaintiff must plead his cause of action, specifically claim a decree for past mesne profits, value the claim approximately and pay court-fees thereon. With regard to future mesne profits, the plaintiff has no cause of action on the date of institution of the suit and it is not possible for him to plead this cause of action or to value it, or to pay court-fee thereon at the time of institution of the suit. Moreover, he can obtain relief in respect of this future cause of action only in a suit in which provisions of O. XX rule 12 apply. But, in a suit to which the provisions of Or. XX rule 12 apply, the court has discretionary power to pass a decree directing an enquiry into future mesne profits and the court may grant a general relief though it is not specifically asked for in the plaint."

5. In the instant case, it is not even necessary for us to traverse the content of the discretionary power vested in a court in the circumstances above stated. This is because Sethuraman J. himself finds that the prayer in the plaint would take in the prayer for future mesne profits also. This would mean that by necessary implication the plaintiff who did not ask for it in the first instance and caused it to be introduced at a later stage by an amendment of the plaint, should be deemed to have asked for the future mesne profits. Therefore, the principle that the court has discretion to grant such mesne profits even when it is not specifically prayed for, does not strictly arise for consideration in the instant case.

6. The other question which arises for consideration is whether the lis did terminate on the date when the application under O. XX R. 12 C. P. C. was filed or whether it was pending. Here again the accepted rule is that if a lis has to be given the badge of finality then it should be for all purposes known to law. In particular, when a suit has been brought into the portals of a court by a litigant, then the usual manner to treat that litigation as having terminated is with reference to the stage when it has culminated in a final decree. The finality attached to such a decree should, for all legal purposes, be unassailable. But, if that decree which is an ex parte decree is again brought into the hotchpot of litigation for being challenged as being incorrect, then it obviously follows that the lis which originated by the plaintiff bringing it into the court has not yet terminated. We have already, while setting out the facts, referred to one important event, viz., that this application for the enquiry into the future mesne profits under O. XX, R. 12, C. P. C. was filed on 7-4-1972, when the application to set aside the ex parte decree was pending by then. The application by the defendant to set aside the ex parte decree passed on 18-2-1972 was filed on 17-3-1972. During the pendency of the enquiry into the possibility or feasibility of setting aside the ex parte decree, the present application under O. XX, R. 12, C. P. C. was made. It cannot, therefore, be said, in the instant case, that the application requesting for an enquiry into the future mesne profits was made at a time when the lis has terminated or ended in a manner known to law. The argument of Mr. Damodara Rao, however, is that the ex parte decree should be deemed to have stood the test of time notwithstanding the supervening order passed by the court in the various applications taken out by the respondent for extension of time for delivery of possession and notwithstanding a modifica-

tion in the text of the ex parte decree made earlier. He would refer to the fact that this court, while dealing with Appln. No. 812 of 1972 and similar applications filed by the defendant thereafter, would sustain the ex parte decree if the defendant did not conform to the conditions laid down in those respective orders. But, with respect to Mr. Damodar Rao, we are unable to agree for the reason that even the learned Judge, who gave certain indulgences from time to time to the defendant, was conscious of the fact that it was only on the defendant's satisfying the conditions laid down in those respective orders the application to set aside the ex parte decree would stand allowed and the suit would stand dismissed as having been settled out of court. This observation obviously means that there is a modification or a fresh look into the decree which was couched in the ex parte decree and, therefore, there was a fresh executable order which was facing the plaintiff every time when the defendant obtained an indulgence or a concession from court in the matter of redelivery of the property. In this view of the matter, it cannot be said that the ex parte decree passed on 18-2-1972, stood at all times as an unchallenged one, but on the other hand, this was revised, modified and, to a certain extent, substituted by a later order of court which is certainly an executable order or decree. We say that later orders passed in applications such as Appn. No 812 of 1972 are executable orders because the decreeholder cannot disobey the direction therein and seek for execution of the ex parte decree ignoring the force contained and the directions issued by this court in the subsequent orders in applications such as Appln. No. 812 of 1972 etc. We are, therefore, of the view that till the final order was passed by Paul J. in Feb. 1973, the lis was pending. It therefore follows that Appln. No. 776 of 1973 filed on 7-4-1972, and which was not disposed of on the date when Paul J. finally refused to grant any indulgence to the defendant was still pending and that there was no termination of the litigation as can be popularly and legally understood.

7. The learned Judge is, therefore, with respect, not correct when he said that the suit has already terminated when the application for an enquiry into the future mesne profits was filed. The order of the learned Judge, therefore, is set aside and the original side appeal is allowed. There will be no order as to costs. The matter shall be placed again before the learned Judge sitting in the Original Side, for him to pass orders for appropriate steps being taken for an enquiry, under O. XX, R. 12, C. P. C. as prayed for in the Judge's summons.

Appeal allowed.

AIR 1978 MADRAS 141

RAMANUJAM, J.

S. Ramaswami, Petitioner v. The Commissioner, Corporation of Madras, Respondent.

C. R. P. Nos. 3275 and 3276 of 1975, D/- 22-7-1977.*

Madras City Municipal Act (4 of 1919), S. 100 — Annual rental value of buildings — Determination of, where fair rent not fixed. AIR 1956 Mad 49, Overruled.

Has to be fixed on the basis of relevant provisions of applicable Rent Act — Such value has to be fixed with reference to the fair rent determined per provisions of the Rent Act — Fair rent not fixed — Municipal Authorities have to apply the provisions of the Rent Control Act and determine the fair rent before assessing the property to tax. AIR 1977 SC 302; AIR 1971 SC 353; AIR 1962 SC 151 and AIR 1947 PC 50, Foll.; AIR 1956 Mad 49, held not good law in view of AIR 1977 SC 302 and AIR 1971 SC 353.

(Paras 5, 8)

Cases Referred: Chronological	Paras
AIR 1977 SC 302	5
AIR 1971 SC 353	5
AIR 1962 SC 151	5
AIR 1956 Mad 49	6
AIR 1947 PC 50	5
(1922) 2 AC 93 : 127 LT 99, Poplar Assessment Committee v. Roberts	6

A. S. Raman, for Petitioner; S. Palaniswami, for Respondent.

ORDER:— These two revision petitions have been filed by one and the same person. He has challenged the orders of the Court of Small Causes, Madras, fixing the rental value of the petitioner's premises No. 5D/1 Gandhi Irwin Road, Egmore, Madras at Rs. 525 and for premises No. 5D/2 Gandhi Irwin Road, Egmore, Madras at Rs. 1,350 for the second half year 1970-71.

2. The rental values of premises Nos. 5D/1 and 5D/2 were originally fixed by the Commissioner of Corporation of

*(To revise order of Sm. C. C., Madras, D/- 18-10-1975).

Madras at Rs. 867 and Rs. 2,232 respectively. On appeal to the Taxation Appeals Committee these rental values were reduced to Rs. 650 and Rs. 1,700 respectively. On further appeal to the Court of Small Causes, Madras, the rental values had been reduced to Rs. 525 and Rs. 1,350 respectively. In these revisions the basis adopted for fixing the rental value has been challenged by the petitioner on the ground that the fair rent payable in respect of the buildings under the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act should alone form the basis, and in support of this stand reliance is placed on certain decisions of the Supreme Court:

3. In respect of premises No. 5D/1 the value had been fixed on the basis of the actual rent paid by the lessee of the property who is running a lodging house. In respect of the other premises No. 5D/2, the actual rents received by the petitioner had been ignored and the rent the building is likely to fetch if let to a hypothetical tenant was taken as the basis and the rent that will be paid by a hypothetical tenant has been determined by the Taxation Appeals Committee with reference to the accommodation available, the locality in which the building is situate and the non-residential purpose for which the building has been put to.

4. The contention of the petitioner as regards door No. 5D/2 is that the actual rent received by the petitioner who is the owner of the premises should be taken into account and that the actual rent is only Rs. 625 per month. The lower court has however expressed the view that the lease deed had not been produced, that it was not known when the building was actually let, that the building is a two-storeyed one, that there are 17 double rooms, one washing room, verandahs, common passage, bathroom and F. O. L. in the premises and that having regard to the fact that a lodging house is run in the premises it will easily fetch a monthly rent between Rs. 400 to Rs. 800 for each floor. It is on this basis the lower court has fixed as Rs. 1,350 as the rental value for this building.

5. It is the petitioner's contention that the rental value of the buildings can be determined only by determining the fair rent fixed by the Rent Controller or if no fair rent has been fixed by him, by determining the fair rent on the basis of the relevant provisions contained in the Tamil Nadu Buildings (Lease and Rent Control) Act. In support of this contention strong reliance has been placed by the learned counsel on the following decisions of the Supreme Court. In Corporation of Calcutta v. Padma Debi, AIR 1962 SC 151 it was held that on a fair reading of S. 127 (a) of the Calcutta Municipal Act, 1923, the annual rent could not be fixed higher than the standard rent fixed under the Rent Control Act. After quoting a passage from a judgment of the Judicial Committee of the Privy Council in Bengal Nagpur Rly. Co. Ltd. v. Corporation of Calcutta, AIR 1947 PC 50 showing that a hypothetical tenancy of an improbable character was not contemplated, the Supreme Court expressed—

"The word 'reasonably' in the section throws further light on this interpretation. The word 'reasonably' is not capable of precise definition. 'Reasonable' signifies, 'in accordance with reason'. In the ultimate analysis it is a question of fact, whether a particular act is reasonable or not depends on the circumstances in a given situation. A bargain between a willing lessor and a willing lessee uninfluenced by any extraneous circumstances may afford a guiding test of reasonableness. An inflated or deflated rate of rent based upon fraud, emergency, relationship and such other considerations may take it out of the bounds of reasonableness."

In Guntur Municipal Council v. Rate Payer's Assn., AIR 1971 SC 353 construing S. 82 (2) of the Madras District Municipalities Act, the Supreme Court pointed out that for determining the annual value of the buildings under the said section, the test essentially is what rent the premises can lawfully fetch if let out to a hypothetical tenant, and that the municipality has to be bound by the fair or standard rent which would be payable for a particular premises under the Rent Control Act in force during the year of assessment and is not free to assess the tax on any arbitrary annual value. It was further pointed out in that case that there can be no distinction between buildings for which fair rent has been fixed by the Rent Controller and those in respect of which no such fair rent has been fixed, that when the Rent Controller has not fixed the fair rent the municipal authorities will have to arrive on their own figure of fair rent in accordance with the principles laid down in the Rent Control Act. Dealing with the plea of inconvenience and procedural difficulty in the application of the prin-

ciples laid down in the Rent Control Act for fixing fair rent for buildings by the assessing authorities constituted under the District Municipalities Act, the court expressed—

"We are not concerned with the procedural difficulties which may be experienced; we have to declare that the law is and as appears to be well settled the assessment of valuation for the purposes of tax must be made in accordance with and in the light of the provisions of the Rent Act which would be in force during the period of assessment."

In Delhi Municipality v. M. N. Soi, AIR 1977 SC 302, the Supreme Court had to consider the scope of the words "may reasonably be expected to let from year to year" occurring in S. 3 (1) (b) of the East Punjab Municipal Act, 1911, and it was pointed out—

"Thus, whatever may be our views on the reasonableness of tying down assessment, for the purposes of rating, to the concept of a rent which has been held to be fair rent in the past but does not bear a real relationship to the prevailing conditions of the market for accommodation if it was uncontrolled, we find it impossible to get over the ratio decidendi of this court in Smt. Padma Debi's case, AIR 1962 SC 151 which we are bound to follow. This was that, if a rent which is higher than that which can be legally demanded by the landlord and actually paid by a tenant, despite the fact that such violation of the restriction on rent chargeable by law is visited by penal consequences, the Municipal authorities cannot take advantage of this defiance of the law by the landlord. Rating cannot operate as a mode of sharing the benefit of illegal racketeering indulged in by rapacious landlords for whose activities the law prescribes condign punishment."

Thus the Supreme Court has taken consistently the view that the standard of reasonableness has to be judged not from the expectation of a landlord who takes the risk of prosecution and punishment which the violation of the law involves, but the expectation of the landlord who is prudent enough to abide by the law and that, therefore, even in cases where the rents actually collected by the landlords are higher than the standard rent the assessment could not be made on the basis of the actual rents received by the landlord but by the fair rent which alone the landlord is entitled to collect legally from the tenants. The above decisions of the Supreme Court have clearly laid down the principle that as a landlord cannot reasonably be expected to let a building for a rent higher than the fair rent in contravention of the rent restriction laws, it should be taken that an upper limit has been fixed on the rate of rent, that a transaction entered into between the parties in defiance of the law cannot be taken to be the basis for determining the rent which can reasonably be executed if the building is to be let out and that it was the actual rent received by the landlord but the hypothetical rent which could be expected if the building is to be let is the legal yardstick for determination of the reasonable rent.

6. The learned counsel for the respondent would however draw my attention to a Bench decision of this Court in Madurai Municipality v. Kamakshisundaram, AIR 1956 Mad 49, wherein Rajamannar C. J. speaking for the Bench had expressed the view that though the fair rent fixed under the House Rent Control Act may and ordinarily should be taken into consideration by the Municipal authorities in computing the annual value under S. 82 of the District Municipalities Act, they are not bound to take such fair rent as necessarily the rent for which the premises may reasonably be expected to be let within the meaning of S. 82 of the Act. Addressing on the question as to whether the annual value for the purposes of S. 82 the Act should necessarily and always be computed on the basis of the fair rent for the concerned property as fixed under the Madras House Rent Control Act and whether the restriction of rent under the Rent Restriction Act can be regarded as a statutory restriction on the rent realisable by the building, the Bench observed that a statutory restriction on rent payable by a tenant cannot operate as a statutory restriction on the profit earning or rent earning capacity of the building and that the rental value will not be affected or controlled by the fact that the landlord cannot enforce as against a tenant rent higher than the statutory standard rent in operation at the time. The Bench quoted with approval the following observation of Lord Parmoor in Poplar Assessment Committee v. Roberts, 1922-2 AC 93; 123—

"The question, however, remains whether a restriction on rent under the Rent (Restrictions) Act 1920, can be regarded as a statutory restriction on the value

to an occupier of the profit earning or rent earning capacity of the 'Cobden's Head'. Ordinary rent is not a restriction on the profit earning or rent earning capacity of an hereditament in the hands of an occupier and has never been so regarded. I am unable to see in what way a statutory restriction on rent payable from a tenant can operate as a statutory restriction on the profit earning capacity of the 'Cobden's Head', or how the value to an occupier is affected or controlled by the fact that a landlord cannot, enforce, as against a tenant, a rent higher than the statutory standard rent in operation at the time".

However, having regard to the decisions of the Supreme Court referred to above, which take a contrary view, the decision in Madurai Municipality v. Kamakshisundaram. AIR 1956 Mad 49 cannot be taken to be good law so far as it runs counter to the view taken by the Supreme Court in the above decisions. As pointed out by the Supreme Court wherever the buildings are subject to the rent control restrictions the rental value of those buildings should be taken as the fair rent, if any, fixed under the statutory provisions and if no fair rent has been fixed by the Rent Controller, the same has to be determined by the Municipal authorities by applying the provisions of the Rent Control Act dealing with the determination of fair rent.

7. In this case no fair rent has been fixed in respect of the buildings in question. As regards premises No. 5D/1 the assessment has been made on the basis of the hypothetical rent. The petitioner contended that the rent which he is receiving is the fair rent and therefore the rental value should be fixed with reference to the actual rent received by him or with reference to the standard rent which has to be determined with reference to the provisions of the Rent Control Act.

8. As regards premises No. 5D/2, the respondent has proceeded on the basis that the rent received by the landlord does not represent a reasonable rent, and that the building may fetch a higher rent, if let to a hypothetical tenant, while the petitioner would say that the rent received by him represents the fair and reasonable rent which a hypothetical tenant would pay in respect of that building. In this state of affairs the rental value has to be fixed with reference to the fair rent to be determined for the building applying the provisions of the Rent Control Act. It is true no fair rent has been fixed in respect of this building. But as pointed out by the Supreme Court in such a case the municipal authorities have to apply the provisions of the Rent Control Act and determine the fair rent for the building before assessing the property to tax. Civil Revision Petitions Nos. 3275 and 3276 of 1975 are, therefore, allowed and the matter remitted to the respondent with a direction to compute the fair rent for the building applying the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act for the purpose of fixing the annual rental value of the building. There will be no order as to costs.

Petitions allowed.

AIR 1978 MADRAS 144

MOHAN, J.

Adhu, Petitioner v. V. M. Palaniswamy Gounder, Respondent.

C. R. P. No. 877 of 1975. D/- 22-6-1977.*

Tamil Nadu Buildings (Lease and Rent Control) Act (18 of 1960), S. 2 (2) — Scope and applicability — Property demised consisting of a masonry structure and extensive open land appurtenant thereto — Tenant using the same as a timber depot as well — Property let covered by the definition in the section — Section does not warrant importing of the theory of dominant intention of the tenant as to its use — The inclusive definition of 'building' in the section clearly indicates that the jurisdiction of the Rent Controller is not ousted in such circumstances. 1960 Mad WN 492, Dist. (Paras 2, 3)

Cases Referred: Chronological Paras

AIR 1961 Pat 330 1

1960 (1) Mad LJ 29 (SN) : 1960 Mad WN 492 1, 2, 3

S. Nainar Sundaram, for Petitioner; M. R. Narayanaswami, for Respondent.

ORDER:— The revision petitioner, a tenant undaunted by the failures in all the courts below, has come up to this court challenging the validity of an order of eviction passed against him in R. C. O. P. 430 of 1965 which was confirmed by the lower authorities both in appeal and revision. He challenges the order on the ground that what was demised in his favour was a mere extensive vacant

*(To revise order of Dist. J., Coimbatore in C. R. P. 363 of 1973).

site to enable him to run a timber depot. The mere fact that there exists a masonry structure, which the learned counsel for the petitioner (Mr. Nainar Sundaram) admits, will not clothe the Rent Controller with the jurisdiction to proceed with the matter under the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, as amended by Tamil Nadu Act 23 of 1973. According to him, if the dominant intention was to carry on timber depot, the definition 'building' under S. 2 (2) of the Tamil Nadu Act 23 of 1973 would not take such a lease. In support of this argument, the learned counsel for the petitioner cites the decisions in Palaniappa Chettiar v. Vairavan Chettiar, 1960-1 Mad LJ 29 (SN) and Jugal Kishori Devi v. Ashok Mills, AIR 1961 Pat 330. The mere existence of a masonry structure would not mean that it would constitute a building within the meaning of the Act since that was a negligible portion. Under similar circumstances, the Patna High Court has ruled concerning the definition in the Patna Act that the Rent Control Court would not have jurisdiction. Therefore, that reasoning will have to prevail. From that point of view, the orders of the courts below are unsustainable.

2. Mr. M. R. Narayanaswami, learned counsel for the respondent, would draw my attention to the definition of 'building' occurring in S. 2 (2) of the Tamil Nadu Buildings (Lease and Rent Control) Act and state that there is absolutely no warrant to import the theory of dominant intention. On the contrary, the definition of 'building' is unambiguous and clear, it being an inclusive definition. The fact that it includes the garden, grounds and out-houses let along with the building would be enough to attract the jurisdiction of the Rent Controller. Whatever may be the view of the Patna High Court, so long as this definition is clear and unambiguous, there is no scope for applying the theory of dominant intention. The decision in Palaniappa Chettiar v. Vairavan Chettiar, 1960-1 Mad LJ 29 (SN) merely defines the word 'appurtenant' and that is not relevant to the facts of this case. Finally it is submitted that when the finding relating to the bona fide requirement of the landlord under S. 14 (1) (b) of the Tamil Nadu Buildings (Lease and Rent Control) Act 18 of 1960, as amended by the Tamil Nadu Act 23 of 1973, had not been disputed, it would only mean that the jurisdiction of the Rent Controller had been conceded because the landlord in that application sought to demolish and reconstruct his building.

3. In order to appreciate the points involved in this revision, I need refer to the definition of 'building' occurring in S. 2 (2) of the Tamil Nadu Buildings (Lease and Rent Control) Act which reads as follows—

"2 (2) 'building' means any building or hut or part of a building or hut, let or to be let separately for residential or non-residential purposes and includes (a) the garden, grounds and out-houses, if any, appurtenant to such building, hut or part of such building or hut and let or to be let along with such building or hut ... ..."

The first thing that requires to be noted is that it is an inclusive definition, as rightly pointed out by the learned counsel for the respondent-landlord. The reason why I want to rather stress this aspect is, because it is a definition in favour of the landlord so that the matter may be put beyond controversy where the building alone is let if there is a garden or ground or out-house appurtenant to or let separate along with such building they would also be taken in and the jurisdiction of the Rent Controller cannot be ousted on that ground. In the instant case, the learned counsel for the petitioner does not dispute the existence of the masonry structure which as of fact has been found by the Commissioner, appointed by the court below. Whatever it may be, I proceed on the basis that a masonry structure does exist. A perusal of the lease deed also discloses that the masonry structure formed part of the demise. However, what is contended by the learned counsel for the petitioner is that in an extensive land, the mere existence of a masonry structure which is on a negligible portion does not clothe the Rent Controller with the jurisdiction. Therefore, the theory of dominant intention must be applied. I have no doubt in my mind that this theory of dominant intention can never be imported into the definition extracted above, which is clearly worded without any ambiguity whatsoever. There is no question of a building being appurtenant to a land. That apart if the buildings were let along with the ground, having regard to the inclusive definitions, the meaning of the building gets expanded. In this view, I am with great respect unable to agree with the view taken by the learned Judges of the Patna High

Court. Whatever may be the definition in the Act, I see no warrant to bring in the theory of dominant intention. Nor again, can there be any such thing as composite lease. The demised portion consists of land and building. The existence of the building which is undoubtedly a part of the demise does clothe the Rent Controller with the jurisdiction. The decision in Palaniappa Chettiar v. Vairavan Chettiar, 1960-1 Mad LJ 29 (SN) does not afford any assistance to the petitioner since that case merely dealt with the meaning of 'appurtenant'. Nor again, am I able to agree with the learned counsel for the petitioner that it must be proved by the landlord that the demised land is appurtenant to the building. I say so because the definition includes even the land let along with such building. In the instant case, at the risk of repetition, I must say that both the land and the masonry structure formed part of the single demise. Therefore, I find it very difficult to appreciate, the argument of the learned counsel for the petitioner that the existence of the building on a negligible portion when extensive land has been demised for the purpose of running a timber depot, would take out the jurisdiction of the Rent Controller.

4. Added to this, I find that when the landlord filed the petition for demolition and reconstruction of the building, the tenant did not question the maintainability as seen from the judgment of the revisional authority. This is an added point in favour of the respondent.

5. As rightly pointed out by the learned revisional authority (District Judge) that this case has a chequered career, I am not inclined to grant more than one month's time to hand over vacant possession.

6. The revision will stand dismissed with costs. Time to vacate one month.

Revision dismissed.

AIR 1978 MADRAS 146

RAMAPRASADA RAO AND SURYAMURTHY, JJ.

M/s. Baba Industries and another, Appellants v. The Mehta Traders, Respondent.

O. S. A. No. 47 of 1975, D/- 20-6-1977.*

*(Against order of Sethuraman J. in Appln. No. 2432 of 1974, D/- 11-10-1976).

KU/KU/E176/77/SBB

Civil P. C. (5 of 1908), O. 37, R. 3 — Leave to defend — Powers of Court to impose conditions — Prima facie defence disclosed — Courts empowered to impose conditions regarding time, manner or method of trial — No power to order deposit or payment of any amount in the Court. Appln. No. 2432 of 1974, D/- 11-10-1976 (Mad), Reversed; AIR 1977 SC 577, Rel. on. (Para 3)

Cases Referred: Chronological Paras
AIR 1977 SC 577 : 1977 TLNJ (SC) 4 3

Habibullah Badsha for N. Srivatsamani and A. Nageswaran, for Appellants; Palaniappan for Aiyar and Dolia, for Respondent.

RAMAPRASADA RAO, J.:— Mr. Habibullah Badsha, learned counsel for the appellants, rightly contends that the order of the learned Judge in Appln. No. 2432 of 1974 wherein he imposed a condition while granting leave to defend, is assailable, because it is against the accepted canons of judicial interpretation as found in the case law.

2. In the instant case, the respondent was the plaintiff and the applicants-appellants were the defendants, who sought for leave to defend an action brought by the respondent on the foot of a promissory note. The learned Master who went into the question, as well as Sethuraman J. expressed the view that there is a prima facie defence available to the defendants and he agreed with the learned Master that leave to defend has to be granted in the instant case. Having granted such relief, he went into the question whether such leave should be conditional or unconditional. He exercised his discretion against the appellants and gave conditional leave subject to the defendants depositing one half of the suit amount into court. It is as against this, the appeal has been preferred.

3. As the case law is abundant, and is also equally clear, we refer to the citation in the Tamil Nadu Law Notes Journal, to wit, 1977 TLNJ (SC) 4 : (AIR 1977 SC 577), M/s. Mechalac Engineers and Manufacturers v. Basic Equipment Corporation, wherein the Supreme Court accepted the basic principles which would guide the court in the matter of grant of such leave to defend. One such principle contained in the ratio of the above decision is that if the court is satisfied that the defence of the defendant is acceptable, though prima facie, and also if the defence raises a triable issue, thereby indicating that the defendant has a fair

or bona fide or reasonable chance of success, or if the state of affairs are such that the court is reasonably led to the conclusion that the trial of the action only can establish the truth. bona fides or otherwise of the defence raised, then, in such circumstances, the court ought not to impose a condition in the matter of the payment of the plaint amount sought for by the plaintiff, into court, as security, before the grant of such leave. This is deprecated by the Supreme Court by the observation that "the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the court may in its discretion impose conditions as to the time or mode of trial but not as to payment into court or furnishing security" (underlining is ours). The accent, therefore, is on the imposition of condition regarding the time within which the original suit laid by the plaintiff has to be disposed of or the manner or the method of such a trial. But the Supreme Court is emphatic that no condition as to payment into court of any portion of the amount claimed, or furnishing of security, would arise in a case where a triable issue is found and a prima facie defence is disclosed. Following this decision, we accept the contention of learned counsel for the appellants that the imposition of the condition by the learned Judge in the last paragraph of his judgment has to be removed.

4. Learned counsel for the respondent, however, wanted to persuade, at this stage, that there is no triable issue at all in the instant case. But we are afraid that sitting at the second stage of hearing viz., as against the order of the Master and the learned Judge sitting in the Original Side, we are not inclined to take a different view, as both the courts found that there is prima facie a presentable defence available to the defendant.

5. We may add that the respondent is not prejudiced because he has already secured an order in his favour restraining the appellants from alienating or otherwise dealing with their properties worth about Rs. 75,000 the description of which is given in the relative affidavit or undertaking filed by the second defendant in appropriate proceedings referred to by the learned Master in his order. We have noticed this also and taking all such circumstances into consideration, the original side appeal is allowed. There will be no order as to costs.

6. The suit is a very old one. The Supreme Court encourages giving a discretion to the trial court to fix a time within which such trial should be concluded. Having regard to this, and because the suit is old, we direct that the trial of the suit be expedited and the same be disposed of by August 1977.

Appeal allowed.

AIR 1978 MADRAS 147

BALASUBRAHMANYAN, J.

S. S. Khader Mohammed Rowther and Co., Petitioner v. G. S. Sundaram and Brothers, Respondent.

C. R. P. No. 188 of 1977, D/- 29-4-1977.*

(A) Tamil Nadu Buildings (Lease and Rent Control) Act (18 of 1960), S. 10 (3) (a) (iii) and (e) — Order for eviction from non-residential building — Order passed ex parte — It is, nonetheless, a nullity for not revealing Rent Controllers' satisfaction as to bona fides of landlord's claim.

Even an ex parte order for eviction from a non-residential building is a nullity for not revealing the Rent Controller's satisfaction as to the bona fides of the landlord's claim especially when the order does not find support in landlord's own pleadings. AIR 1974 SC 471, Disting; Case law discussed.

(Paras 9, 14, 27)

The Legislature has made it quite clear in Section 10 (3) (e) that the Rent Controller has to act only according to the dictates of this clause. He cannot act in any other way. The real foundation for the Rent Controller's order, is the foundation of his satisfaction, one way or the other, on the question of the landlord's bona fides. He cannot either allow or reject the eviction petition without forming this satisfaction. Hence, where the Rent Controller's order lacks finding as to his satisfaction. the order, whether ex parte or not ex parte, is invalid. (Paras 9, 14)

(B) Tamil Nadu Buildings (Lease and Rent Control) Act (18 of 1960), Ss. 23 (3), 10 (3) (e) — Order of eviction, a nullity for not conforming with S. 10 (3) (e) — Appellate order by evaluation of evidence supporting such order is also invalid.

(Paras 33, 34)

*(To revise Order of Sm. C. C., Madras, D/- 24-12-1976).

KU/KU/E108/77/SNV/VBB

Cases Referred: Chronological	Paras
AIR 1974 SC 471	16, 25, 26
AIR 1973 SC 1311	16, 21
AIR 1970 SC 794	19
AIR 1970 SC 838	19
(1969) 2 SCR 432	18, 21
(1969) 2 AC 147 : (1969) 2 WLR 163, Anisminic Ltd. v. Foreign Compensation Commission	29, 31
1968 AC 192, Reg v. Governor of Brixton Prison; Ex parte Armah	31
(1966) 2 All ER 981 : (1966) 2 WLR 1386, Peachey Property Corporation v. Robinson	18
(1959) 61 Pun LR 33	24
(1897) ILR 24 Cal 504 (PC)	6

ORDER:— This revision is under S. 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960. It is brought by the tenant of a non-residential building in Madras City. What he is up against is an order of eviction passed by the Rent Controller on a petition filed by the landlord for personal occupation of the premises. The Rent Controller passed the order ex parte. And it was confirmed in appeal.

2. The validity of the ex parte eviction order is questioned in this revision, Mr. Govind Swaminathan appears for the tenant. He argues that the order is a nullity.

3. The nullity argument, as elaborated by the learned counsel, was not so much on the ex parte nature of the order as on the terms of the order itself. Mr. Govind Swaminathan did not, for instance, say that under the Act all ex parte orders must be held to be nullities. Nor did he claim that this particular proceeding setting his client ex parte was not warranted by the circumstances. This latter ground could not, in any case, have been advanced in the present proceedings pursued by the tenant for getting the ex parte order set aside, his plea of 'sufficient cause' failed to carry conviction with the Rent Controller as well as the higher tribunals.

4. This revision, then, has been argued accepting the position that the Rent Controller acted aright and within the law when he set the tenant ex parte and proceeded to dispose of the eviction petition in his absence. Even so, according to the argument, the order of eviction is a nullity.

5. Mr. Govind Swaminathan invited me to read the order first, before he addressed his criticism on it. The order, as it happens, is a short one. It is reproduced below, verbatim:

"Respondent absent. No representation. Set ex parte. P. W. 1 examined. Eviction ordered with costs".

Learned counsel, if I remember right, said something unflattering about the brevity of the order. But that could only have been an aside. He did not mean to say that because the order was short, the law must, on that account, regard it as nasty and brutish. I myself could hardly abide the order's staccato prose. And I think I said that judicial writing has no business to be telegraphic. But Mr. Govind Swaminathan did not adopt this line in argument either. His client, evidently, had no mind, at the moment, to indulge on literary criticism. His grievance was much more substantial. Here was a case, learned counsel said, where the Rent Controller's jurisdiction was invoked to evict a tenant with a view to accommodating the landlord in the premises. The jurisdiction in such cases and the manner of its exercise are clearly drawn in the Act by S. 10 (3) (e). Eviction of a tenant, under this provision can be ordered only if the Rent Controller were 'satisfied' that the landlord's claim in that regard is 'bona fide'. The section, according to Mr. Govind Swaminathan, makes the Rent Controller's satisfaction a necessary pre-condition on the foot of which, and on the foot of which alone, an order for eviction can properly follow. Now, what is the position in the present case? asked learned counsel, turning to the order in question. All we gain from it, he said, is the knowledge that the Rent Controller set the tenant ex parte for non-appearance and went on to record such evidence as P. W. 1 gave in the witness box. Beyond these, the order says nothing—nothing except to announce, abruptly, that the tenant is ordered to be evicted. It does not say that eviction was being ordered because the Rent Controller was satisfied that the landlord's claim was bona fide. The result, according to Mr. Govind Swaminathan, is that his client was evicted contrary to the provisions of S. 10 (3) (e) of the Act. He was evicted in the absence of the statutory condition, the presence of which alone could have given validity to the order. In this sense, learned counsel said, the order was a nullity.

6. Mr. Kesava Iyengar, appearing for the landlord, supported the order. He said that the order was as valid as valid can be. In judging its validity, he cautioned, one must not forget that it had

been rendered in an ex parte proceeding. In a proceeding of this kind, he said, one starts from the position that the court has to get on with the case before it in the absence of the party against whom relief is claimed. In such a situation, the evidence let in by the only party in attendance before the court not only goes uncontradicted, but constitutes the only evidence in the case. Necessarily, therefore, it is that evidence to which one must attribute the court's decision, for there is nothing else on record on which the court could have addressed itself. Learned counsel urged me to adopt this approach as the right one for judging the validity of the present order of the Rent Controller. He added that it is no defect at all that the order contains little or no discussion about the evidence in the case. This omission, according to him, can be made good by a reference to the transcript of evidence, which is there on record for all to see. Learned counsel pointed out that this was precisely the course which the appellate authority had adopted while hearing the appeal against the order. It went through the papers, on its own, to find out if the order of the Rent Controller was according with the evidence which he had recorded from PW 1. Learned counsel invited me to do likewise. He cited the example of a Privy Council case in Amriteswari Debi v. Secy. of State, (1897) 24 Cal 504 (PC), to show that the evidence on record may be referred to for construing a decree.

7. I do not, however, feel impelled to go into the evidence of P W 1 for deciding the question before me, which is, whether the order as passed by the Rent Controller is a valid order or a nullity. The Privy Council case, it may be observed, had to do with the construction of a decree whose validity, as far as I can see from the reports, was not in question. The problem that arose in that case was rather one of trying to understand the precise scope of a term in the decree. It was in that context that the Privy Council permitted itself a peep into the evidence on record. The problem before me in this case, however, is quite different and is more fundamental. What falls for my decision is, the very validity of the order itself. The line of inquiry, is not what the order means, but whether it is an order at all, within the contemplation of the law? To that inquiry I shall address myself immediately.

8. S. 10 (3) (a) of the Tamil Nadu Buildings (Lease and Rent Control) Act 1960, makes provision for eviction of tenants in cases where the landlord requires the building for his own occupation. Sub-cls. (i) to (iii) lay down the particular circumstances under which a landlord can ask for eviction of the tenant. Sub-cl. (i) deals with residential buildings; sub-cl. (ii) deals with non-residential buildings which are meant, or actually used, for stationing vehicles; sub-cl. (iii) deals with other non-residential buildings. It is the last sub-clause which has relevance to the present discussion. For it is under this sub-clause that the eviction petition in the present case had been filed by the landlord against the tenant. There is no dispute as to what the requirements of this provision are for maintaining an eviction petition before the Rent Controller. It may be that the language of this sub-clause, as compared with sub-cls. (i) and (ii) is susceptible of a narrow, literal, interpretation, but it is the common acceptation of lawyers and courts that this provision, like the two other fellow provisions in the same sub-section, lays down two indispensable conditions for an eviction petition. The landlord must be in need of the premises under the tenant's occupation for the purpose of his own business or that of a member of his family. This is the first requisite. The other is that the landlord has no other non-residential building of his own elsewhere in the same city, town or village concerned.

9. The Legislature having laid down what the requisites are of an eviction petition, proceeds further and lays down how, and in what manner, the Rent Controller should deal with the landlord's claim and give it a proper disposal. This latter provision is enacted in S. 10 (3) (e) of the Act and is in the following terms:—

"The Controller shall, if he is satisfied that the claim of the landlord is bona fide, make an order directing the tenant to put the landlord in possession of the building on such date as may be specified by the Controller and if the Controller is not so satisfied he shall make an order rejecting the application".

My reading of the provisions of S. 10 (3) (a) (iii) and 10 (3) (e) is this. When a landlord files a petition to evict the tenant of a non-residential building, naturally the Rent Controller will first examine whether the petition satisfies the two initial requirements, one, that the landlord is badly in need of the buildings

for carrying on his business, and two, that he has no other building which he can call his own elsewhere in the same city. If these requirements are not fulfilled, the petition for eviction fails then and there at the initial stage. But the jurisdiction of the Rent Controller is not cut out by the terms of S. 10 (3) (a) (iii) alone. For we also have in the enactment S. 10 (3) (e), and it is in that provision that we find the real crux of the Rent Controller's jurisdiction. The language in which this jurisdiction is defined by the Legislature is too elaborate to need further elucidation. The Legislature has made it quite clear that the Rent Controller has to act only according to the dictates of this clause. He cannot act in any other way. No latitude of discretion is permitted to him. He certainly has jurisdiction to allow the eviction petition and direct the tenant to put the landlord in possession of the premises. But this he can do only on one condition, namely, that he is satisfied that the landlord's claim for relief is bona fide. Not otherwise. If in the case before him, the Rent Controller is not satisfied that the landlord's claim is bona fide, then this clause in the section insists that he shall reject the eviction petition. The real foundation for the Rent Controller's order, then, is the foundation of his satisfaction, one way or the other, on the question of the landlord's bona fides. He cannot either allow or reject the eviction petition without forming this satisfaction.

9A. In my view the order in the present case fails to live upto the strict requirements of S. 10 (3) (e) because the order does not show that eviction had been ordered on the basis of the Rent Controller's satisfaction that the landlord's claim is bona fide.

10. I do not accept Mr. Kesava Iyengar's argument that the Rent Controller's satisfaction is implicit in his order. On the written text of the order, which I have earlier reproduced verbatim, I do not think it is possible to read any such implication into it. The Rent Controller merely says "Evidence of PW 1 recorded. Eviction ordered." What does he mean by this? Putting two and two together, we may possibly imply that the Rent Controller accepted the evidence of PW. 1. We may, perhaps, go a little further too and say that according to the Rent Controller P. W. 1's evidence made out the grounds which had been set out in the eviction petition. But even this liberal construction would fall short of what the section expects and requires the Rent Controller to find. Giving to the order the most charitable interpretation one can give and reading into it every implication that its language reasonablly bears, we would still be left with the position that the order does not show what the Rent Controller thought about the landlord's bona fides or, what is worse, whether he thought about them at all.

11. Mr. Kesava Iyengar said there is no magic in the words 'satisfied', 'bona fides' etc., and these words can be easily played up in legal discussion and be given a significance far greater than what the Legislature had intended to impose on them. I agree that we must guard against statutory expressions being debased and reduced to claptrap. But that is not the case here. The expressions which are the subject of the present discussion are terms whose precise legal attributes no lawyer can miss. That is the very reason why the legislative draftsmen have used them in the section. Take the term 'satisfied'. For a court or tribunal to be satisfied about something it is essential that it should have applied its mind to that subject. In this sense, satisfaction is a mental thing. But it is implicit in our court system that the court's satisfaction, in order to be recognisable as such, must always and ever find verbal expression. Otherwise, how on earth is one to know whether there has been any satisfaction at all and if so what was in the mind of the court?

12. The significance of the other statutory expression 'bona fides' cannot also be missed. It has a distinct connotation in legal writings. In the context of S. 10 (3) (e) dealing with the jurisdiction of the Rent Controller the phrase has a special significance. The provision demands that the landlord's claim must be held to be one made in good faith. His prayer before the Rent Controller is statedly for an order directing the tenant to put him in possession and it is statedly addressed for a particular purpose, to wit, his pressing need for accommodating his own business in those very premises. In this context the question of bona fides lies in this: that the landlord does not desire the removal of the tenant as an end in itself, but only as a means to an end. It is on this aspect on which the Act requires the Rent Controller to dwell and form his own satisfaction.

13. All this shows that a Rent Controller cannot sustain an eviction order on the basis, merely, of what the landlord or his business manager says from the witness box. Apart from testing the veracity of the witness, the Rent Controller must also see whether the landlord's move is not just a device to kick the tenant out. He must see whether the landlord really means business and wants it to be set up in, or shifted to the premises in question. In the very nature of the inquiry, therefore, these impressions have got to be put down in writing by the Rent Controller himself, while passing the order. They are not things which can be filled in according to the fertility of the reader's imagination.

14. Mr. Kesava Iyengar pleaded that this would be too high and meticulous a standard from which to test an ex parte order. But we are not here examining the Rent Controller's order as a piece of judicial writing. What we are doing, and have to do, is to see whether the order is a valid one under S. 10 (3) (e), I search in vain this provision to find whether it has made any reservations for ex parte orders. It has not. It follows therefore that ex parte order or no ex parte order, the Rent Controller must enter in it what kind of satisfaction he has formed on the question of the landlord's bona fides. If the order lacks this finding, then it is no order at all under S. 10 (3) (e). This direction of our present inquiry is not one of review in which all we do is to go into correctness of the order. Our present question is to see whether what the Rent Controller has written is an order at all within the contemplation of S. 10 (3) (e). There can be no two answers to this question. It is plain to me, at any rate, that the Rent Controller has not given a moment's thought to the considerations bearing on the exercise of his jurisdiction. He seems to have acted under some kind of conditioned reflex which is not an uncommon experience to lawyers familiar with ex parte proceedings. The order, as it reads, is a fine example of what may be called automatic writing of the writer's mind not entering what he writes about. I have therefore, no hesitation in holding that his order is no order at all, and is a nullity.

15. Mr. Kesava Iyengar in the course of his argument drew my attention to the relevant statutory rules bearing on the subject. I have studied them. There is nothing I can find in those provisions which militates against the conclusion which I have reached in this case. The rules merely lay down the stage by stage procedure which the Rent Controller has to adopt in proceedings that come before him. They do not lay down what the Rent Controller should say and what he may leave unsaid in his orders. These things, as I have earlier shown are dealt with by the sections in the Act. And what the sections lay down cannot, obviously, be whittled down by any subordinate rules. Indeed, on my reading, they make no such attempt. They rather tend to underline my view that every order which the Rent Controller passes must come forth as a speaking order, giving expression to what the statute requires him to be satisfied about, in the particular proceeding before him. The rules cited by Mr. Kesava Iyengar no doubt, provide for ex parte decision making, as well as the procedure for setting it aside. But even these provisions do not — as, indeed, they cannot — water down the statutory imperative that the Rent Controller shall not evict a tenant without first entering his satisfaction, formed on the materials before him, that requisite grounds exist in the case of warranting the eviction.

16. Mr. Kesava Iyengar then submitted that no appellate or revisional authority can ever be at a loss to find out if the appropriate statutory grounds existed for the making of any given order of eviction. He said this would be the position even in a case where the order of the Rent Controller does not speak out his mind. Learned counsel instanced cases of eviction proceedings which at one stage or another end in compromise. The parties in such cases would ordinarily reduce the terms of their settlement in writing, file their joint memorandum in court and invite the Rent Controller to pass orders in terms thereof where, under those terms, the tenant agrees to vacate the premises, the Rent Controller simply records the compromise and orders eviction. Necessarily, in such cases, the Rent Controller would not be found taking the trouble of recording his own individual judgment as to the existence of the statutory precondition for the tenant's eviction; Mr. Kesava Iyengar said that the latest trend of cases reported in the books is to uphold the validity of such compromise eviction orders, despite their not being 'speaking orders' in any proper sense of the term. He cited two recent decisions of the Sup-

reme Court as instances in point. One is reported in K. K. Chari v. R. M. Seshadri AIR 1973 S. C. 1311, and the other Nagindas v. Dalpatram AIR 1974 S. C. 471. He drew from these two decisions a broad principle which he formulated in the following terms: If at the time of passing the order, there was some material before the Rent Controller on the basis of which he could be satisfied, Prima facie, about the existence of a statutory ground for eviction, then a court of review must presume that the Rent Controller was, in fact, so satisfied.

17. It may be observed that in each of the Supreme Court decisions relied on by Mr. Kesava Iyengar what was under examination was an order of eviction passed on the basis of a compromise between the landlord and the tenant. Neither decision had to do with an ex parte order of eviction of the kind we have to contend with in the present case. The court had accordingly, no occasion to express itself on the relevant legal position. But Mr. Kesava Iyengar urged that the rule laid down in those decisions must unquestionably apply even for testing the validity of an ex parte order which does not, ex facie, manifest the Rent Controller's satisfaction as to the existence of the statutory requisites for the tenant's eviction from the premises.

18. Learned counsel's argument involves a consideration of what the Supreme Court has laid down in those two cases. But before proceeding to do so, I may briefly touch on the earlier trend of authority, or rather, on how it was commonly understood. To begin with, it may be observed that all the cases which ultimately found their way to the High Court and the Supreme Court had one thing in common. They called for the interpretation and application of special legislation meant for regulating the letting of residential and non-residential buildings in urban, and other areas and the prevention of unreasonable eviction of tenants therefrom. Jurisdiction in such cases was vested by the Legislature in special tribunals or was subjected to special conditions and restrictions even where it was allowed to continue with the common law courts. The terms of building tenancies were taken out of the realm both of contracts and of the Transfer of Property Act. It was also a common provision to be found in the class of legislation that the eviction of tenants could be ordered only where the tribunal or the court, as the case may be, was satisfied about the existence of grounds to justify the eviction — the grounds being clearly drawn and defined in the statute itself. What is more, to ensure that the special Tribunals exercised their jurisdiction in this regard, the concerned legislation also usually provided for a revision or other proceeding for review by a superior court. Cases thus arose often before the High Courts in the country under one or other of the rent control statutes, and learned Judges were asked to examine the validity or propriety of individual eviction orders. The trend of decisions, as might be expected, of the superior courts was to insist on the Rent Control tribunals passing orders of eviction in terms of the relevant statute and on nothing else. Orders were clearly examined by learned Judges to see to what extent the Tribunals below had recorded their findings as to the existence of the statutory grounds for eviction in the disputes that came up for decision before them. In this situation, it came to pass that the higher courts were invited to go into a particular kind of orders which, though not unfamiliar to lawyers and courts, yet raised peculiar problems concerning their validity in the context of the special provisions of rent control enactments. I refer to proceedings where the landlord and tenant, either before or after a contest, preferred to compromise their dispute, but insisted nevertheless on getting the imprimatur of an order from the tribunal concerned. In such cases, where the tenant agreed, under the compromise, to vacate the premises, the tribunal seldom refused the invitation to pass an order of eviction, without further ado, on the basis of the compromise. One view of such orders was that they were perfectly valid even under the special statute. The other view was that they were not. Surprising as it may now seem, the broad trend of certain early decisions of the Supreme Court was to the effect that an order of eviction which is based solely on a settlement or compromise between landlord and tenant cannot be regarded as one passed in terms of the statute. That, at any rate, was the impression they gave. The earliest of the cases was Bahadur Singh v. Muni Subrat Dass, (1969) 2 SCR 432. That case was concerned with a dispute between the tenants of a building and the landlord's son, which was ultimately referred to arbitration. The arbitrator entered on the

arbitration and gave his award in due time. The award provided that the tenants should remove the machinery which they had installed in the premises, and give vacant possession to the landlord on a certain date. The award was filed before the court and decree was passed in terms of the award. The decree-holder then applied for execution. The tenants objected on the ground that the decree passed by the court was a nullity. They raised the objection that it contravened S. 13 (1) of the Delhi and Ajmer Rent Control Act 1952. That section prohibited the court from passing a decree or order for recovery of possession of any premises in favour of the landlord against a tenant except in any suit or proceeding instituted by the landlord against the tenant for recovery of possession on one of the grounds stated in the Act, and unless the court was satisfied that a ground for eviction existed. The Supreme Court held that the decree in that case was a nullity. For two reasons — one, that the decree was passed in a proceeding to which the landlord was not a party, and two, that the court had passed the decree without satisfying itself that a ground for eviction existed. The Supreme Court held that on the plain wording of S. 19 (1) of the Delhi and Ajmer Rent Control Act 1952, the court was forbidden to pass a decree otherwise. In the course of their judgment, the learned Judges derived support from a decision of the English Court of Appeal in Peachey Property Corporation v. Robinson, (1966) 2 All ER 981. That was a case where the landlords of a flat had issued a writ to recover possession from the concerned tenants for non-payment of rent. The tenants did not enter appearance in the case and the court gave judgment in favour of the landlords in default of the tenants' appearance. The court of appeal had to consider whether the judgment was in accordance with the Rent and Mortgage Interest Restrictions (Amendment) Act 1933 as applied to the Rent Act, 1965. S. 3 (1) of the former Act provided that "no order or judgment for the recovery of possession of any dwelling house to which the principal Acts apply or for the ejection of a tenant therefrom shall be made or given unless the court considers it reasonable to make such an order or give such a judgment....." The court of Appeal held that the judgment given by the court of first instance in default of appearance of the tenants was a nullity. The reason for this view finds expression in the judgment of Winn L J who spoke for the Court of appeal:—

"It is perfectly plain from what I have said that before the judgment in default of appearance was entered, no court had determined whether it was reasonable to make such an order or give such a judgment. In my view, therefore, by express force of that section the judgment in default of appearance here was a nullity. It was, according to its terms, a judgment for recovery of these premises, and that is something which the section prohibits unless there has been a prior determination by the court that it was reasonable to give such a judgment."

The above passage was quoted with approval by the Supreme Court in the decision Bahadur Singh v. Muni Subrat Doss, (1969) 2 S. C. R. 432. It may be observed that while in the case before the English Courts of Appeal, the order of eviction was an ex parte order passed in default of appearance by the tenants, the Supreme Court was concerned with a decree passed by a court on the basis of an arbitration award without the court itself going into the grounds of eviction. In both the cases, the court of first instance was found not to have exercised its mind to form its own satisfaction about the precise ground on which alone eviction could have been ordered under the relevant statutory provisions.

19. The Supreme Court took the same view in two later decisions. Ferozilal v. Manmal, AIR 1970 S. C. 794 and Kaushalya v. K. L. Bansal, AIR 1970 S. C. 838, Hegde J. speaking for the court in the latter case observed thus — (at P. 796).

"From the facts mentioned earlier, it is seen that at no stage, the court was called upon to apply its mind to the question whether the alleged subletting is true or not. Order made by it does not show that it was satisfied that the subletting complained of has taken place, nor is there any other material on record to show that it was so satisfied. It is clear from the record that the court had proceeded solely on the basis of the compromise arrived at between the parties. That being so, there can be hardly any doubt that the court was not competent to pass the impugned decree. Hence the decree under execution must be held to be a nullity".

20. It might have been noticed that Hegde J. in the above said decision had not said that all orders of eviction passed

in terms of compromises arrived at between the parties, must be regarded as nullities. There might be cases where either within the four corners of the memorandum of compromise or elsewhere from the record it might be possible to deduce the existence of the statutory grounds for eviction. Hegde J. does not seem to have regarded as invalid orders passed by the tribunals on the basis of compromise terms in such cases. Yet a general impression appears to have gained ground among lawyers that orders of eviction passed by a Tribunal on the basis of agreement between the parties must be held to be invalid on the score that the very presence of an agreement between the parties, must per se, rule out the existence of satisfaction which the statute requires the Tribunal to form as pre-condition for eviction.

21. The opportunity for clarifying the position of compromise eviction orders under the scheme of the Rent Control statutes soon presented itself before the Supreme Court in K. K. Chari v. R. M. Seshadri AIR 1973 S. C. 1311. In that case, the landlord of a residential building in Madras City moved the Rent Controller for evicting the tenant. The petition was filed under the Madras Buildings (Lease and Rent Control) Act 1960. The tenant in that case was a retired I. C. S. Officer and a practising advocate. The ground for eviction put forward by the landlord was that he had no other building in the city and he required the building for his personal occupation. The petition was resisted by the tenant. The parties having joined issues, the landlord let in evidence, both documentary and oral, in support of his petition. The tenant, however, did not choose to cross-examine the petitioner's witnesses. Subsequently, the parties entered into a settlement, and filed a memorandum of compromise before the Rent Controller under the terms of which the tenant withdrew all his defences to the petition and submitted to a decree for eviction. The Rent Controller passed an order in terms of the compromise. The question before the Supreme Court was whether this order of eviction, passed as it was on the terms of a compromise, should be held to be a nullity on the basis of the ruling of the Supreme Court in Bahadur Singh v. Muni Subrat Dass (1969) 2 S. C. R. 432 and the two later decisions following it. Both the learned Judges, Vaidialingam J. and Alagiriswami J. who heard this case, gave separate but concurring judgments. Vaidialingam J. referred in his judgment to the averments in the eviction petition, the salient points made out in the evidence on the side of the landlord, the terms of the compromise memo and the course of proceedings as a whole. Having done so, he observed that it cannot be held in the particular circumstances of that case that the eviction order had been passed solely on the basis of the compromise entered into between the parties. According to the learned Judge, it was 'clear from the various matters referred to, that the court was satisfied about the bona fide requirement of the landlord. Therefore, the decree for eviction is neither void nor inexecutable'

22. Having decided the case before the Court on the basis of its attendant circumstances, Vaidialingam, J. proceeded to lay down the position, somewhat generally, thus: If the tribunal had expressed its satisfaction in the order itself, that will conclude the matter. That the tribunal was so satisfied can also be considered from the point of view whether a stage had been reached in the proceedings for the tribunal to apply its mind to the relevant question. Other materials on record can also be taken into account to find out if the tribunal was so satisfied.

23. The other learned Judge, Alagiriswami, J. began by giving a brief rendering of the reasonings of his learned colleague. He did so in the following passage—

"He (Vaidialingam, J.) has also pointed out that the true position appears to be that an order of eviction based on consent of the parties is not necessarily void if the jurisdictional fact, viz, the existence of one or more of the conditions mentioned in Sec. 10 were shown to have existed when the court made the order, that the satisfaction of the court, which is no doubt a pre-requisite for the order of eviction, need not be by the manifestation borne out by a judicial finding; and that if at some stage the court was called upon to apply its mind to the question and there was sufficient material before it before the parties invited it to pass an order in terms of their agreement it is possible to postulate that the court was satisfied about the grounds on which the order of eviction was based. He has further pointed out that if the tenant in fact admits that the landlord is entitled to possession on one or other of the statutory grounds mentioned in the Act, it is open to the

court to act on that admission and make an order for possession in favour of the landlord without further enquiry. It is on these grounds that he has come to the conclusion that the facts in this case satisfied these tests."

24. Having traced the various steps in Vaidialingam J.'s reasoning in the manner aforesaid, Alagiriswami J. wholly agreed with his learned colleague's conclusion, observing that 'in so far as it is necessary for the purposes of this case, this is a satisfactory conclusion'. It, however, seemed that Alagiriswami J. very much wished to re-state the position in a more general way and for a wider application since, according to him, the law on the subject has got into a labyrinth and the time had come for taking a hard look at it. He also seemed to have gone some way in the direction of a re-statement of the whole law on the subject of compromise eviction orders. Quoting at some length a passage from a decision of the Punjab High Court reported as Baburam Sharma v. Balsingh (1959) 61 Pun. L. R. 33, the learned Judge seemed inclined to take the view that an eviction order based on a compromise would be a valid order, if in the concerned eviction petition the landlord had asked for possession on any one of the grounds on the basis of which he could have asked for possession under the statute. The learned Judge, however, did not offer any final views of his own on the matter, observing — "This would, however, have to be considered when a proper occasion arises".

25. That occasion, apparently, arose before the Supreme Court very soon in Nagindas v. Dalpatram AIR 1974 S. C. 471. Sarkaria J. who gave the decision of the court, seemed to have discovered a general thread of principle running right through in the earlier cases. He observed:—

"From a conspectus of the cases cited at the Bar, the principle that emerges is: that if at the time of the passing of the decree, there was some material before the court, on the basis of which, the court could be prima facie satisfied about the existence of a statutory ground for eviction, it will be presumed that the court was so satisfied."

It is the above passage from the judgment of Sarkaria J., which Mr. Kesava Iyengar has heavily relied on. He said that the rule laid down by the learned Judge must apply to every case of eviction order passed by a Rent Controller which does not ex facie manifest the tribunal's satisfaction as to the existence of the statutory ground for eviction. The order in question may have been passed on the basis of a settlement between the parties. Or, it may have been passed ex parte in the absence of the tenant and after recording the evidence of the landlord. In every case, according to Mr. Kesava Iyengar, the question would be one of finding out whether there was some material or other on record to which the Tribunal's decision could reasonably be attributed and which could be held to have made out one or other of the grounds set out in the Act as a lawful ground for eviction. This, according to the learned counsel, is what Nagindas v. Dalpatram AIR 1974 S. C. 471, has laid down in unmistakable terms.

26. I do not agree with Mr. Kesava Iyengar's understanding of the ruling in the above case. In my view, Sarkaria J. in the passage relied on by learned counsel, was minded only to summarise what he considered to be the conspectus of the earlier rulings of the Supreme Court. It will be remembered that all those rulings dealt with only one class of cases, namely, cases of compromise, in which the Tribunal or court, as the case may be, was found issuing eviction orders without recording its own finding as to the existence of the relevant statutory grounds for eviction. Not one of those earlier decisions had to deal with an ex parte eviction order suffering from a similar shortcoming. The case in Nagindas v. Dalpatram AIR 1974 S. C. 471, itself was yet another, instance of a compromise order of eviction. It seems to me, therefore, reasonable to understand the law stated by Sarkaria J. to be limited in its application to compromise orders of eviction. There are clear indications in the very judgment of the learned Judge to indicate that what he had in mind was only consent orders. The learned Judge made it perfectly clear in his judgment that there must be materials on record on the basis of which alone the Tribunal, in any given case, might be held to have been satisfied about the existence of the statutory grounds for eviction. In the absence of such materials, it cannot be so held. And, adverting to the question as to what kind of materials might possibly lead to such an inference, the learned Judge cited the compromise memo itself as one such material. Compromise, he said, must be based on an implied admission, and, so treated, can

be accepted as the best evidence of the facts admitted. It was in this sense that the learned Judge upheld the compromise order in that case as having been validly made.

27. The position in the present case is wholly different. The grounds set out by the landlord in its eviction petition are by no means admitted anywhere by the tenants. On the contrary, they are seriously controverted. It may be mentioned at this stage, that although the Rent Controller set the tenant ex parte, it was not before the tenant had entered appearence and filed his affidavit in opposition in the Court. A refence to this affidavit shows not only a denial of the landlord's averments, but also a positive assertion by the tenant that the claim made in the petition was not bona fide. I cannot, therefore, bring myself to construe the eviction order in this case as based on any statutory grounds of eviction, merely on the score that the petition quotes the statute. On the contrary, as pointed out by Mr. Govind Swaminathan, there is a clear indication in the record itself to show that before ordering eviction the Rent Controller did not even advert to the pleadings of the landlord, let alone evaluate the evidence of PW. 1. The petition was avowedly made under S. 10 (3) (a) (iii) of the Act. This means that the landlord, in order to claim relief, had to plead, inter alia, that it had no other building in the city or town concerned. The non-residential building in question in the case is situate in Madras City. But, curiously enough, the landlord sought to maintain its petition not on the ground that it had no other non-residential building in the city, but on the ground that it had no other similar building in Malayaperumal Street — which is the street in which the building under tenancy is situate. Mr. Govind Swaminathan observed that this is a fatal shortcoming in the landlord's petition. This woeful inadequacy in the pleading, he said, could have caught even the eye of a man running. The Rent Controller after going through the motions of an ex parte hearing, had passed the eviction order in the face of this state of the pleading is positive proof, according to learned counsel, that he was wholly oblivious to everything on record —pleadings materials and what not. I am inclined to agree with him. I have earlier explained in some detail my reasons for holding this order to be null and void. As may be seen, I have derived my conclusion by reference to the mandatory provisions of S. 10 (3) (e) and by looking at the mere aspect of the order, without more. What Mr. Govind Swaminathan has now submitted provides an additional grist to the mill as it were, from a source external to the order itself. That the order finds no support in the landlord's own pleadings only underlines the conclusion that it is a nullity.

28. Mr. Kesava Iyengar lastly urged that the order under revision cannot be regarded as a nullity in the true sense of that expression. He said that only where an order is passed in total absence of jurisdiction, or in excess of jurisdiction, would the law regard it as a nullity. Learned counsel reminded me that in this case the Rent Controller was admittedly seized of the matter, and had undoubted jurisdiction to issue the order. There was, therefore, no scope for considering it, in terms of its being a nullity.

29. I do not agree with the above submission. Early conceptions of nullity amongst lawyers were based on the jurisdictional aspect of the proceedings or orders in question. Recent advances in Jurisprudence, however, (sic) that even where the Tribunal or court has undoubted jurisdiction to pass orders, they can yet be challenged as nullities for quite other reasons. Some of them are set out in a recent decision of the House of Lords in Anisminic Ltd. v. Foreign Compensation Commission (1969) 2 A. C. 147. The following passage from the judgment of Lord Reid represents the current thinking on the subject:—

"But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power, to make. It may have failed in the course of inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on such matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive".

Lord Pearce in the same case made the following further observations:—

"Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the Tribunal having any jurisdiction to embark on an enquiry. Or the Tribunal may at the end make an order that it had no jurisdiction to make. Or in the intervening stage, while engaged in a proper inquiry, the Tribunal may depart from the rules of natural justice or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by Parliament and fail to make the inquiry which Parliament did direct. Any of these things would cause its purported decisions to be a nullity."

30. Mr. Kesava Iyengar submitted that it would be a misuse of the expression to dub as nullity an order passed by a Tribunal having jurisdiction, merely because it had passed a wrong order. He added that a tribunal or court having jurisdiction has a right to pass right orders as well as wrong orders, and if the orders are wrong, they can be corrected in appeal or other appropriate proceedings, but by no means can they be regarded as a nullity.

31. Lord Reid, in his judgment above cited, adverted to this aspect in the Anisminic Ltd. v. Foreign Compensation Commission (1969) 2 A. C. 147. He referred to an earlier decision of the House of Lords, and clarified the position thus—

"I understand that some confusion has been caused by my having said in Reg. v. Governor of Brikton Prison; ex parte Armah 1968 A. C. 192, 234, that if a Tribunal has jurisdiction to go right it has jurisdiction to go wrong. So it has, if one uses 'jurisdiction' in the narrow original sense. If it is entitled to enter on the enquiry and does not do any of those things which I have mentioned in the course of the proceedings then its decision is equally valid whether it is right or wrong subject only to the power of the court in certain circumstances to correct an error of law."

32. I have therefore, no doubt in my mind, that this order of the Rent Controller is, by all standards, a nullity. I approach this question as a court sitting in revision under Sec. 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act of 1960. Under that section, this court may on the application of any person aggrieved by an order of the appellate authority, call for and examine the record of the appellate authority, to satisfy itself as to the regularity of such proceeding or the correctness, legality or propriety of any decision or order passed therein and if, in any case, it appears to this court that any such decision or order should be modified, annulled, reversed or remitted for reconsideration, it may pass orders accordingly. It seems to me that under the wide sweep of this revisional jurisdiction this court has a dual role to fulfil: One as a court of review, examining the decisions of the appellate authority and the Rent Controller on merits; the other, as that of a superior court exercising supervisory jurisdiction over the appellate authority and the Rent Coltroller. In the former role, the correctness and the legality of the Rent Controller's order are properly reviewable by this court. But I conceive the other, supervisory jurisdiction to be the more salutary one from the point of view of maintaining the tone of the subordinate courts and tribunals. I believe that the powers have been specifically conferred on this court under the section only to ensure that the tribunals, at all lower levels, bring to bear a proper judicial bearing and outlook in the discharge of their functions under the Act. It is in this context, apart from anything else, that I feel interference is called for in this case. As I said earlier, the responsibility of the Rent Controller is a special one, and it has to be discharged strictly in accordance with the statute. Besides, any order that he passes has serious consequences for the parties before him. There can, therefore, be no question for his doing less than what he is capable of doing and less than what the statute expects him to do. This means and implies that he cannot be adopting any labour-saving devices in composing his orders. He cannot shirk mental work. Nor can he skip his findings, driving the litigants and the superior courts alike to probe the unknown recesses of his mind and blunder their way into assigning some meaning, or any meaning, to his orders. I like to imagine that had the Rent Controller's orders contained some discussion, be it ever so little, the course of further proceedings in this case might have been different. As it happens, the order has to be declared a nullity, but

regrettably enough, only after avoidable expenditure in time, effort and costs.

33. The appellate authority in this case had gone into the evidence itself and sought to support the eviction order on its own perception and evaluation of the evidence. But, as I had explained earlier, when the order is a nullity, there can be no question of supporting its conclusion by reference to the evidence in the case. I must, therefore, regard the appellate order as equally futile.

34. In the result, the civil revision petition is allowed. The order of the appellate authority is set aside and the ex parte order of eviction passed by the Rent Controller is declared to be a nullity and set aside. In the circumstances, I make no order as to costs.

Revision allowed.

AIR 1978 MADRAS 158

VARADARAJAN, J.

V. Usman Koya, Petitioner v. R. Muthukrishnan and others, Respondents.

Civil Revn. Petn. No. 1894 of 1976, D/- 15-4-1977.*

Tamil Nadu Buildings (Lease and Rent Control) Act (18 of 1960), S. 9 (2) — Civil P. C. (5 of 1908), S. 151 — Tenant depositing amount of rent due in Rent Controller's Court under S. 9 (2) — Controller mistakenly permitting tenant to withdraw amount — Controller can rectify mistake and order tenant to redeposit amount — S. 151 does not apply.

On the death of the landlord the tenant being in doubt as to the person entitled to receive the rent, made a petition under S. 9 (2) and deposited the amount of rent due in the Rent Controller's Court. On the dismissal of the petition the Rent Controller mistakenly permitted the tenant to withdraw the amount. In such a case the Rent Controller as a quasi-judicial tribunal has inherent power to rectify the mistake by directing the tenant to redeposit the amount though S. 151, Civil P. C. does not apply to proceedings under the Act. AIR 1951 Mad 766, Rel. on; (1965) 1 Mad LJ 287 and AIR 1975 Mad 383, Dist. (Para 3)

*(Against order of Sub-J., Coimbatore in R. C. A. No. 180 of 1975).

KU/AV/E425/77/GNB

Cases Referred: Chronological Paras

AIR 1975 Mad 383 : (1975) 2 Mad LJ 171 3

(1965) 1 Mad LJ 287 3

AIR 1951 Mad 766 : (1951) 1 Mad LJ 422 3

S. Nainar Sundaram, S. Natarajan and V. Nicholas, for Petitioner; T. R. Rajagopalan and T. R. Rajaraman, for Respondents.

ORDER: — The tenant who had lost before the Rent Controller as well as the Appellate Authority is the petitioner. This petition has been filed to revise the order of the Appellate Authority confirming the order of the Rent Controller directing the petitioner to re-deposit a sum of Rs. 21,580-92, which he had deposited towards rent due from him in R. C. O. P. 296 of 1973, which he had filed under S. 9 (2) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, and which he had subsequently withdrawn as per order in I.A. No. 204 of 1974. The petitioner had become a tenant of the premises under one Varadarajan who died on 7-8-1971, leaving his widow Rukmaniammal (4th respondent), three sons and one daughter as well as his mother, Rajammal (2nd respondent), and two brothers Nagarajan (3rd respondent) and Muthukrishnan (first respondent). Since the petitioner was in doubt about the person to whom he should pay the rent subsequent to the death of Varadarajan who had leased the premises to him, he filed the aforesaid R. C. O. P. No. 296 of 1973, under S. 9 (2) of the Act, and deposited the sum of Rs. 21,580.92 in the Court of the Rent Controller. The three branches appear to have agreed to share the amount in certain proportions, and consequently, R. C. O. P. 296 of 1973, was dismissed on 9-8-1974. However, strangely enough, the petitioner withdrew the amount by filing I. A. No. 204 of 1974, for issue of a cheque for the said amount, evidently without notice to the respondents in the main R. C. O. P. The first respondent herein, Muthukrishnan, filed I. A. No. 155 of 1975 to excuse the delay in filing an appeal against the order in I. A. No. 204 of 1974, but it was dismissed on the ground that the Limitation Act is not applicable to proceedings under the Rent Control Act. Later respondents 1 and 2 in the present petition, against whom alone the present petition is pressed by the learned counsel for the petitioner, filed I. A. No. 26 of 1975 on 18-2-1975 under S. 151,

a right to purchase the property from the Board and the Board has no option except to sell it to the allottee-lessee. There is no discretion in the Housing Board to avoid such a result. This right to obtain a conveyance of immoveable property which is apparent in the lease-cum-sale agreement is not equable to a contingent right. It has to be fairly held that this right is a right in immoveable property and is certainly property which comes within the meaning of the expression "property over which he has the capacity to exercise and take proceedings for exercising of such powers in or over or in respect of property." Palaniswamy, J. rightly relied upon the decision in Willingham v. Joyce ((1796) 30 ER 951) and Buckland v. Papillon ((1866) 2 Ch App 67) and held the benefit of the rights which flow from the lease-cum-sale agreement being property rights would pass on the Official Assignee. In our view, the rights inbuilt in the lease-cum-sale agreement are not bare expectancies or possibilities, but are rights which could be transmitted in accordance with law and in this sense, the right, title and interest of the insolvent over the property under the said agreement would vest in the Official Assignee after adjudication. As the effect of an order of adjudication is to vest in the Official Assignee every beneficial matter belonging to the insolvency estate, it cannot be said that the benefit which the insolvent has obtained under the lease-cum-sale agreement cannot pass on to the Official Assignee. The learned counsel for the State Housing Board was unable to place, before us any decision or authority to hold that the insolvent did not have a right in the property at the time of adjudication and that it was the Board alone which had the predominant right over it and that the insolvent had no rights at all under it. The Division Bench which approved of the judgment of Palaniswamy, J. in Application No. 589 of 1971 and O. S. A. No. 2 of 1972 also reiterated that the rights which the allottee-lessee acquired are valuable rights which could be treated as property which on adjudication will vest in the Official Assignee. We respectfully agree with the view expressed by the learned Judges as above and hold on the first point that the insolvent Vasudevan had an interest in the property in question and the benefit of such an interest automatically got transmitted and vested in the Official Assignee under S. 52 of the Presidency Towns Insolvency Act.

9. The second point is whether Govindaswamy as the intending purchaser who parted with a sum of Rs. 43,000/- could claim a charge over the property. In Application No. 338 of 1970 in the main insolvency proceedings. the insolvency Judge of this Court directed Govindaswamy to file an affidavit of claim relinquishing his rights for specific performance and thereupon an order dated 19-2-1971 was passed admitting the claim of Govindaswamy to a charge over the property for a sum of Rs. 43,000/- and interest and that order has become final in the eye of law. This is binding on all the creditors including the appellant before us. Even apart from it, S. 55 (6) (b) of the Transfer of Property Act provides an answer to the objection raised by the Appellant before us. Section 55 (6) (b) of the Transfer of Property Act provides that the buyer is entitled unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer, in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him in a suit to compel specific performance of the contract or to obtain a decree for its rescission. In the instant case, it is nobobody's case that Govindaswamy improperly declined to accept delivery of the property. On the other hand he was ready to complete the sale but for the attitude of the Official Assignee, who wanted to bring the property to sale in the interest of body of creditors. It was in those circumstances, and under directions of Court, Govindaswamy gave up his right to purchase the property but insisted upon a charge on the property being created to the extent of his interest in the property for the amount of the purchase money paid by him as buyer in anticipation of the delivery of the property and completion of sale and for interest on such amount. Govindaswamy, therefore, secured a statutory charge for the prepaid price, that is, the price paid by him in anticipation of completion of sale. The principle under S. 55 (6) (b) of the Transfer of Property Act is indeed a

2. Whether the charge claimed by Govindaswamy under the provisions of the Transfer of Property Act is sustainable ?

3. Whether the State can claim any right in the payment of the arrears of income-tax over and above the rights of Govindaswamy, who sought for a charge on the property and after a sale thereof a charge on the sale proceeds of that property : and

4. Whether the order of Official Assignee dated 5-5-71 in having admitted the claim of Govindaswamy for a sum of Rs. 43,000/- with interest at 6 per cent per annum as a secured debt is correct or not ?

6. We have seen that in July, 1965, the insolvent entered into an agreement with the Housing Board with regard to the property in question. This is ordinarily known as a lease-cum-sale agreement. What is contended is that the right flowing under the said agreement is a personal right and that the insolvent does not acquire any property right which he could transmit to the Official Assignee after adjudication. On a perusal of the lease-cum-sale agreement the primary intention of the parties appears to be to create a saleable interest in the property provided, the allottee-lessee (insolvent herein) complies with the terms and conditions therein. The allottee-lessee is entitled to occupy the property on the terms and conditions mentioned therein and under Cl. 15 thereto, the Board shall sell the property to the lessee for such price as the Chairman of the Board may fix; the allottee-lessee is bound to bear all the expenses of sale, besides paying the price fixed by the Board. If the allottee-lessee commits default, the agreement is liable to be terminated. Clause 24 provides that if the allottee-lessee commits breach of any of the terms of the agreement, the Board is at liberty but is not bound to determine the lease and the agreement of sale without prejudice to the rights of the Board to recover from the allottee-lessee any loss incurred by the Board. No doubt Cl. 29 interdicts the lessee, from assigning, transferring or dealing with his rights in favour of third parties and provides that the lessor-Board is not bound to recognise any such transfer or assignment in favour of third parties. The agreement is however silent in the case where the lessee-allottee becomes an insolvent. It is in the light of these provisions that the counsel for the appellant contends that Vasudevan as insolvent-lessee-allottee, obtained only a contingent right under the lease-cum-sale agreement and such rights would not vest in the Official Assignee.

7. What is it that vests in the Official Assignee is specifically dealt with in S. 52 of the Presidency Towns Insolvency Act. In law on the making of an order of adjudication, the property of the insolvent vests in the Official Assignee for the benefit of his creditors and becomes divisible amongst them.

S. 52. "Under the Presidency Towns Insolvency Act the property which is not divisible amongst the creditors of the insolvent comprises the following particulars, namely :

(i) property held by the insolvent on trust for any other person.

(ii) the tools (if any) of his trade and the necessary wearing apparel, bedding, cooking vessels, and furniture of himself, his wife and children to a value inclusive of tools and apparel and other necessaries as aforesaid, not exceeding Rs. 300/- in the whole. The property which is divisible amongst the insolvent's creditors includes —

(a) all such property as may belong to or be vested in the insolvent at the commencement of the insolvency or may be acquired by or devolve on him before his discharge.

(b) the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge; and

(c) all goods in the possession, order or disposition of the insolvent."
(Vide Mulla on the Law of Insolvency in India-III Edn. by D. S. Chopra) para 472 — page 369.

8. It is seen that all such property over which the insolvent had the capacity to exercise rights and take proceedings for exercising all such powers, in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency shall be deemed to be property of the insolvent. On a fair reading of the lease-cum-sale agreement it is clear that he has a right to obtain ownership over the property on fulfilment of certain conditions agreed to therein. Once the stipulations under the agreement are satisfied he has

that that right was in the nature of a right to get a sale and that such a right was property which on adjudication of Vasudevan as lessee-allottee vested in the Official Assignee.

This matter was taken up in appeal to the First Bench in O. S. A. No. 2 of 1972 (Mad). Veeraswamy, C. J. agreed with Palaniswamy, J., and observed that Vasudevan, before his adjudication did possess certain rights over the Indra Nagar house-property hereinafter referred to as the property which included continuance in possession till the end and asking for a conveyance to be made in his favour by the Board. The Division Bench also observed that Vasudevan's rights were valuable rights which could well be treated as property, which on adjudication would vest in the Official Assignee. Whilst this was the position and when the Official Assignee sought to bring the property to sale as a statutory functionary representing the body of creditors, Govindaswamy who was anxious to get a sale-deed but for the intervening of insolvency, and who, it appears has also prepared a draft sale-deed for the purpose, could not proceed with it; but he was on the other hand, willing to permit the Official Assignee to sell the property publicly provided the statutory charge to which he was entitled under S. 55 (6) (b) of the Transfer of Property Act, was declared in his favour. The Official Assignee with the concurrence of the Court (Vide Order in application No. 338 of 1970) accepted the stand of Govindaswamy and brought the property to sale, after admitting the claim of Govindaswamy for the sum of Rs. 43,000/- with interest at 6 per cent per annum thereon as a secured debt. Thereafter in March 1973 the Income-tax Officer, Hundi Circle, 1, Madras-6, filed application No. 173 of 1973 praying to set aside the order of the Official Assignee dated 5-5-1971 admitting the claim of Govindaswamy as a secured creditor and sought for an interim direction to the Official Assignee to stay the payment of the amount due to Govindaswamy as such secured creditor. Govindaswamy resisted this application and asserted that he has secured a statutory charge as per the provisions of the Transfer of Property Act and that, therefore, the Income-tax Officer representing the State, cannot dislodge the vested rights in him and sought for a dismissal of the said application.

2. Paul, J. heard the application and held that under the terms of the lease-cum-sale agreement entered into between Vasudevan and the State Housing Board, Vasudevan had a right in the property and was entitled to become full owner on the fulfilment of the stipulations under it and in that sense he agreed with Palaniswamy, J. He upheld the charges over the property in favour of Govindaswamy to the extent of Rs. 43,000/-. On the question whether the Government can claim priority over the debt due to Govindaswamy, he held that as such a priority can be claimed over unsecured creditors only and as the debt in question is a secured debt, in consequence of which Govindaswamy secured a statutory charge under S. 55 (6) (b) of the Transfer of Property Act, he would not agree with the State and dismissed the said application. The present appeal is by the Income-tax Officer, representing the State, questioning once over the nature of the right of Govindaswamy in the property and claiming priority in respect of the arrears of income-tax admittedly payable by the insolvent.

3. The learned counsel for the Appellant once again reiterated the same ground which, in our view, has become final that under the lease-cum-sale agreement the insolvent did not get any transferable or assisgnable interest in the property and that, therefore, any agreement entered into by him with Govindaswamy is of no avail. Incidentally, it was also argued that Govindaswamy could not in the circumstances, claim a statutory charge under S. 55 (6) (b) of the Transfer of Property Act and that, therefore, Govindaswamy could not claim any priority in the disbursement of the assets of the insolvent.

4. As in the earlier proceedings, the State Housing Board was not represented, we thought that the Board should be given an opportunity to state their views on the rights and obligations which are set out in the lease-cum-sale agreement commonly entered into by the Board with their allottees. We heard the counsel for the State Housing Board as well.

5. The points that arise for consideration are:

1. Whether the insolvent has acquired an interest in the property and if so, what is the nature of that interest? Whether it is assignable and transmittable?

in the property, for the amount of any purchase-money properly paid by the buyer, in anticipation of the delivery and for interest on such amount, and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him in a suit to compel specific performance of the contract or to obtain a decree for its rescission. (Para 9)

Where the intending buyer gave up his right to have the sale of property executed in his favour only because the Official Assignee in whom the property vested on seller's insolvency insisted on bringing the property to sale in the interest of creditors and the insolvency Court so directed the buyer who insisted upon a charge on the property being created for the amount of the purchase money paid, secured a charge for the pre-paid price, that is the price paid by him in anticipation of completion of a sale. (Para 9)

Anno: AIR Comm., T.P. Act (4th 1968 Edn.), S. 55, N. 20.

(C) Presidency Towns Insolvency Act (3 of 1909), S. 49 — Priority of Govt. dues over dues of other creditors — Nature of.

Where a certain property of the insolvent was sold under orders of the Court subject to the charge of the intending purchaser being maintained throughout including the sale proceeds of the public sale of the property by the Official Assignee, the Govt. dues could not get priority over the dues of the such purchaser i. e. a secured creditor. AIR 1962 Mad 59 (FB) Rel. on. (Para 10)

Anno: AIR Manual (3rd Edn.), Presidency Towns Insolvency Act, S. 49, N. 1.

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Mrs. Nalini Chidambaram Standing Counsel for Income-tax Department, for Appellant; K. Chandramouli, (for No. 1), K. N. Balasubramanian, (for No. 2) and T. Ramakrishna, Official Assignee, (for No. 3), for Respondents; K. P. Subramaniam, for State Housing Board, Tamil Nadu.

RAMAPRASADA RAO, J.:— This appeal is directed against the judgment of Paul J., in application No. 173 of 1973 in I. P. No. 39 of 1970. A petitioning creditor filed a petition in insolvency against his debtor one P. Vasudevan on the ground that the debtor committed acts of insolvency under section 9 (d) (ii) and 9 (d) (iii) and 9 (g) of the Presidency Towns Insolvency Act. This petition was presented on 4-5-1970. Prior to the presentation of this petition, to wit, on 15-1-1970, Vasudevan (the debtor) entered into an agreement with one Govindaswamy, the first respondent for the sale of his house and ground bearing plot No. 113, 12th Cross Street, Indra Nagar for a sum of Rs. 83,000/-, and in pursuance of that agreement, the first respondent Govindaswamy had paid Rs. 43,000/- and it was agreed that the balance should be paid after Vasudevan gets clearance from the State Housing Board with whom Vasudevan had a lease-cum-sale agreement entered into between him and the Board on or about 15-7-1965. We shall presently refer to the terms of the said agreement. The insolvency filed as above by the petitioning creditor was heard and by an order dated 23-3-1971 Vasudevan was adjudicated as an insolvent. Whilst these proceedings were pending Govindaswamy, on the strength of the agreement for sale dated 15-1-1970, which was indeed oral and further on the foot that he has paid a sum of Rs. 43,000/- to the insolvent pursuant to the said agreement of sale desired to bring himself on record in the insolvency proceedings so as to secure his rights as intending purchaser who parted with a part of the purchase price to the vendor. Fearing that Govindaswamy was likely to claim an interest as a secured creditor pursuant to the payment of the part of the agreed purchase price in furtherance of the agreement of sale referred to above, the insolvent filed application No. 589 of 1971, and sought for a declaration that Indra Nagar house as above did not vest in the Official Assignee, as he had no transferable or assignable interest therein. The application of Vasudevan (application No. 589 of 1971) was rejected by Palaniswamy, J., who held that Vasudevan under the lease-cum-sale agreement with the State Housing Board acquired an interest in the property and was entitled to get a conveyance from the Housing Board on his fulfilment of the obligations undertaken by him under the lease-cum-sale agreement and

29-30. Before we assess the damages, it is necessary to find as to what was the intention of the parties when they contracted to buy one wagon of starch whether it was to purchase 150 bags or 200 bags. Exs. A-1, A-4 and A-5 give the clue that the intention of the parties was to supply 200 bags or purchase 200 bags, when they referred to the supply of one wagon of starch. In fact, the above contracts referred to 200 bags as the normal content of a wagon. But the learned counsel for the appellant-defendant relying upon Ex. A-11 which was the bill prepared by them when they supplied 150 bags of starch under Ex. A-1 argued that the said bags were sent in a wagon and, therefore, one wagon could contain only 150 bags. We are unable to agree. No expert evidence was let in to show that a wagon which could be despatched by the defendant from its nearest Railway Station in South India could hold only 150 bags and not more. Even otherwise, there is intrinsic evidence as per the recitals in Exs. A-1, A-4, and A-5 that what was contracted for was 200 bags of starch and that the parties intended to sell and purchase 200 bags when they contracted to supply one wagon. There is evidence on the side of the plaintiff to show that one wagon could contain 200 bags — vide Exs. A-27 and A-28. The plaintiff, therefore, would be entitled to damages as per the calculations below:

So far as the non-supply of starch is concerned, the prevailing market rate on or about the date of breach should be deemed as Rs. 60/- per 50 K. Gms. It is worked out by us on the quotation given by the defendant in Ex. A-9. Therefore, the plaintiff would be entitled to damages for the non-supply of the goods under Exs. A-2, A-3, A-4 and A-5 and the damages for non-supply of starch would be worked out on the basis of the difference between Rs. 60/- and the contracted rate. So far as the non-supply of liquid glucose is concerned, the damages would be worked out again at Rs. 69/- per 50 K. Gms. which was the quotation of the defendant themselves under Ex. A-9. This works out to Rs. 414/- per barrel. The contract rate was Rs. 345/- per barrel. The plaintiff would be entitled to the difference as above for each barrel.

31. The appeals are partly allowed and each party will bear their own costs in this court. This plaintiff would be entitled to interest at 6% on the amount worked out from the date of suit till the date of payment.

32. These Appeals having been set down this day for being mentioned, the court made the following Order:—

33. In the lower Court also, the appellant, who suceeeded will suffer only proportionate costs.

Appeal partly allowed.

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RAMAPRASADA RAO AND SURYAMURTHY, JJ.

Income-tax Officer, Hundi Circle I, Madras, Appellant v. K. A. Govindaswamy and others, Respondents.

O. S. Appeal No. 77 of 1974, D/- 17-6-1977.*

(A) Presidency Towns Insolvency Act (3 of 1909), S. 17 — Insolvent's property — What is.

All such property over which the insolvent had the capacity to exercise rights and take proceedings for exercising all such powers, in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency is deemed to be property of the insolvent, and vests in the Official Assignee after adjudication. Consequently, the right of the insolvent to obtain a conveyance in respect of the house allotted to him by the State Housing Board under the lease-cum-sale agreement on fulfilment of certain conditions agreed to in the said agreement not being a contingent right but property would also vest in the Official Assignee after adjudication. (1796) 30 ER 951 and (1866) 2 Ch. App. 67 and O. S. A. No. 2 of 1972 (Mad), Rel. on. (Para 8)

Anno: AIR Manual (3rd Edn.), Presidency Towns Insolvency Act, S. 17, N. 1.

(B) Transfer of Property Act (4 of 1882), S. 55 (6) (b) — Agreement to sell property — Payment of part of purchase money — Creation of charge on property in respect of pre-paid price — Nature of.

S. 55 (6) (b) provides that the buyer is entitled unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him to the extent of the seller's interest

*(Against judgment of Paul J. in Appln. No. 173 of 1973, D/- 23-8-1973.)

at all. This is also an indication to show that in so far as 1964 contracts are concerned, for which they (defendants) had already made the necessary preparation to despatch the goods, they cannot wriggle out and insist on an increase in price under the guise of the so-called power vested under Clause 9 of the contract. On the ground that there is no proof of the increase in the market price in the month of January, 1965 excepting for the bare statements from time to time by the defendant or by D. W. 1 in the box and also on the ground that the goods had been ascertained by the defendants, as is seen from the text of Ex. A-9, they (defendant) cannot escape reasonable damages which flow from the breach, which breach is referable to their conduct in the non-supply of the contracted goods.

25. The question incidentally arose whether the rule of intention in Sec. 23 of the Sale of Goods Act would apply to the facts of this case. It would be convenient to refresh about the terms of the contract. No doubt, clause 1 says that the R. R. was deliverable against cash or documents negotiated through Bank. But Clause 4 says that the goods would be despatched at the buyer's risk and responsibility. Clause 6 says that the defendants were not responsible for any loss or damages or any mishappening to the goods after they had left their premises.

26. The learned counsel for the appellant (defendant) basing his contention of Clause 1 would say that the property in the goods did not pass until the R. R. was honoured by payment either in cash or through the agency of the bank. This may be so if Clause-1 stood alone. But clauses 4 and 6 which cannot be reconciled with Clause 1 would give the reasonable impression that once the defendant despatched the goods, they travel at the buyer's risk. This Clause cannot, therefore, avoid the rule of intention provided for in Sec. 23 (1) of the Sale of Goods Act which says:

"Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made".

27. The very fact that under Ex. A-9, the defendant made it clear that all the goods had been appropriated and were ready for despatch, and which communication the plaintiff took it for granted, raises the usual presumption that the defendant as seller had appropriated the goods unconditionally to the respective contracts and they were in a deliverable state, and the only thing which remained in order to perform the contract was only to put them in a wagon for onward transport. In the instant case, the assent of the buyer (plaintiff) is implied and it has been given by them even before the appropriation was made. In our view, therefore, in the light of the disclosed facts, the property in the goods under the various contracts had passed to the plaintiff.

28. If, therefore, the sellers fail to perform their part of the bargain, the buyer would certainly be entitled to damages which flow reasonably from such breach. The plaintiff themselves in the pleadings would say that the date of breach on each of the contracts was 21st January, 1965. Therefore, they cannot shift from this date, so as to get higher damages to March, 1965. We should, therefore, find from the records whether there is reasonable material to find the market rate of the goods in or about 21st January, 1965. The defendant themselves have provided the market rate under Exs. A-9 and A-12. Under Ex. A-9, they would say that the rates at which they would book orders in 1965 was Rs. 60/- per 50 K. Gms. for the supply of starch and Rs. 69/- for 50 K. Gms. in old drums for the supply of liquid glucose. We accept this, in the absence of any other acceptable evidence, as the measure to be adopted for the award of damages. The lower court obviously relied upon P. W. 1. But P. W. 1's evidence is again his own bare ipse dixit. Having regard to the stand taken by the plaintiff that the breach had occurred on 21-1-1965 and as the defendant themselves have stated in Ex. A-9 as to what possibly can be the market price in January, 1965 at the earliest, we adopt the price in Ex. A-9 as reflecting the correct market price in January, 1965. The plaintiff would be entitled to damages that flow from the breach. There has been no supply in so far as the contracts covered by Exs. A-2, A-3, A-4 and A-5 are concerned. Only 150 bags were supplied under the contract Ex. A-1.

avoidable, the normal course of a contract ought not to be stemmed, but, on the other hand, the court should aid to follow up such contracts and ease the methods to implement them.

19. Sec. 23 of the Contract Act which provides the basis for Courts to find whether a contract is opposed to public policy says that a contract with consideration or object which is forbidden by law, or is of such a nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or involves or implies injury to the person or property of another is a contract which is opposed to public policy. The foundation on which the principle of public policy is based is that no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If the cause of action springs from ex turpi causa, then the courts are prevented from assisting a litigant who bases his cause of action on such immoral and illegal causes. But it is always necessary that the court's conscience should be satisfied that the illegality, immorality or irrationality complained of in a contract goes to the very root of the matter and shakes its foundation. If such is the situation, then the courts will not assist the litigant who seeks its assistance under such circumstances.

20. If the above is the basic concept which surrounds public policy, we are unable to agree with the trial court that Clauses 3 and 9, the former vesting a right in the seller to accept or reject orders formerly booked by its representative and the latter clause whereunder a higher price was demanded by the seller under certain circumstances, have to be whittled down and thrown out as clauses which are opposed to public policy.

21. Commercial transactions couched in easy and understandable language and contained in a contract have to be respected according to its tenor. This is so because, the parties with open eyes and being conscious of the merit of the letter and spirit of the Clauses in such a contract do enter into them.

22. The courts, therefore, ought not to be astute to defeat the efficacy of such document or destroy such bargains. While interpreting a commercial contract, a broader outlook has to be adopted and care should be taken to avoid an artificial and unrealistic approach in the matter of the understanding the meaning and purpose of such documents. In such cases, the courts should occupy the chair of the contracting parties and reasonably understand their minds and intents. If after such an approach the instrument still presents circumstances which the conscience of a reasonable and prudent person cannot accept and if ex facie the terms are so unconscionable, illegal and designed to avoid or evade law, then only the doctrine of public policy will intervene, and will not implement such bargains.

23. In the instant case, we are satisfied that Clauses 3 and 9 nay the tenor of Exs. A-1 to A-5 do not pose any irrational principle in commercial practice nor could it be said to be so unconscionable so as to be ignored by courts as being opposed to public policy.

24. But then the question is whether, in the circumstances, the plaintiff who has come to court claiming damages or compensation for non-performance of the contract is entitled to damages at all. As we said, the appellant-defendant under Ex. A-12 made it clear that they would not supply or perform the contract unless an increased price was paid for the goods. In particular, while dealing with the contract made under Ex. A-5, the defendant would say under Ex. A-14 that due to the increase in the price of raw materials, they were unable to register their order. Obviously, they were trying to take advantage of Cl. 3 of the contract. But their conduct in having written about Ex. A-5 belatedly on 15th February, 1965 after encashing the draft which was sent as advance by the plaintiff towards Ex. A-5 is something which obviously exposes the appellant-defendant who uniformly was bent upon avoiding performance of the contracts including Ex. A-5. The defendant would admit that they did not perform the contracts under Exs. A-2, A-3 and A-4 and they partly performed the contract under Ex. A-1. They would rely upon their right to demand a higher price being not satisfied with the payment of the contract rate. But, in our view, there is no proof of increase in market rate as between the 1st and 15th January, 1965, which would prompt a reasonable person to demand a rate higher than the contract rate. Even under Ex. A-9, the defendant made it clear that the rates quoted by them would apply for the year, 1965 and the orders booked in that year. They did not refer to the 1964 contracts

14. Learned counsel for the appellant-defendant would refer to Ex. A-12 which appears to be the sheet anchor of the defendant's case. This is dated 17th January, 1965. We have already seen that in Ex. A-9 dated 1-1-1965 the defendant unequivocally presented the situation that they were ready to despatch the goods ordered by the plaintiff, but they were unable to do so because of the non-availability of Railway wagons. But about two weeks later, the defendant would take up the position that the orders cannot be executed at the rates booked by their agent as the prices of raw materials had suddenly shot up. They demanded a higher price as a condition precedent for the supply of the goods already contracted for. They made it clear that if the plaintiff were inclined to purchase at Rs. 70/- per 50 K. Gms. of starch, they would continue the supplies. Ex. A-12 makes the mind of the defendant very clear. They were not prepared to supply any more goods under the various contracts unless the plaintiff was prepared to pay the higher rate demanded by them.

15. The question which immediately arises for consideration is whether one of the terms in the contract which enabled the defendant to fix a price of their choice in the case of the execution of the contract is a binding term and whether the non-observance of it will deny the plaintiff the right to claim damages, if the seller (defendant) failed to perform the contract.

16. It is in this context that Ex. A-9 looms very large. Even though in the pleadings, the plaintiff also would refer to the fact that the price of starch was hopelessly fluctuating, yet, it cannot be said that as between the 1st of January and 17th of January, 1965, there was so much of fluctuations, which would enable the defendant to claim an increased rate and avoid the contract rate. Excepting for the ipse dixit of the defendant, there is no evidence to show that such was the position or situation. Even otherwise, under Ex. A-9, the defendants committed themselves to the fact that the goods which were initially unascertained were ascertained by them and delineated by them and they were ready for despatch; and but for non-availability of wagons, the defendant would have despatched the same. After having committed themselves to that position, the defendant innocuously refers to the current rate of glucose and starch in that letter and obviously, the said quotations as current rate on 1st January 1965 were given by them, so that the plaintiff, if they were inclined to place any further orders, such would be the price for future supplies. The defendant, on that date, did not take up the position that the goods covered by the contracts could only be supplied to the plaintiff if and when they pay a higher rate or the current rate referred to by them in Ex. A-9. The learned counsel for the appellant, relying upon the terms of the contract and particularly Ex. A-12, would say that the plaintiff is bound to pay the increased rate. Clause 9 of the contract reads thus:

"PRICES: Prices quoted are subject to revision without any notice or adjustment in accordance with the price ruling at the time of despatch and the goods will be supplied subject to availability".

17. Even though on a first blush, the Clause would enable the seller to unilaterally assume a right in himself to increase the contract price without notice, but yet, this power contracted for by the seller is conditioned by the fact that the ruling price at the time of despatch is higher than the contract price. Therefore, it follows that the seller cannot on his own motion and without any more proof of the increase in price demand the same under Clause 9. We searched in vain in the records and in fact, the learned counsel for the appellant fairly stated that excepting for the evidence of D. W. 1 who was the only witness examined, there was no such proof of the increase in the price of the contracted goods at or about the time when Ex. A-12 was written. Even otherwise, we are of the view that the burden which lay very heavily on the defendant to prove that the prices were fluctuating as between the 1st and 17th January has not been discharged in a manner known to law.

18. The lower court, however, put it on the ground that Cl. 3 and Cl. 9 of the contract are opposed to public policy. Public policy, which sometimes confronts Civil Courts, while interpreting the documents and instruments entered into inter vivos between the parties as also by conduct of parties, is not an immutable doctrine. With the passage and march of time, it changes, and has to change. Unless the court is satisfied on the pleadings and the evidence let in that the bargain contained in a contract is so irrational, unconscionable, illegal, and

6. Whether the plaintiff is entitled to interest?

7. Whether the plaintiff is entitled to return of advance amount of Rs. 2,000/-?

8. Whether the plaintiff is entitled to the decree as prayed for with costs?

9. To what relief, is the plaintiff entitled to?

O. S. No. 663 of 1967:

1. Who committed the breach of contract?

2. What is the date of breach?

3. Whether Bolaram Rangalal Jain was not agent of the defendant and whether the contracts entered into by the agent are not binding upon the defendants as contended in paragraphs 7 to 9 of the written statement?

4. Whether the defendant has not accepted the contract as alleged in paragraph-8 of the written statement, in view of the defendant's letter dated 28-12-1964 and other correspondence?

5. Whether the alleged cancellation of the contracts by the defendant as alleged in paragraph-4 of the plaint true, valid and binding on the plaintiff?

6. Whether the alleged printed conditions 3, 4 and 9 are true, valid and binding upon the plaintiff and whether the defendant is entitled to rely upon them and refused to supply the goods at the contract rate?

7. To what damage, if any, is the plaintiff entitled? what is the market rate of starch on the dates of breach of contracts?

8. Whether the contention of the defendant that one wagon of goods would mean only 150 bags of starch and not 200 bags is true and valid? and whether the acceptance of the defendant's agent that one wagon means 200 bags is unauthorised, erroneous and not binding upon the defendant as alleged in paragraph-10 of the written statement?

9. Whether the order in respect of K-4 has been performed by the defendant as contracted by him in paragraph 12 of the written statement? and whether the claim in respect of 50 bags of starch not supplied and the contract the order is barred by limitation?

10. Whether the plaintiff is entitled to interest?

11. To what relief?

10. As is seen from the substance of the issues as above, they are overlapping.

11. On the main issue which was urged by the plaintiff, the court agreed with them when it held that Clauses 3 and 9 are not enforceable, repugnant, void and against public policy. Having found thus and made certain observations in connection thereto, the learned Judge was of the view that the defendant was not entitled to raise the price unilaterally. On an appreciation of the documentary and oral evidence, the lower court found that there was a breach as complained of. While assessing damages, the lower court, not for any clear or cogent reason, totally agreed with the plaintiff's claim and decreed the suit. Lastly, when a wagon of starch flour is the subject matter of the contract on the question whether it is a contract to sell 200 bags of starch flour or 150 bags, he held that the parties intended that the seller should supply 200 bags of starch, even though the contract to supply one wagon of starch flour. It is as against this judgment and decree of the court below, the defendant has come up in appeal.

12. This is a case where the defendant admittedly did not supply the goods contracted for under Exs. A-2, A-3, A-4 and A-5. A hesitant reference was made in the course of the argument as to whether the contract under Ex. A-5 was received prior to Ex. A-9. Ex. A-9 is dated 1-1-1965. Under it, the defendant unequivocally said on being incessantly reminded of their failure to supply the goods under the contract that every effort was being made to despatch the goods ordered through their sales depot agents in Delhi. The defendant would unhesitatingly confess that due to non-availability of Railway wagons, they could not despatch the goods earlier.

13. The learned counsel for the appellant (defendant) in these appeals says that as Ex. A-5 was received by the defendant only on 3-1-1965, after service of Ex. A-9 and even if this factor does affect the defendant, it cannot make any impact on the supervening contract entered into between themselves and the plaintiff under Ex. A-5. That the contract Ex. A-5 dated 26-12-1964 was received by the defendant on 3-1-1965 is spoken to by D. W. 1. Besides this, there is no acceptable material to take it for granted that Ex. A-5 contract was received by the defendant only on 3-1-1965. While referring to this in passing at this stage only to complete the narration, in our view, the receipt of the contract Ex. A-5 on 3-1-65 by the defendant, even if true, would not alter the legal position of the conclusion which would reasonably flow from the admitted facts in this case.

hanced price from time to time. They stated that they tendered the goods for despatch at such enhanced rates and as the plaintiff insisted that the supply should be made at the contract rates, they could not further the supplies as contracted. There case is that since the plaintiff was not inclined to pay the revised price for starch or for liquid glucose, they treated the said orders as cancelled. They would refer to the opportunity which they gave to the plaintiff to perform the contract by paying a higher price. According to them, the plaintiff not having availed themselves of the said opportunity, cannot come to Court and seek for damages. when, in the circumstances of this case, they (defendant) were always ready and willing to supply the goods though for a higher price and not for the contract price. Explaining the delay in the matter of the despatch of the goods, the defendant would plead that it was beyond their control and they could not do so because of the non-availability of the railway wagon. In these circumstances, the claim for damages is disputed. One other defence taken was that a wagon could contain only 150 bags of starch and in the absence of the descriptive content in each of the orders regarding the number of bags which were to be supplied under each of such contracts, the ordinary presumption is that a wagon could contain only 150 bags as, according to the plaintiff, when they executed Ex. A-1 contract, they secured one wagon from the Railway and that wagon could contain only 150 bags. On the basis of this, the defendant wants to raise the presumption that if there was a contract for the supply of one or two wagons of starch flour, it means that it is only for the supply of 150 bags or multiples thereof and not 200 bags and multiples thereof as claimed by the plaintiff.

8. In the written statement, the defendant has curiously referred to another date as the date when there was a breach of the contract. According to the defendant. the plaintiff committed a breach and that breach was on 16-2-1965. There is no particular pleading refuting the allegation made by the plaintiff that the contracts are to be deemed to have been broken by the defendant on or about 21-1-1965.

9. In the light of the above pleadings, the following issues were framed by the learned trial Judge in each of the suits:

O. S. No. 628 of 1967:

1. Who committed breach of contract?
2. Whether there is privity of contract between plaintiff and defendant?
3. Whether Cls. 3, 4 and 9 of the contract are not just, valid and binding on the parties?
4. Whether the defendant is entitled by virtue of cl. 9 to claim higher rate of price prevailing at the time of despatch?
5. Whether the defendant is entitled to reject any contract as manufacturers by virtue of cl. 3?
6. Whether the defendant was proper in refusing to perform the contract as plaintiff refused to abide by the claim for the higher price?
7. Whether the defendant agreed to or accepted the contracts?
8. Whether the contract was only for 2 wagon loads of starch and not for 400 bags?
9. Whether the contract K-4 was only for one wagon load of starch or for 200 bags?
10. Whether claim in respect of the contract K-4 is in time?
11. Whether Bholaram Rangalal Jain was a selling agent or only a depot agent of defendant?
12. Whether Bholaram Rangalal Jain was authorised to assure that one wagon load is 200 bags?
13. Whether Bholaram Rangalal Jain fixed any period for performance?
14. What is the period agreed, if any, for performance?
15 Whether plaintiff is entitled to any damages, and if so, to what extent?
16. Whether plaintiff is entitled to interest?
17. Whether plaintiff is entitled to return of the advance amount of Rs. 1,000/-?
18. To what relief?

O. S. No. 656 of 1967:

1. Whether the defendants have committed breach of contract and have failed to supply the goods as agreed upon and for the agreed price?
2. Whether Cls. 3, 4 and 9 of the printed conditions are not just, valid and binding on the plaintiff?
3. Whether the defendant was proper in rejecting was contracts?
4. Whether Bholaram Rangalal Jain was a selling agent or only a depot agent of defendant?
5. What is the period, if any, agreed for performance?

of starch flour (here the descriptive content of each wagon is given as 200 bags) at Rs. 45/- per 50 K. Gms. The fifth contract is under Ex. A-5 dated 26-12-1964. This was for the supply of one wagon (200 bags) of starch flour at Rs. 50/- per 50 K. Gms. and one wagon of liquid glucose (50 barrels) at Rs. 345/- per barrel. These contracts were entered into at Delhi and the defendant was represented by their agent.

3. The relevant terms of the contract under which the parties stipulated to sell and purchase may be immediately referred to. The mode of payment was understood as cash against R. R. or documents through bank or per V. P. P. The despatch of the goods was at the buyer's risk and responsibility. The defendant stipulated that they should not be held responsible for any loss or damage or any mishappening to the goods after they leave their premises. The prices quoted were subject to revision without any notice or adjustment in accordance with the price ruling at the time of despatch and the goods were to be supplied subject to availability. Inter alia, the contract provided that all orders were booked subject to confirmation by the defendant whose representative was at Delhi. The defendant also reserved the right to accept or reject any order in part or in full (cl. 3). We have already referred to the right vested in the seller to revise the prices in accordance with the ruling rate. This is in Cl. 9. We are not referring to the other clauses as they are not quite relevant.

4. The plaintiff paid the stipulated advances payable under each of those contracts. Excepting for the supply of 150 bags of starch flour under Ex. A-1, no other supply was made. The plaintiff made incessant demands and issued reminders to the defendant for the supply of starch flour and liquid glucose. Exs. A-7 and A-8 are some of such reminders issued by the plaintiff reminding the defendant of their obligation to supply the agreed quantities of goods under the respective contracts. They called upon the defendant to start execution of the orders under Ex. A-8 dated 28-12-1964. To this, the defendant sent a reply under Ex. A-9 which reads as follows:

".....We thank you for your letter dated 28-12-1964 (Regd.). Every effort is being made to despatch the goods ordered through our sales depot agents in Delhi. Due to non-availability of railway wagons, we could not despatch earlier. We shall despatch as soon as the position improves.

Our current rates for Glucose and starch are as follows:

1. Liquid Glucose in New drums Rs. 73/- per 50 Kg. Ex. Depot at Delhi.
2. Liquid Glucose in old drum Rs. 69/- for 50 Kg. Ex. Depot at Delhi.
3. Starch in Bags Rs. 1,200/- per M. Ton ex-factory.

Regarding booking advance orders for the above items for the year 1965 you are requested to kindly contact our Depot Agents in Delhi for further information....."

5. The plaintiff having had no satisfaction in spite of such reminders and having reasonably complained about the inaction in the matter of supply of goods, was interested in claiming compensation for the non-supply of the goods and non-performance of the contracts.

6. The defendant, however, far from respecting their obligations under the contract, wrote to the plaintiff on 17-1-1965 that the orders cannot be executed at the rates booked by their agent as the price of raw materials had suddenly shot up and that the supply would be made if the plaintiff was prepared to pay Rs. 70/- per 50 K. Gms. of starch. The plaintiff naturally resisted this counter offer and after exchange of correspondence through lawyers, instituted the present suit. The plaintiff alleges that the contract has been broken by the defendant on or about 21-1-1965 and it is not in dispute that this averment applies to all the contracts in question which are the subject-matter of the three suits under consideration by us. After having pleaded that the defendant broke the contracts on or about 21-1-1965, the plaintiff, for reasons not clear, assessed the market value of the goods which were not supplied to them during the first week of March, 1965 and claimed the difference between that market rate and the contract rate as damages. The plaintiff also admits in the course of his pleadings that the price of the commodities which he bargained to purchase from the defendant was fluctuating during the time when he entered into the contracts and soon thereafter.

7. The defendant in their written statement after admitting that the contracts were entered into referred to their right under the contract to ask for en-

will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If the cause of action springs from ex turni causa, then the Courts are prevented from assisting a litigant who bases his cause of action on such immoral and illegal causes. But it is always necessary that the Court's conscience should be satisfied that the illegality, immorality or irrationality complained of in a contract goes to the very root of the matter and shakes its foundation. If such is the situation, then the Courts will not assist the litigant who seeks its assistance under such circumstances. (Para 19)

Held on facts that the Cls. 3 and 9 of the Contract. the former vesting a right in the seller to accept or reject orders formerly booked by its representative and the latter clause whereunder a higher price was demanded by the seller under certain circumstances, could not be whittled down and thrown out as clauses which were opposed to public policy. (Para 20)

Anno: AIR Manual (3rd Edn.), Contract Act, S. 23, N. 12.

(B) Contract Act (9 of 1872), S. 10 — Commercial contract — Interpretation — Duty of Court. (Deed — Construction).

While interpreting a commercial contract, a broader outlook has to be adopted and care should be taken to avoid an artificial and unrealistic approach in the matter of the understanding the meaning and purpose of such documents. In such cases, the Courts should occupy the chair of the contracting parties and reasonably understand their minds and intents. If after such an approach the instrument still presents circumstances which the conscience of a reasonable and prudent person cannot accept and if ex facie the terms are so unconscionable, illegal and designed to avoid or evade law, then only the doctrine of public policy will intervene, and will not implement such bargains. (Para 22)

Anno: AIR Manual (3rd Edn.), Contract Act. S. 10, N. 7.

(C) Sale of Goods Act (3 of 1930), S. 23 (1) — Property in goods when passed — Applicability of rule of intention provided in S. 23 (1).

The contract between plaintiff and the defendants provided under Cl. 1 that the R. R. was deliverable against cash or documents negotiated through Bank. But other terms (Cls. 4 & 6) provided that the goods would be despatched at the buyer's risk and responsibility, and that the defendants were not responsible for any loss or damages or any mishappening to the goods after they had left their premises.

Held it was not correct to say that the property in the goods did not pass until the R. R. was honoured by payment either in cash or through the agency of the bank. This might be so if Cl. 1 stood alone. But Cls. 4 and 6 which cannot be reconciled with Cl. 1 would give the reasonable impression that once the defendant despatched the goods, they travel at the buyer's risk. This clause could not, therefore, avoid the rule of intention provided for in S. 23 (1). (Para 26)

The very fact that under the letter, the defendants made it clear that all the goods had been appropriated and were ready for despatch, and which communication the plaintiff took it for granted, raised the usual presumption that the defendant as seller had appropriated the goods unconditionally to the respective contracts and they were in a deliverable state, and the only thing which remained in order to perform the contract was only to put them in a wagon for onward transport. The assent of the buyer (plaintiff) was implied and it had been given by them even before the appropriation was made. Therefore, in the light of the disclosed facts, the property in the goods under the various contracts had passed to the plaintiff. (Para 27)

Anno: AIR Manual (3rd Edn.), Sale of Goods Act. S. 23, N. 3.

RAMAPRASADA RAO, J.: — The defendant in O. S. Nos. 628, 656 and 663 of 1967 on the file of the Court of the Subordinate Judge of Coimbatore has preferred these appeals.

2. The defendant Messrs. Kamala Sugar Mills Ltd., are manufacturers of starch flour and liquid glucose. The plaintiff who was interested in the said goods entered into five contracts in December, 1964 with the agent of the defendant at Delhi. The contracts are exhibited as Exs. A-1, A-2, A-3, A-4 and A-5. Ex. A-1 is dated 3-12-1964 which was for the supply of one wagon (220 bags) of starch flour at Rs. 42.50 per 50 K. Gms. Exs. A-2 and A-3 dated 8-12-1964 were each for the supply of 2 wagons of starch flour (here there is no further description as to the quantity of bags) at Rs. 42.50 P. per 50 K. Gms. Exs. A-4 dated 17-12-1964 is another contract for the supply of two wagons

had already been passed. Mohan, J., by an order dated 11-4-1975 directed the transfer of the records in O. S. 3032/66 along with the two applications. The application out of which this appeal arises, Application No. 1239/75, was filed by the judgment-debtor for re-transfer of the applications to the City Civil Court, Madras. The learned Judge found that the application for setting aside the ex parte decree was belated and that it had to be dismissed. He also found that no grounds have been made out to re-transfer all the proceedings to the City Civil Court under cl. 13 of the Letters Patent. In the result he dismissed Application No. 1239/75.

3. The present appeal by the judgment-debtor is against the order of the learned Judge dismissing the application for re-transfer to the City Civil Court. We find that the order of the learned Judge in Application No. 757/75 transferring the suit and the two applications filed by the judgment-debtor for setting aside the ex parte decree and for excusing the delay in filing the application for setting aside the ex parte decree was without jurisdiction. Clause 13 of the Letters Patent empowers the High Court to remove and to try and determnie, as a Court of extraordinary original jurisdiction, any suit being or falling within the jurisdiction of any Court, whether within or without the Presidency of Madras subject to its superintendence, when the High Court shall think proper to do so, either on the agreement of the parties to that effect, or for purposes of justice, the reasons for so doing being recorded on the proceedings of the said High Court. The power under the Letters Patent is under extraordinary original jurisdiction and from the wording of the said clause, it is confined to remove and to try and determine any suit. This contemplates the existence of a suit pending. It is admitted in this case that a decree was passed ex parte and the suit was no longer pending. No doubt, after the suit was decreed, two applications were filed for purposes already mentioned. But the filing of the two applications after the suit was decreed will not make the suit pending, and as such, the transfer of the two applications along with the suit to the High Court under cl. 13 of the Letters Patent is without jurisdiction. It naturally follows that the order being void and wihout jurisdiction, it should be taken as not having been in existence at all. The result will be the two applications filed for setting aside the ex parte decree and for excusing the delay in seeking to set aside the ex parte decree will be before the City Civil Court for being disposed of according to law. In this view, it is not necessary to proceed further with the appeal, because the two applications were in law never before the High Court. The result is the two applications, one for setting aside the ex parte decree and the other for excusing the delay in seeking to set aside the ex parte decree will be remitted to the City Civil Court for being disposed of on merits. We refrain from dealing with the merits of the case dealt with by the learned Judge. The City Civil Court will dispose of the matter without in any way being influenced by the observations made by the learned Judge or by us. The appeal is allowed. There will be no order as to costs.

Appeal allowed.

AIR 1978 MADRAS 178

RAMAPRASADA RAO AND RATNAVEL PANDIAN, JJ.

M/s. Kamala Sugar Mills Ltd., Delhi, Appellant v. M/s. Ganga Bishen Bhajan Singh and another, Respondents.

Appeals Nos. 385 to 387 of 1970, D/- 19-2-1976.*

(A) Contract Act (9 of 1872), S. 23 — Principle of public policy — Applicability — Duty of Court.

Public Policy, which sometimes confronts Civil Courts, while interpreting the documents and instruments entered into inter vivos between the parties as also by conduct of parties, is not an immutable doctrine. With the passage and march of time, it changes, and has to change. Unless the Court is satisfied on the pleadings and the evidence let in that the bargain contained in a contract is so irrational, unconscionable, illegal and avoidable, the normal course of a contract ought not to be stemmed, but, on the other hand, the Court should aid to follow up such contracts and ease the methods to implement them. (Para 18)

The foundation on which the principle of public policy is based is that no Court

*(Against decrees of Sub-J. (Principal), Coimbatore in O. S. Nos. 628, 656 and 663 of 1967).

ly on the misconception that the Governor is in the position of a delegate, which is not correct for, according to G.S.R. 55 (E) and 56 (E), the President, in exercise of his powers under Article 356 (c), can make such incidental and consequential provisions as appear to him to be necessary or desirable for giving effect to the objects of the Proclamation and, under sub-cl. (i) of cl. (a) of the Proclamation to act to such extent as he thinks fit through the Governor of the said State. The Governor being a person who could be equated to the President, can himself act and no question of delegation arises.

10. The submission that the functions of the Secretary are quasi-judicial in nature, and, as delegate, the Governor has to exercise those functions himself is also due to a misconception. There is no delegation and the Secretary functions by virtue of the powers validly given to him by the Governor.

11. Equally untenable is the contention that the Governor had created a Cabinet system by appointing two Advisers and allocating the work between them. The appointment of the advisers and the allocation of the work between them was in exercise of the powers which have been vested in the Governor by G.S.R. 56 (E).

12. We are satisfied that there is no substance in this appeal and dismiss the same.

Appeal dismissed.

AIR 1978 MADRAS 177

P. S. KAILASAM, C. J. AND BALASUBRAHMANYAN, J.

Seethai Mills Ltd., Appellant v. N. V. Perumalaswamy, Respondent.

O. S. Appeal No. 86 of 1975, D/- 5-10-1976.*

Letters Patent (Madras), Cl. 13—Power of High Court under — Exercise of — Scope — The power of High Court under Cl. 13 in its extraordinary original jurisdiction is confined to remove and to try and determine any suit pending before any Court subject to its superintendence. Application No. 1239 of 1975 in Com. Petn. No. 96/71, D/- 20-10-1975 (Mad), Reversed.

A money suit was decreed ex parte. The judgment-debtor filed two applications, one for setting aside the ex parte decree and another for excusing the delay in seeking to set aside the ex parte decree. Thereupon the decree-holder filed an applicaion for transfer of the proceedings namely the two applications to the High Court along with the original suit in which an ex parte decree had already been passed. The Single Judge directed the transfer of the record in original suit along with the two applications. (Para 2)

Held, in this case a decree was passed ex parte and the suit was no longer pending. No doubt, after the suit was decreed, two applications for setting aside the decree and for excusing delay in filing application for setting aside ex parte decree were filed. But the filing of the two applications after the suit was decreed would not make the suit pending, and as such, the transfer of the two applications along with the suit to the High Court under cl. 13 of the Letters Patent was without jurisdiction. Application No. 1239 of 1975 in Com. Petn. No. 96 of 1971 D/- 20-10-1975 (Mad), Reversed. (Para 3)

A. Ganapathy and M. S. Gnanasoundari, for Petitioner; O. V. Baluswami, for Respondent.

P. S. KAILASAM, C. J.:—This appeal is filed against the judgment of Mohan, J. in Application No. 1239/75 in Company Petition No. 96/74 dismissing the said application for re-transfer of C. S. No. 113/75 on the file of this Court to the file of the City Civil Court, Madras, for trial and disposal.

2. O. S. No. 3032/66 was filed by the respondent herein for recovery of Rs. 17,093.06 being the value of cotton supplied to the appellant. As the appellant was absent, an ex parte decree was passed on 30-3-1967 by the learned City Civil Judge. For non-payment of the decree amount, proceedings under the Company law for winding up also were started in this Court. While so, Application No. 757/75 was filed by the respondent herein on the original side of this Court for transfer of the proceedings, namely, the application for setting aside the ex parte decree and another application for excusing the delay in seeking to set aside the ex parte decree, to the High Court along with O. S. No. 3032/66, in which an ex parte decree

*(Against judgment of Mohan, J. in Appln. No. 1239 of 1975 in Com. Petn. No. 96 of 1971, D/- 20-10-1975).

State, make the incidental and consequential provisions, mentioned thereunder, which appears to him to be necessary or desirable for giving effect to the objects of the Proclamation. Sub-cl. (i) of cl. (c) reserves the power to the President, in the exercise of the functions and powers assumed to himself by virtue of cl. (a) of the Proclamation, to act to such extent as he thinks fit through the Governor of the said State. By virtue of the powers conferred by sub-cl. (i) of cl. (c) the order G.S.R. 56 (E) was issued. According to that order and in pursuance of sub-cl. (i) of cl. (c) of the Proclamation, the President directed that all the functions of the Government of the State and all the powers vested in it exercisable by the Governor of that State under the Constitution or under any law in force in that State which had been assumed by the President by virtue of cl. (a) of the said Proclamation shall, subject to the superintendence, direction and control of the President, be exercisable also by the Governor of the said State. Though the position of the Governor under the Proclamation is one in which he is empowered to exercise all the functions taken over by the President, subject to the superintendence, direction and control of the President, it will be totally inappropriate to call the Governor a delegate or an agent. The result is that the Governor acts as if the President himself acts, subject of course, to the superintendence, direction and control of the President. If this position is clear, most of the contentions of the learned counsel for the appellant loose their force, as they are mainly based on the basis that the Governor is a delegate and that he cannot further delegate the powers delegated to him.

7. The Governor by a Notification dated 1st Feb., 1976, issued in pursuance of the Proclamation, G.S.R. 55 (E) and the Order G.S.R. 56 (E) dated the 31st Jan., 1976, issued by the President of India, appointed two officers as his Advisers, and allocated the business of the Government among them. The Governor issued instructions regarding the transaction of the business of the Government. He directed (i) that all the files which were required to be submitted to the Governor immediately before the said date shall be submitted to the Governor through the Adviser concerned, and (ii) that all the files which were required to be submitted to the Ministers immediately before the said date shall be submitted to the Adviser concerned, according to the allocation indicated in the Annexure to the Order. Another Order, G.O.Ms. No. 279, dated 1-2-1976, was issued by the Governor, directing that the distribution of the business among the Departments, of the Secretariat shall continue to be the same as immediately before the said date.

8. The contention of Mr. Venugopal learned counsel for the appellant, is that the Secretary of the State Government was exercising powers under the Madras Business Rules framed by virtue of the powers conferred on the Governor under Art. 166 (2) and (3) of the Constitution of India. Rule 23-A of the said Rules provided that the powers and functions of the State Government referred to in cl. (b) of S. 68-A of the Motor Vehicles Act, which the State Government may exercise and perform under S. 68-D of the Act, and the rules relating thereto, shall be exercised and performed by the Secretary to the State Government. The submission of the learned counsel for the appellant is that the operation of Article 166 (3) of the Constitution was suspended by G.S.R. 55 (E) and that therefore R. 23-A of the Madras Business Rules which enabled the Secretary to the Government to function is not in force, and therefore the Secretary had no power. This contention cannot be accepted for the Secretary to the Government acts, not by virtue of the powers conferred by the Madras Business Rules which were framed under Art. 166 (3) of the Constitution, but by virtue of the notification of the Governor made in G.O.Ms. No. 279, by which he directed that the distribution of the business among the Departments of the Secretariat shall continue to be the same as immediately before the said date. It was not necessary for the Governor to enumerate all the rules. He could adopt the rules and, by virtue of the powers conferred on him by G.S.R. 56 (E), direct the distribution of the business among the departments of the Secretariat. The suspension of Art. 166 (3) of the Constitution does not mean that all the rules framed under Art. 166 (3) of the Constitution, have been abrogated. There could be no objection to those rules being adopted by the Governor, as he has done in this case.

9. The contention of the learned counsel for the appellant is based main-

4. On 4th Feb., 1976, the President's Rule was proclaimed in Tamil Nadu and the Notification and Order of the Government of India issued on 31st Jan., 1976, were republished in the Tamil Nadu Government Gazette dated 4th Feb., 1976. The Notification is G.S.R. 55 (E). The relevant portion of the Notification runs as follows:

"G. S. R. 55 (E). The following Proclamation by the President is published for general information:

Whereas, I, Fakhruddin Ali Ahmed, President of India, have received a report from the Governor of the State of Tamil Nadu and after considering the report and other information received by me, I am satisfied that a situation has arisen in which the Government of that State cannot be carried on in accordance with the provisions of the Constitution of India (hereinafter referred to as 'the Constitution'):

Now, therefore, in exercise of the powers conferred by Art. 356 of the Constitution and of all the other powers enabling me in that behalf, I hereby proclaim that I—

(a) assume to myself as President of India all functions of the Government of the said State and all powers vested in or exercisable by the Governor of that State;

(b) declare that the powers of the Legislature of the said State shall be exercisable by or under the authority of Parliament; and

(c) make the following incidental and consequential provisions which appear to me to be necessary or desirable for giving effect to the objects of this Proclamation, namely—

(i) in the exercise of the functions and powers assumed to myself by virtue of cl. (a) of this Proclamation as aforesaid, it shall be lawful for me as President of India to act to such extent as I think fit through the Governor of the said State;

(ii) (Omitted)

(iii) (Omitted)

(iv) any reference in the Constitution to the Governor shall in relation to the said State be construed as a reference to the President, and any reference therein to the Legislature of the State or the Houses thereof, shall, in so far as it relates to the functions and powers thereof, be construed, unless the context otherwise requires, as a reference to Parliament, and, in particular, reference in Art. 213 to the Governor, and to the Legislature of the State or the Houses thereof, shall be construed as references to the President and to Parliament or to the Houses thereof respectively;

Provided that nothing herein shall affect the provisions of Art. 153, Articles 155 to 159 (both inclusive), Art. 299 and Art. 261 and paras 1 to 4 (both inclusive) of the Second Schedule or prevent the President from acting under sub-clause (i) of this clause to such extent as he thinks fit through the Governor of the said State;

(v) any reference in the Constitution to Acts or laws of or made by the Legislature of the State shall be construed as including a reference to Acts or laws, made in exercise of the powers of the Legislature of the State, by Parliament by virtue of this Proclamation or by the President or other authority referred to in sub-cl. (a) of cl. (1) of Art. 257 of the Constitution and the Madras General Clauses Act, 1891, (Madras Act 1 of 1891) as in force in the State of Tamil Nadu, and so much of the General Clauses Act, 1897 (10 of 1897) as applies to State laws, shall have effect in relation to any such Act or law as if it were an Act of the Legislature of the State.

New Delhi, Fakhruddin Ali Ahmed
The 31st Jan., 1976. President."

5. On the same day an order was issued by the President and was published for general information. The Order, G.S.R. 56 (E) runs as follows:

"G. S. R. 56 (E)—The following Order by the President is published for general information:—

In pursuance of sub-cl. (i) of cl. (c) of the Proclamation issued on this the 31st day of Jan., 1976, by me under Art. 356 of the Constitution of India, I hereby direct that all the functions of the Government of the State of Tamil Nadu and all the powers vested in or exercisable by the Governor of that State under the Constitution or under any law in force in that State, which have been assumed by the President by virtue of cl. (a) of the said Proclamation shall, subject to the superintendence, direction and control of the President, be exercisable also by the Governor of the said State.

New Delhi, Fakhruddin Ali Ahmed
The 31st Jan., 1976. President."

6. Particular reference may be made to cl. (c) of G. S. R. 55 (E) which states that the President, while assuming to himself all functions of the Government of the State and all powers vested in or exercisable by the Governor of that

C. P. C. for a direction to the petitioner herein to re-deposit the amount of Rs. 21,580.92. The petitioner's defence was that S. 151, C. P. C. cannot be invoked for directing him to re-deposit the above amount in proceedings under the Rent Control Act. The petitioner claimed to have paid a sum of Rs. 7,813.96 to the first respondent, a sum of Rs. 8,274.76 to the 3rd respondent and a sum of Rs. 8,774.76 to the 4th respondent and he contended that in view of these payments he cannot be directed to re-deposit the amount in any event.

2. The Tribunals below rejected the contentions of the petitioner and directed him to re-deposit the amount. The Appellate Authority has observed in his order that the receipt of Rs. 7,813.96 by the first respondent is not disputed. The payment of Rs. 8,274.76 to the third respondent was not disputed before the Rent Controller. The Appellate Authority found the payment of Rs. 8,774.76 to the 4th respondent to be true.

3. Deceased Varadarajan has left even the second respondent as his heir and since there was admittedly a dispute between the parties about the right to receive the rent, the petitioner himself was in doubt as to who was entitled to receive the amount. The subsequent payment of the various amounts out of Court in the absence of any agreement between the parties to receive the payment in any proportion cannot avail the petitioner. The point strongly urged by the learned counsel for the petitioner is that the Rent Controller and the Appellate Authority are only persona designata and S. 151, C. P. C. cannot be invoked before them for directing the petitioner to re-deposit the amount, albeit the amount was wrongly paid out to the petitioner. It is conceded there is no provision in the Act enabling a tenant who had deposited the amount under S. 9 (2) of the Act to withdraw the amount. There can be no doubt that the money deposited in R. C. O. P. 296 of 1973 belonged to the respondents in that petition and other heirs of Varadarajan. The learned counsel for the petitioner relied on the decisions of Kailasam J. (as he then was) in Seethalakshmi Ammal v. Rajammal, 1965-1 Mad LJ 287, and of Gokulakrishnan, J. in Ganapathi v. Kumaraswami, 1975-2 Mad LJ 171 : (AIR 1975 Mad 383) in support of his contention that the Rent Controller and the Appellate Authority are persona designata. Kailasam J. (as he then was) has, no doubt, held in the former decision that the Rent Controller is not a court and the Civil P. C. is not applicable and he has no power to appoint a Commissioner to inspect the premises and make a report for fixing fair rent. Gokulakrishnan, J. has, after considering several decisions, held in the subsequent case that the Rent Controller constituted under the Tamil Nadu Act is only a persona designata and not a court. The learned Judge was considering the question whether the provisions of the Limitation Act could be relied on before the Appellate Authority for condoning a delay in filing an appeal against the order of eviction passed by the Rent Controller. These decisions do not apply to the facts of the present case. On the other hand, the learned counsel for the first and second respondents invited my attention to the decision of a Bench of this court in S. N. Komaraswami Gounden in re, 1951-1 Mad LJ 422 : (AIR 1951 Mad 766), and submitted that the Rent Controller has committed a mistake in ordering payment out of the amount in the cheque petition and he has jurisdiction to rectify his mistake by ordering the petitioner to re-deposit the amount, at the instance of the first respondent. The learned Judges have observed in that decision that it may be that S. 151 C. P. C. by itself, does not apply to proceedings under the Madras Buildings (Lease and Rent Control) Act 1946, but quasi-judicial tribunals like the Rent Controller and the Appellate Tribunal have an inherent power to set right mistakes made by inadvertence. The learned Judges have made that observation in a case which arose out of an application for amendment of the petition. As already stated, there is no provision in the Act enabling a tenant who had deposited the amount towards rent admittedly due from him in view of the doubt which he had as to the person entitled to receive the payment, to withdraw the amount after the dismissal of the petition. The amount represented the rent due to the persons having interest in the demised premises. The Rent Controller, therefore, committed a mistake in allowing payment out of the amount to the petitioner in the cheque petition. Relying upon the Bench decision of this Court, I hold that the Rent Controller, as a quasi-judicial tribunal, has power to rectify the mistake by directing the petitioner to re-deposit the

amount. There is, therefore, no reason to interfere with the order of the Tribunals below. The civil revision petition is dismissed with costs of respondents 1 and 2.

Petition dismissed.

AIR 1978 MADRAS 160

V. RAMASWAMI, J.

Sampath Financial Chit Fund (P) Ltd., Appellant v. N. P. M. Abdul Rahman and another, Respondents.

Second Appeal No. 1988 of 1974, D/- 9-3-1977.*

Madras Chit Funds Act (24 of 1961), Ss. 13 (b) and 14 (4) — Liability of prized subscriber on default — Forfeiture of Kasar already earned and given credit to before payment of prize amount — Not valid.

The liability of a prized subscriber under the Act on his defaulting to pay future instalments would be only to pay a consolidated amount of all future subscriptions immediately and on such defaults, the Act also requires payment of interest on the total amount of such future instalments. The Act does not recognise any forfeiture of the Kasar already earned and given credit to the subscriber before the prize amount was paid to him. Under the provisions, the foreman is not entitled to claim anything more than commission or the remuneration. He would therefore not be entitled to appropriate the Kasar for himself in default of payment by the subscriber. (Para 5)

JUDGMENT: — The plaintiff (appellant) is a company incorporated under the Companies Act, 1956. It was carrying on business in chit transactions. In respect of a chit in group No. 73, chit No. 11 of the face value of Rs. 4,000 and consisting of 20 monthly instalments of Rs. 200 each, the first defendant was a subscriber. Each subscriber had to pay a monthly instalment of Rs. 200 for 20 months. This chit is what is usually known as "auction chit" and each subscriber is entitled to bid at the auction held in each month. As per the general rules whoever has bid at the lowest will be paid the prize amount and the difference between the total amount after deducting the commission of 5% payable to the plaintiff and the prize amount is divided among the subscribers as dividend or Kasar. A person who had been paid at the auction will have to execute a promissory note along with the surety guaranteeing payment of the future instalments. The general rules relating to the chit of the plaintiff company also provided that in case of default of any one instalment, the entire future instalments become payable in one lump sum. If a subscriber, after bidding at the auction and receiving the prize money defaults to pay the future subscription, R. 30 of Ex. A-2 provided that the security bond executed by him is enforceable and that in such case the defaulting subscriber will not be entitled to the Kasar payable in respect of the earlier instalments also. The first defendant in this case regularly paid the subscription for the first ten months. At the 10th auction held he bid the chit for Rs. 2,780. On his executing the promissory note for Rs. 4,000 along with the second defendant as surety agreeing to repay the same with interest at 12 per cent per annum, the prize amount of Rs. 2,750 was paid to the first defendant. After the bid in the 10th auction the first defendant paid three more instalments and defaulted in payment on the 14th instalment onwards. The plaintiff thereafter had filed this suit for recovery of a sum of Rs. 2,510 with subsequent interest and costs. In arriving at this sum of Rs. 2,510, the Kasar earned by the first defendant prior to his default amounting to Rs. 836.25 was not given credit to on the ground that by reason of default the first defendant had forfeited his right to the same.

2. The first defendant filed a written statement contending that the forfeiture of the earned Kasar of Rs. 836.25 is against law and that the plaintiff should give credit to the said sum. He also claimed that he paid a sum of Rs. 150 on 31-7-1971 and another sum of Rs. 200 on 17-9-1971, and those two amounts also will have to be given credit to.

3. The trial Court found that the said sum of Rs. 150 and Rs. 200 were paid by defendants and they will have to be given credit to. So far as the Kasar amount of Rs. 836.25 is concerned, the trial Court held that the forfeiture of the same by the plaintiff was against law and that therefore the defendants are entitled to get credit for the same. Thus after giving credit to the Kasar amount and the other two amounts referred to

*(Against decree of Sub-J., Mayuram in A. S. No. 86 of 1973).

above, a decree was given in favour of the plaintiff for the balance of Rupees 1,286.22 with proportionate costs.

4. The plaintiff preferred an appeal before the learned Subordinate Judge, Mayuram. The lower appellate Court held that though the forfeiture itself might not be illegal each case will have to be decided on merits as to whether the forfeiture of the Kasar amounts to penalty. On the facts it came to the conclusion that in the instant case in view of the provisions in the chit agreement the forfeiture of the Kasar amount is penal in nature and therefore not enforceable. Accordingly the decree and judgment of the trial Court was confirmed. It is against this judgment the plaintiff has filed the present appeal.

5. The chit transactions of this nature, so far as the Tamil Nadu is concerned is governed by the provisions of the Madras Chit Funds Act (Act XXIV of 1961). Under S. 13 (b) of that Act, the foreman shall be entitled only to such commission or remuneration not exceeding 5 per cent of the chit amount as may be fixed in the chit agreement. Section 14 (4) of the Act specifically prohibits the foreman from appropriating for himself any amount in excess of what he is entitled to as commission or remuneration under S. 13 (b) of the Act. Chapter V dealing with prized subscribers required every prized subscriber to furnish sufficient security for the due payment of the future subscription and on his failure to pay future subscriptions he shall be liable to make a consolidated payment of all future subscriptions at once. Thus the liability of a prized subscriber on his defaulting to pay future instalments was only to pay a consolidated amount of all future subscriptions immediately and on such defaults the act also requires payment of interest on the total amount of such future instalments. The Act does not recognise any forfeiture of the kasar already earned and given credit to the subscriber before the prize amount was paid to him. Under the provisions, the foreman was also not entitled to claim anything more than the commission or the remuneration. He is, therefore, not entitled to appropriate the kasar for himself in default of payment by the subscriber. The provision in the general rules relating to the chit in the present case enabling the forfeiture of the kasar amount already given credit to the subscriber by reason of default in payment of the instalments is therefore clearly against the provision and not enforceable. The decree and judgment of the lower appellate Court are therefore correct and they do not call for any interference. The second appeal accordingly fails and it is dismissed. But there will be no order as to costs.

Appeal dismissed.

AIR 1978 MADRAS 161

V. RAMASWAMI, J.

Chinnathayi and others, Appellants v. Narayanaswami Kounder and others, Respondents.

Second Appeal No. 1641 of 1974, D/- 7-2-1977.*

Hindu Marriage Act (1955) (as amended by Act 68 of 1976), S. 15 — Marriage within one year from the date of dissolution of earlier marriage — Validity of — Marriage held valid under S. 15 as amended — Amendment is retrospective.

The amendment of Hindu Marriage Act by reason of S. 39 of Marriage Laws (Amendment) Act, 1976, which makes the amended Hindu Marriage Act applicable to all pending matters, has been made to take retrospective effect. That being so, S. 15 will have to be read as if there is no proviso. Therefore a marriage after dissolution of earlier marriage would be legal and valid even if the new marriage had taken place prior to the amendment of the Act and within one year of dissolution of earlier marriage. AIR 1967 SC 581, Ref. (Para 2)

Cases Referred: Chronological Paras
AIR 1967 SC 581 2

K. Sarvabhauman and K. Sampathi, for Appellants; M. N. Sundararajan, for Respondents.

JUDGMENT: — The plaintiffs are the appellants. The first plaintiff is the widow of one Ramaswami, who died on 6-10-1969. The second and third plaintiffs are the daughter and son of the first plaintiff by Ramaswami. The suit was filed by the plaintiffs for declaration of title to the suit properties and for an injunction restraining the defendants from interfering with the plaintiffs' possession and enjoyment. The first defendant is the divided brother of Ramaswami. That the suit properties

*(Against decree of Sub-J., Cuddalore in A. S. No. 25 of 1972).

items 1 to 11 and 7 cents in item 12 were allotted to Ramaswami in a partition between Ramaswami and the first defendant has been found by the Courts below and that is not in dispute in this second appeal. Defendants 2 to 13 were not interested in the properties and therefore they did not defend the suit. The first defendant alone contended that Chinnathayee, the first plaintiff, was not the validly married wife of Ramaswami and that therefore neither her daughter nor her son, namely, the second plaintiff or third plaintiff was entitled to the properties. It is found by the Courts below that Chinnathayee was married to one Nagamuthu of Pagandai and that on an application filed by her to dissolve the marriage in O. P. 83 of 1960 on the file of the Court of the Subordinate Judge, Cuddalore, the marriage was dissolved by a decree dated 31-10-1960. It has also been found by the Courts below that the first plaintiff was married to the said Ramaswami within about two months from the date of the dissolution of the marriage of the first plaintiff with Nagamuthu. The Courts below therefore held that under the proviso to S. 15 of the Hindu Marriage Act, as it stood prior to its amendment by Central Act 68 of 1976, the marriage between Ramaswami and the first plaintiff was void, as having been contracted within one year from the date of the decree of the Court which dissolved the earlier marriage. On that ground, the suit was dismissed by the Courts below.

2. The main part of S. 15 of the Hindu Marriage Act as it stood originally conferred a right on either party to the marriage to remarry after the earlier marriage has been dissolved by a decree of divorce. But the proviso provided that a remarriage to be lawful must be after the lapse of one year from the date of the decree. Thus, a remarriage solemnised by either party in defiance of the rule laid down in that section prohibiting the same for a period of one year from the date of the decree of the Court of first instance is null and void. But the question for consideration is, as to what is to happen to the children born out of that marriage. Section 16 of the Hindu Marriage Act dealt with consequences of a decree of nullity granted in respect of any marriage under S. 11 or S. 12. This is not a case where there is any decree of nullity of the marriage under S. 11 or S. 12 of the Act. The argument of the learned counsel for the appellant is that the principle of S. 16 is not to be restricted to a case of nullity granted to any marriage under S. 12 alone; but the legitimacy will have to be implied even in respect of a marriage which has become void by reason of the contravention of proviso to S. 15. In support of this contention, the learned counsel relied on a decision of the Supreme Court reported in Chandra Mohini v. Avinash Prasad, AIR 1967 SC 581. In that case the husband filed a petition for dissolution of marriage under S. 10 of the Hindu Marriage Act read with S. 13 (1) (viii) of the Hindu Marriage (Uttar Pradesh Sanshodhan) Adhiniyam Act (XIII of 1962). Though the petition was originally dismissed, on appeal, by a decree dated 7-1-1964, the High Court granted dissolution of marriage. The wife filed a petition for special leave to appeal to the Supreme Court. On 7-4-1964 when that petition was pending the husband married another woman on 2-7-1964, and a son was born to him by this marriage on 20-5-1965. When the husband prayed the Supreme Court to revoke the special leave granted on the ground that he had already married another woman, the Supreme Court held that on that ground the special leave granted could not be revoked. It was pointed out to the Supreme Court that even under the main part of S. 15, where the marriage has been dissolved either party to the marriage can lawfully marry only when there was no right of appeal against the decree dissolving the marriage and the right to file an appeal by special leave granted could not be treated as a right of appeal vested in the party and that, therefore, the husband was within his right in marrying subsequent to the dissolution by the High Court. The Supreme Court observed that even though S. 15 may not apply in terms and it may not have been lawful for the husband to have married immediately after the High Court's decree as no appeal as of right from the decree of the High Court to the Supreme Court lies. In that case the Supreme Court further observed that still it was for the husband to make sure whether an application for such special leave was filed and he could not by marrying immediately after the High Court's decree deprive the appellant of the chance to present a special leave petition to the Supreme Court. If he takes such a risk, he cannot ask the Court to revoke the special leave granted on that

ground. Having held so, the Supreme Court further observed—

"We need not consider the question as to whether the child born to the new wife on 20-5-1965, would be legitimate or not, except to say that in such a situation S. 16 of the Act may come to the aid of the new child."

It is seen from the decision that though prima facie the Supreme Court was of the view that S. 16 would apply, they have not given any decision holding that S. 16 would apply to such a case. But it is not necessary for me to pursue this question as S. 15 and S. 16 have been later amended by the Marriage Laws (Amendment) Act, 1976, (Act 68 of 1976). Section 10 of this Act deleted the proviso to S. 15. Section 39 of this Act has made a special provision relating to pending cases. Under this provision, all petitions and proceedings in causes and matters matrimonial which are pending in any Court at the commencement of the amending Act, shall be dealt with and decided by such Court if it is a petition or proceeding under the Hindu Marriage Act, then so far as may be, as if it had been originally instituted therein under the Hindu Marriage Act, as amended by this Act. In this suit the first defendant raised the question as to the validity of the marriage between Ramaswami and the first plaintiff under S. 15 of the Act. So far as the issue relating to the validity of the marriage is concerned, it will have to be decided only with reference to the provisions of the Hindu Marriage Act as it is a proceeding "in causes and matters matrimonial". The amendment by reason of S. 39 had been made to take retrospective effect in the sense that it is applicable to all pending proceedings and those pending proceedings are to be decided only as per the amended provision. If that is so, S. 15 of the Hindu Marriage Act will have to be read as if there is no proviso. The result is since there is a dissolution of the marriage and the first plaintiff married the deceased Ramaswami only after the dissolution of the marriage, though within a period of one year from the date of dissolution, the marriage is legal and valid. The first plaintiff as the legally married wife, and plaintiffs 2 and 3 as the legitimate children of Ramaswami, are, therefore, entitled to inherit the property of Ramaswmi, on his death. The plaintiffs are, therefore, entitled to the decree as prayed for in respect of Items 1 to 11 and 7 cents in item 12 which alone are found to be the properties of Ramaswami. The electric motor and pumpset which are found to be kept in common will have to be enjoyed also in common between the parties. The plaintiffs will be entitled to the declaration in respect of this common right also in regard to the electric motor and pumpset. The second appeal is accordingly allowed, the judgments and decrees of the Courts below are set aside and there will be a decree to the above effect in the suit. No costs.

Appeal allowed.

AIR 1978 MADRAS 163

P. GOVINDAN NAIR, C. J. AND VARADARAJAN, J.

M/s. T. S. Radhakrishnan, Appellant v. The State Bank of India, Madras, Respondent.

O. S. A. No. 65 of 1977, D/- 11-10-1977.*

(A) Civil P. C. (5 of 1908), S. 35 — Madras High Court Fees Rules (1956), Order III Rule 1 — Costs — Includes costs incidental to the proceedings.

The judgment declared the successful party to be entitled to costs. The judgment did not mention in so many words that the costs awarded shall include costs incidental to the proceedings in the suit. There was also no declaration that any portion of the costs or incidental to the suit shall not follow an event. In the appeal the other side did not state any circumstances or reasons for disallowing the amounts incidental to the proceedings in the suit.

Held that the successful party was entitled to costs and costs include incidental costs also. (Para 5)

Anno: AIR Comm. C. P. C. (9th Edn.), S. 35, N. 4.

(B) Civil P. C. (5 of 1908), S. 152 — Application for amendment of decree — Application for including incidental costs — Construed as one for amendment of decree.

The judgment declared the successful party to be entitled to costs. An application was made for including some items as costs incidental to the proceedings.

*(Against judgment and decree of Mohan J., in Diary No. 11511 of 1974, D/- 14-2-1975.)

Held that the application can be construed to be an application for amendment of decree. (1880) 14 Ch D 542, (1895) 1 Ch D 141 and (1901) 1 Q B D 694, Rel. on. (Para 6)

Anno: AIR Comm. C. P. C. (9th Edn.), S. 152, N. 2.

Cases Referred: Chronological Paras

(1901) 1 Q B D 694, Chassum and Sons v. Gordon 5
(1895) 1 Ch D 141 : 71 LT 708 Preston Banking Co. v. Allsup (William) & Sons 5
(1887) 35 WR 592 : 56 LT 400, Blakey v. Hall. 5
(1886) 56 LT 131, Barker v. Purvis 5
(1880) 14 Ch D 542 : 42 LT 225, Fritz v. Hobson 5
(1858) 3 De G & J 282 : 121 RR 121 Viney v. Chaplin 5

M. Kalyanasundaram, for Appellant; M. Raghavan, for Respondent.

VARADARAJAN J.:— This appeal by the defendant in C. S. No. 68 of 1967 on the Original Side of this court is directed against the order of Mohan J. in Diary No. 11511 of 1974 dated 14-2-1975 directing the inclusion of Rs. 100 and Rs. 150 said to have been paid by the appellant on 11-4-1967 and 26-4-1967 respectively, Rs. 850 paid to the receiver for his remuneration and Rs. 5017-30 paid to the receiver for his expenses as per order dated 11-4-1967 in Appn. No. 849 of 1967 in the costs awarded to the respondent (plaintiff) in the decree in the said CS No. 68 of 1967.

2. The judgment dated 7-7-1971 of N. S. Ramaswami J. declares the respondent to be entitled to costs from the appellant. In accordance with Or. XVIII rule 6 of the Original Side Rules, clause 3 of the decree declares that the respondent is entitled to costs of suit when taxed and noted in the margin of the decree. One of the prayers in the suit was for appointment of a receiver to take charge of the properties described in schedule I to the plaint and protect the same and safeguard the interest of the respondent as the pledgee of those properties. An interim Receiver had been appointed by order dated 10-4-1967 in Appn. No. 840 of 1967, pending the suit. Cl. 8 of the decree provides for adjustment of the amount deposited into court by the Receiver as the sale proceeds of the hypothecated goods towards the amount due to the respondent under the decree. The respondent filed an application on 21-7-1971, before the Registrar to tax the bill of costs filed by it. The bill of costs included the aforesaid four sums of Rs. 100, Rs. 150, Rs. 850 and Rs. 5017-30 forming items 5, 6, 11 and 13 respectively. The appellant opposed the inclusion of the two sums of Rs. 100 and Rs. 150 and contended that the third sum of Rs. 850 cannot be included as costs and that the expenditure of Rs. 5017-30 had not been authorised by the court and could not, therefore, be included in the decree. The First Assistant Registrar, declined to include those four items in the costs on the ground that there was no specific direction of the court to include them. Thereupon the respondent took out an application in March 1973, for including those four items in the costs. The appellant opposed that application, reiterating the objections raised by him before the First Assistant Registrar and contending that the remedy of the respondent was only by way of appeal against the order of the First Assistant Registrar. The application was returned by the Registry as it was felt that only an appeal could be filed against the order of the Assistant Registrar and not a separate application. The respondent represented the application (Diary No. 11511 of 1974) on 12-11-1974, saying that the taxing officer's order does not appear to be wrong for an appeal to be preferred and that since the inclusion of the four items had not been specifically ordered by the court, the application may be placed before the court for orders. Diary No. 11511 of 1974 came up for hearing before Mohan J. on 14-2-1975, and the learned Judge ordered inclusion of those four items in the costs awarded to the respondent. Subsequently the learned Judge dismissed the said application No. 1425 of 1975 (Diary No. 11511 of 1974) on 3-11-1975 on the ground that no further order was necessary on the application in view of his order dated 14-2-1975 on Diary No. 11511 of 1974. Hence this appeal.

3. It has been contended in the memorandum of grounds of appeal that the learned single Judge should have dismissed the application filed for the inclusion of the four items in the costs since, according to the respondent, as per O. IV R. 7 of the High Court Fees Rules 1965, only an appeal lies against the decision of the Taxing Officer and if no appeal is preferred in time, his decision becomes final.

4. The learned counsel for the respondent submitted that the costs were

taxed by the Assistant Registrar only on 17-10-1974 and that in view of the provisions of O. III R. 1 of the High Court Fees Rules, 1956 which lays down that:—

"No costs of, or incidental to, a proceeding shall be allowed, unless the same are expressly awarded by an order, or decree."

The Assistant Registrar was justified in declining to include these four items in the costs, as those items are incidental to the proceedings in the suit and there was no specific direction in the judgment to include those incidental costs in the costs of the suit awarded to the respondent and there was, therefore, no need to file an appeal against the Assistant Registrar's order and the application for including those four items in the costs was consequently filed within a month from 17-10-1974 for an order of the court and the learned single Judge was justified in including them in the costs.

5. The learned counsel for the appellant did not contend before us that an appeal should have been filed against the order of the Assistant Registrar declining to include the four items in the costs awarded to the respondent. But he contended that an application for review of the judgment by providing for payment of incidental costs should have been filed within 30 days from the date of the judgment as provided for in Art. 124 of the Limitation Act, and no separate application for including those four items lies and that, since costs are in the discretion of the court in view of S. 35, C. P. C., only an application for review of the judgment should have been filed and the amounts cannot be included in the costs by an amendment of the decree. No doubt, S. 35 (1) C. P. C. lays down that:—

"Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of an incident to all suits shall be in the discretion of the court, and the court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid".

But cl. (2) of that section lays down that:—

"Where the court directs that any costs shall not follow the event, the court shall state its reasons in writing."

In the present case, the court has not directed in the judgment that any portion of the costs of or incidental to the suit shall not follow the event. The learned counsel has not placed before us any circumstances or reason for the court disallowing the amounts concerned in this appeal, which are costs incidental to the proceedings in the suit, on a review of the judgment under O. XLVII R. 1 C. P. C. within the period provided under Art. 124 of the Limitation Act. This is not a case where an application for review of the judgment could have been filed, for, as already stated, the judgment declares the respondent to be entitled to costs of suit. Costs, according to S. 35, C. P. C. as also O. III R. 1 of the High Court Fees Rules, 1956, include costs incidental to the proceeding or suit. There is, therefore, no need for the respondent to move any application for review of the judgment for including the incidental costs in the costs taxed and noted in the margin of the decree which had been done by Assistant Registrar on 17-10-1974. It was only from the order dated 17-10-1974 of the First Assistant Registrar that the respondent came to know that these four items of costs incidental to the proceeding were not included in the amount of costs taxed and noted, in the margin of the decree. According to the respondent, the First Assistant Registrar did not err in declining to include these four items of costs incidental to the proceedings having regard to the fact that the learned Judge, who disposed of the suit, has not stated in his judgment in so many words that the costs awarded to the respondent shall include costs incidental to the proceedings in the suit. In the circumstances of the case, we are of the opinion that the respondent was justified in proceeding on the basis that there is no need to file any appeal against the order of the First Assistant Registrar under R. 7 of O. IV of the Original Side Rules, 1956 which says that any party or his advocate or attorney who is dissatisfied with the decision of the Taxing Officer may, within ten days of the decision, appeal by summons to the Judge. Appln. No. 1426 of 1975 should, under the circumstances of the case, be treated as an application for amendment of the decree as provided for in S. 152 C. P. C. which lays down that:—

"Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties."

O. 41-(a) of Dec. 1879 (England) providing for correction of clerical mistakes in judgments or orders which later became O. 28, R. 11 corresponds to S. 152, C. P. C. and reads:—

"Clerical mistake in judgment or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court or a judge on motion or summons without an appeal".

Fry J. has observed in Fritz v. Hobson (1880) 14 Ch D 542 thus:—

"This is an application to give the plaintiff the costs of a motion for an interim injunction made during the long vacation, and afterwards before the Master of the Rolls, when it was adjourned to the trial. The judgment which I pronounced at the trial has been drawn up and passed and entered. In that state of circumstances the defendant resists the application on three separate grounds. In the first place, he says that, in point of substance and merits, the plaintiff is not entitled to the costs. In my judgment the plaintiff is entitled to the costs on that ground. I think that the motion was a proper one to make. The evidence on the trial showed that the plaintiff was justified in making it. The defendant's evidence on the motion was inaccurate to a culpable extent, and contained statements which might well have induced the Judge to order the motion to stand over to the trial, or even to refuse it altogether. I heard the evidence which came out at the trial in opposition to the defendant's affidavits used on the motion, and which were read to me; and from what the defendant himself admitted, it appeared to me that the evidence on the motion on the part of the defendant was strained in many important particulars. In the next place, it is said that I have no jurisdiction to amend the judgment or to grant this application, because the court has no jurisdiction to rehear an action. In my opinion, I have jurisdiction to grant this application. In the first place, it is to be borne in mind that an order was made, although it was not drawn up, directing the motion in question to stand until the trial. According to my understanding of the practice (and this is confirmed by what the Master of the Rolls has said), all orders of the court carry with them in gremio liberty to apply to the court. The judgment at the trial as drawn up reserves express liberty to apply. In Viney v. Chaplin (1858) 3 De. G. and J. 282, application was made under the liberty to apply reserved by the order that the motion should stand to the hearing of the cause, and it appears to me, therefore, that I am right in following Viney v. Chaplin and that I can make the order which I am now about to make either under the liberty to apply reserved by implication in the order on the motion, or under the liberty expressly reserved by the judgment. Though actions are not originally set down before me, but are transferred to me for trial or having only, yet under R. 1-a of O. LI I have power to direct that any proceeding in the action, whether before or after the trial, shall be taken before me, and, if necessary, I should give a direction to that effect in regard to the present application.

There is another ground on which, in my opinion, I have jurisdiction to make the order asked for, viz, under O. 41-A, In my view, the error in the present case has arisen from the accidental omission of counsel to call my attention to the adjourned motion when I pronounced my judgment, an omission very natural at a time when counsel's attention was directed to matters of greater importance. In substance the motion was before me at the trial, for my attention was called to the affidavits made upon it. I recollect quite enough of what took place, and I am confirmed in my recollection by the notes which I made at the time, to know that all the affidavits upon the motion were in substance before me at the trial, and that the various witnesses who made those affidavits were examined in the course of the proceedings. On this ground therefore, I think I have jurisdiction to make the order.

In the third place, it is said that this application is wrong in form, that it ought to have been an application for a direction to the Taxing Officer to allow the plaintiff the costs of the motion.

It appears to me that the plaintiff's right to the costs depends upon whether the motion is to be considered as successful or unsuccessful, and there is nothing in the judgment as drawn up to show whether it was the one or the other. The Taxing Master might very fairly say that, if the court had intended to give the plaintiff the costs of the motion, there would have been a direction to that effect in the judgment.

I think, therefore, that the application has been made in the proper way, and I shall make a separate order (following

the precedent in Viney v. Chaplin) directing the taxation of the plaintiff's costs of the motion, and their payment by the defendant. And as, before making the present motion the plaintiff applied to the defendant to consent to the payment of the costs of the adjourned motion I shall give the plaintiff also the costs of the present motion."

As stated above, the appellant has not placed before us any reason or circumstance, which the learned trial judge could have taken into consideration and disallowed those four items of costs incidental to the proceedings. In Preston Banking Co. v. Allsub (Williams) and Sons, (1895) 1 Ch D 141 A. L. Smith LJ has observed:—

"It has been held that when an order has been passed and entered, and the record does not express the intention of the court it may be altered. And again, an order has been corrected by including in it the costs of an interlocutory proceeding although the Court had at the time when it gave its decision no intention in the matter, it not having been brought to the notice of the court; Blakey v. Hall (1887) 35 W. R. 592."

The decision in Chassum & Sons v. Gordon, (1901) 1 QBD 694 fully supports our view that the application is in the nature of one for amendment of the decree by specifying that it shall include these items of costs incidental to the proceedings. There A. L. Smith, Master of the Rolls, as he then was, has observed —

"There was an action in the Queen's Bench Division in which the plaintiffs recovered judgment against the defendant for a sum to be ascertained by a special reference, with costs. The referee assessed the sum payable to the plaintiffs at £.3863, and judgment was drawn up and entered for the plaintiffs for the sum so assessed with costs to be taxed. The plaintiffs carried in their bill of costs for taxation, but by a pure slip they did not include in their bill of costs the sum of £.160 s.11 d.8 which they had paid to the referee when they took up the award. The Master accordingly taxed the bill of costs as carried in and gave his certificate for £ 516 S.8 d.7 The defendant paid the plaintiff the two sums of £.3863 and £.516 S.8 d.7 . The plaintiffs' solicitors shortly afterwards discovered that by a mistake the sum paid to the referee had not been included in the bill of costs carried in for taxation. A summons was thereupon taken out for an order that the defendant should pay the plaintiffs the sum of £.160 s.11 d.8, or such amount as might be allowed as a proper payment, and Day, J. ordered that this sum should be referred to the taxing master for taxation, and that the taxing master's certificate should be amended on the ground that there had been a mistake in not including the referee's fees. From that order the defendant appeals to this Court. There can be no doubt that according to the justice of the case the plaintiffs ought to be paid this sum or whatever may be allowed as a proper sum upon taxation. It is satisfactory to know that no technical rule stands in the way of the Court making an order to that effect. In my opinion, the case of Preston Banking Co. v. Allsup (William) & Sons, (1895) 1 Ch D 141 does not touch the question before us. There was no question in that case of any 'accidental slip or omission.' The application was made to the Vice-Chancellor of the County Palatine of Lancester to rehear an order which he had made with regard to the costs of an application before him, the order having been drawn up and entered. The applicant there wanted to reopen the order as to costs, and to have another order made in its place, not upon the ground that the order as drawn up did not carry out the intention of the Court, but upon the ground that the orginal order was wrong and ought not to have been made. The Vice-Chancellor held that he had no jurisdiction to alter the order, and this Court affirmed his decision. That is a very different case from an application to correct a judgment or order which has by some accidental slip or omission been drawn up so as not to carry out the intention of the Court. Where there has been such a slip there is always power, either under the inherent jurisdiction of the Court or under the provisions of O. 28, R. 11, to correct the error and set the matter right. Order 28, R. 11 provides that 'clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or a judge on the motion or summons without an appeal.' In my opinion, the omission of this item of £.160 s.11 d.8 from the bill of costs carried in for taxation was an 'accidental slip or omission' within the meaning of the rule, and the error in the judgment arising therefrom can

therefore be corrected 'at any time'. The error may be corrected even after the judgment has been drawn up and entered. There are two authorities which seem to me to be in point. The first is Fritz v. Hobson, (1880) 14 Ch D 542. In that case a motion for an interim injunction had been adjourned to the trial of the action. At the trial the plaintiff succeeded, but his counsel forgot to ask for the costs of the adjourned motion. After the judgment had been drawn up and entered, Fry, J. acceded to an application by the plaintiff to allow the judgment to be corrected so as to include therein the costs of the adjourned motion, holding that he had power to do so either under the liberty to apply impliedly reserved in the order on the motion, or under the liberty to apply expressly reserved by the judgment, or under the provisions of O. XLI-A the terms of which are now reproduced in O. 28, R. 11. The other case is Berker v. Purvis, (1886) 56 LT 131, a case in the Court of Appeal. There the judgment directed that the defendant should be at liberty to set off against the sum due to the plaintiff a sum of £.453 on account of interest which the defendant had paid on behalf of the plaintiff. The amount of £.453 was arrived at by an innocent mis-statement by the defendant that he had paid thus sum, whereas it was discovered, after the judgment was drawn up, that the defendant had by mistake over stated the amount. The Court allowed the judgment to be corrected under O. 28, R. 11, holding that there was an error in the judgment which arose from an accidental slip of the defendant. These two decisions seem to me to be distinctly in point. For these reasons, I think that the order of Day, J. was right and should be affirmed."

6. The learned counsel for the appellant did not contend before us that the respondent is not entitled to have these four items included in the costs. But he only objected to the procedure adopted by the respondent for that purpose. We are of the opinion, as already stated, that the application has to be treated to be one for amendment of the judgment by directing to include these four items in the costs, and that there is no reason to interfere with the order of Mohan, J., directing the inclusion of those items in the costs awarded to the respondent taxed and noted in the margin of the decree.

7. The appeal is accordingly dismissed, but under the circumstances of the case, without costs.

Appeal dismissed.

AIR 1978 MADRAS 168

RAMAPRASADA RAO, Offg. C. J. AND SURYAMURTHY, J.

Kochuman Mathew and another, Petitions v. T. N. K. Estates, Respondents.

S. C. P. No. 13 of 1977, D/- 20-4-1977.*

(A) Constitution of India, Art. 133 — Substantial question of law — What is.

What is substantial question of Law, would, of course, depend upon the facts and circumstances which arise in a particular situation and it would be hazardous to iron-jacket the elastic expression within certain set norms and principles. (Para 4)

The following were held substantial questions of law:—

(a) Whether the head lessor can file a suit for possession on the basis that the covenant in the lease deed of head lessee and under-lessee providing for surrender of lands by lessee to the head lessee by the event of surrender by the head lessee to the lessor, is automatically enforceable ignoring the latter part of S. 115 of the T. P. Act, is a substantial question of law. (Para 4)

(b) What is the scope and extent of rights and obligation which arise as a result of the covenant like above also raises a substantial question of law. (Para 5)

Anno: AIR Comm., Constitution of India (2nd Edn.), Art. 133, N. 18.

(B) Constitution of India, Art. 133 — Final order — Remand order deciding certain material issues affecting right of parties finally — Appeal lies to Supreme Court. AIR 1958 SC 253, AIR 1933 PC 58 and AIR 1960 SC 941, Distinguished. (Para 6)

Anno: AIR Comm., Constitution of India (2nd Edn.), Art. 133, N. 8.

Cases Referred: Chronological	Paras
AIR 1960 SC 941	6
AIR 1958 SC 253	6
AIR 1933 PC 58	6

*(Against judgment and decree of Venkataraman and Krishnaswamy Reddy, JJ., in Appeal No. 185 of 1970, D/- 10-1-1975).

LU/AV/E690/77/KHA

S. Govind Swaminathan for M. A. Rajagopalan, for Petitioners; V. K. Thiruvenkatachari for R. Vaidyanathan and K. Alagumalai, for Respondents.

RAMAPRASADA RAO, Offg. C. J.: — The defendants-respondents in Appeal No. 185 of 1970 on the file of this Court seek leave under Art. 133 of the Constitution of India, to prefer an appeal to the Supreme Court against the judgment and decree of this Court rendered therein. The relevant facts are: The plaintiffs, who owned a rubber estate of an extensive area, leased out the same to one English and Scottish Joint Co-operative Wholesale Society Ltd., London, and the period of the demise was from 1940 and ending with 1988. The English Society continued in possession of the demised property but subject to the covenant that they had an option to surrender the demised lands during the course of the period of the lease. It transpires that almost contemporaneously with the beginning of the lease, the English Society (hereinafter referred to as the head lessee) leased out the property to the defendants (hereinafter referred to as the under-lessees) for the very same period. Under the lease deed which governed the relationship of head lessee and the under-lessee, it was provided —

"In the event of the lessor surrendering to the head lessor the lands demised under the head lessee for any reason whatsoever, the lessee shall also surrender the leased lands to the lessor but not otherwise, and the lessees shall, in addition, pay all rents, avagasams, Government dues and interest etc., till the end of that year and also perform and observe all covenants and conditions as hereinbefore provided and shall not be entitled to remove and carry away all or any buildings, machinery, plant or other improvements then existing and also they shall not be entitled to claim compensation for the same. In this case they shall execute a deed of surrender at their cost."

The reference to the lessor in the above covenant is to the head-lessee and the reference to the lessee is to the under-lessee. It is common ground that on 25-3-1960 the head lessee surrendered the demised property to the owners, and it appears that they got a benefit out of it. On the basis of the covenant as above, the original lessor (the owners) sought for possession of the demised property by virtue of the clause excerpted above. The defence was that cl. 14 was not a valid and enforceable covenant and that on the basis of it a suit for possession would not lie but only a suit for specific performance. The learned Subordinate Judge dismissed the suit on the ground that there was no actual surrender and that the covenant could only be enforced by the head lessee and not by the plaintiffs as owners. The owners took up the matter in appeal, and the argument of Mr. V. K. Thiruvenkatachari, which found favour with a Division Bench of this Court, was to the effect that, when the head lessee surrendered the lease, the lessor (the owner) under the later part of S. 115 of the T. P. Act could seek for possession, without filing a suit for specific performance. The learned Judge accepted the argument as perfectly logical and as being unanswerable. In the end, therefore, they allowed the appeal in part, but remanded the subject-matter for evaluation of the improvements, if any, made by the under-lessee, and for the ascertainment of mesne profits. In that sense the appeal was allowed in part.

2. Initially the decree that was drafted could not spell out the intention of the learned Judges clearly. Therefore it was amended on the application of the parties. While amending the decree, the learned Judges made it clear that Issues 1, 2 and 3 framed in the original action had been fully decided and were no longer open for trial on remand by this Court. They further explained that Issues 4 and 5 alone shall be adjudicated upon further on remand. In the result, they made the following observation —

"The result is that the decree in Appeal 185 of 1970 is clarified by directing the trial of Issues 4 and 5 and Issues 6 and 8 in the light of the observations and directions given by this Court. Issues 1, 2 and 3 have been decided by this Court and are not triable by the trial Court."

Issues 1, 2 and 3 in the trial Court were as follows —

1. Whether the deed of surrender dated 23-5-1960 by the English and Scottish Joint Co-operative Wholesale Society in favour of Raja Shanker Royal is not valid?

2. Whether the plaintiffs are not entitled to invoke the provisions of cl. 14 of the deed of sub-lease dated 9-8-1946?

3. Whether the plaintiffs are not entitled to the benefit of and enforce the

provisions incorporated in cl. 14 of the sub-lease agreement dated 9-8-1946?

3. Mr. Govind Swaminathan has come up with this application for leave to appeal to the Supreme Court under Article 133 of the Constitution of India. His case is that, inasmuch as a portion of the matters in issue has become final in the eye of law and as the order of remand has specifically circumscribed the further trial of certain issues, and as the subject-matter raises questions of law of general importance and since they are substantial in nature, leave has to be granted. Opposing the grant of leave, Mr. Thiruvenkatachari for the owners submits, firstly, that no substantial question of law is involved in this case, as it is very rare to provide in an under-lease a covenant like the one in question. Secondly he submits that it is open to the defendants-petitioners to canvass the correctness of the conclusions of the Court after a final decision is reached on remand and after an appeal is filed therefrom and decided by this Court. Thirdly, he would say that, as no appeal against an order of remand is provided to the Supreme Court, and as the subject is not yet over, no leave should be granted. Fourthly, he would submit that it is not necessary to file a suit for specific performance to obtain possession and that a suit for possession straightway would lie. Lastly, he would say that there is a Bench decision of this Court rendered by two learned Judges, who have since retired from the Court and that, as there is no other precedent available to the contrary, this Bench should rather agree with that opinion and should not grant leave on one or other of the grounds contemplated in Art. 133 of the Constitution.

4. Whether a particular case poses a substantial question of law is essentially a matter which depends upon the merits of each case. What is a substantial question of law, would, of course, depend upon the facts and circumstances which arise in a particular situation and it would be hazardous to iron-jacket an elastic expression, such as a 'substantial question of law' within certain set norms and principles. That a substantial question of law does arise in the instant case is seen from the fact that the appellants have raised an important plea which is based upon S. 115 of the T. P. Act. Section 115 of the T. P. Act consists of two parts and it deals with the effect of surrender and forfeiture on under-leases. The section runs as follows —

"The surrender, express or implied, of a lease of immoveable property does not prejudice an under-lease of the property or any part thereof previously granted by the lessee, on terms and conditions substantially the same (except as regards the amount of rent) as those of the original lease; but, unless the surrender is made for the purpose of obtaining a new lease, the rent payable by and the contracts binding on, the under-lessee shall be respectively payable to and enforceable by the lessor."

We are now concerned with the latter part of the section which says 'unless the surrender is made for the purpose of obtaining a new lease, the rent payable by, and the contracts binding on, the under-lessee shall be respectively payable to and enforceable by the lessor." The argument of Mr. Govind Swaminathan, learned counsel for the petitioner, is that the respondents have a right to enforce the covenant, but not to seek redress as if it is automatically enforceable. It is in this sense that the plea of limitation was raised. The learned Judges would not countenance this argument. But the question in the instant case is whether a suit for possession simpliciter could be filed without regard to the letter and spirit of the latter part of S. 115 of the T. P. Act. This certainly raises a subsantial question of law of general importance.

5. Another argument is that it is unusual to provide for such a covenant like the one extracted above in instruments creating under-leases. This may be so, but that, by itself, could not be a ground to refuse leave, if in a given case the question for determination is what is the scope and extent of the rights and obligations which arise as a result of such a covenant? This again is a matter which raises an important and rather a substantial question of law.

6. Mr. V. K. Thiruvenkatachari would say that it is still open to the petitioners to agitate the correctness of the findings on Issues 1, 2 and 3 after a decision is rendered by the trial Court on remand and when the matter comes up for appeal again before this Court, and thereafter. It is very doubtful whether in the circumstances of the case, such a course is available to the petitioner. When their attention was drawn to the fact that the decree originally drafted was not clear, the learned Judges

clarified it in the manner already stated. They observed that Issues 1, 2 and 3 have been decided by this Court and are not triable by the trial Court. In view of this specific observation it can reasonably be presumed that, in so far as Issues 1, 2 and 3 are concerned, the suit is not alive and everything relating to them has been adjudicated upon. Even adopting the language of the Supreme Court in Syedna Taher v. State of Bombay, AIR 1958 SC 253, we are of the view that the specific decision and conclusion arrived at by the learned Judges was not on a preliminary point and, as is obvious a decree had already been passed by them in relation to the three issues as above. Undoubtedly Abdul Rahman v. Cassim and Sons, AIR 1933 PC 58 : 60 Ind App 76, which is oft quoted, is an authority for the proposition that no appeal lies against an order of remand. The Supreme Court in Satyadhyan Ghosal v. Smt. Deorajin Debi, AIR 1960 SC 941 has also observed that S. 105 (2), Civil P. C. can have no application to appeals to the Supreme Court, since no such appeal lies to the Supreme Court against an order of remand. But in the instant case, we are of the view that, though the suit formally and technically can be said to be alive, certain material issues affecting the rights of parties have been finally decided and in that sense the request of the petitioners for grant of leave under Art. 133 of the Constitution is justified.

7. Another contention of Mr. Thiruvenkatachari is that we should rather agree with the conclusion of another Division Bench, since there is no contrary opinion available in the shape of precedent on such matters. Far from assisting learned counsel, we are of the view that it is one of the formidable grounds on which we should grant leave, provided that the other requirements of Art. 133 of the Constitution are satisfied.

8. Article 133 of the Constitution lays down certain norms for the grant of leave to appeal to the Supreme Court, namely, that the case should involve a substantial question of law of general importance and that in the opinion of the High Court the question needs to be decided by the Supreme Court. We have already expressed ourselves that on the question of limitation and on the frame of the suit, a substantial question of law of general importance has arisen. In our opinion, and in the absence of authoritative precedent on the subject, it is desirable that the question arising herein be decided by the Supreme Court. Leave granted.

Leave granted.

AIR 1978 MADRAS 171

MOHAN J.

Mahaveer Prasad Prasan Kumar Jain, Petitioner v. The Tahsildar, Pondicherry and another, Respondents.

W. P. No. 1889 of 1974, D/- 24-3-1977

Constitution of India, Art. 245 — Delegation of Legislative functions — There can be valid delegation to adopt other State laws by extension — Pondicherry Pawn Brokers Act (11 of 1966), S. 2 (1) — S. 2 (1) only adopts and applies the Madras Pawn Brokers Act, 1943 as it stood on the date of passing the Pondicherry Act and is valid — Act does not suffer from the vice of the Pondicherry Sales Tax Act as held in AIR 1967 SC 1480, because it did not apply future amendments in the Madras Act. 1969-2 Mad L. J. 62 Foll. (Pondicherry Pawn Brokers Act (11 of 1966), S. 2 (1)).

(Paras 4, 5)

Cases Referred: Chronological Paras

(1969) 2 Mad LJ 62 4

AIR 1967 SC 1480: (1967) 2 Mad LJ 98 3, 4

C. Masilamani, for Petitioner; T. Somasundaram, Govt. Pleader, for Respondents.

ORDER:— The writ petition is to prohibit the respondents, the Territory of Pondicherry represented by the Collector of Pondicherry, from enforcing the provisions of the Pondicherry Pawn Brokers Act, 1966 as against the petitioner.

2. The petitioner has been carrying on the business of Pawn Broking at Villiyanur Road, Nellitope, Pondicherry after obtaining a licence under the Pondicherry Pawn Brokers Act, 1966 (Act 11 of 1966). The Collector of Pondicherry inspected the petitioner's shop on 9-5-1974 and checked some of the account books and also enquired one of the customers. After the said inspection the petitioner was issued with a notice on 10-5-1974, to show cause why action should not be taken against him for those irregularities. The petitioner submitted an explanation. Not being satisfied with the explanation, the Tahsildar, by an order dated 20-5-

1974, cancelled the licence of the petitioner. Aggrieved by the same, the petitioner preferred an appeal to the Deputy Collector, Revenue, Pondicherry. Pending the appeal, he prayed for stay which was refused on 31-5-1974. It is at this stage, the present writ petition has been preferred.

3. The only question that is urged in the affidavit in support of the writ petition is that the Pondicherry Pawn Brokers Act, 1966 hereinafter called the Act, is a still-born legislation. The Act was passed by the Legislative Assembly of Pondicherry on 3-6-1966. S. 2 (1) of the said Act reads as follows:—

"The Madras Pawn Brokers Act 1943 (Madras Act 23 of 1943) (hereinafter referred to as the said Act) as in force in the State of Madras immediately before the commencement of the Act shall extend to and come into force in the Union territory of Pondicherry subject to the following notification and adaptations namely". The Act was notified in the Gazette of Pondicherry on 15-10-1966. In so far as the Legislative Assembly of Pondicherry extended and adapted the Madras Pawn Brokers Act of 1943 with all its future amendments that may be made upto the date of commencement, it had abdicated its Legislative functions to the Legislative Assembly of Tamil Nadu. Therefore, in view of the decision of the Supreme Court in Shama Rao v. Union Territory of Pondicherry 1967-2-Mad LJ (SC) 98 : (AIR 1967 SC 1480) this Act cannot be enforced against the petitioner. It is this contention which is also urged during the hearing of the writ petition.

4. The learned Govt. Pleader of Pondicherry would say that this is not a case in which future amendment to the Tamil Nadu Pawn Brokers Act was made applicable, but the Pawn Brokers Act, as it stood, on the date of adoption was alone adopted by the Legislature which it is well competent to do. Therefore, the decision in Shama Rao v. Union Territory of Pondicherry, 1967-2-Mad LJ (SC) 98 ; (AIR 1967 SC 1480) is clearly distinguishable. On the contrary, in D. Gopalaswami v. Union of India, 1969-2-Mad LJ 62 at P. 66 it has been categorically laid down that it is open to the Pondicherry Legislature to adopt any legislation of the Tamil Nadu viz, the decision in Shama Rao v. Union Territory of Pondicherry, 1967-2-Mad LJ (SC) 98 at p. 105 : (AIR 1967 SC 1480 at p. 1487) which chose to adopt all its future amendments which is not present in this case. Since the decision of the Supreme Court in Shama Rao v. Union Territory of Pondicherry 1967-2 Mad LJ (SC) 98, 105 : (AIR 1967 SC 1480 at p. 1487) forms the only basis of the petitioner's argument, let me refer to that decision. In that case, the petitioner was a merchant carrying on business in liquor and was a dealer within the meaning of the Madras General Sales Tax Act. Up to March 1966 he was liable and was paying certain taxes similar to the sales tax under the French Regulations till then in force in Pondicherry. With the coming into force of the Principal Act, viz, the Pondicherry General Sales tax Act X of 1965 which was published on 3-6-1965, after the President's assent on 25-5-1965, he was served with a notice to register himself as a dealer and thereupon he filed a petition challenging the validity of the principal Act. It was contended on behalf of the petitioner that the principal Act was void and was still-born legislation by reason of the Pondicherry legislature having abdicated its legislative assembly function in favour of the Madras State Legislature, such abdication resulted from the wholesale adoption of the Madras Act as in force in the State of Madras immediately before the commencement of the principal Act and that S. 2 (1) read with S. 1 (2) meant that the Legislature adopted not only the Madras Act as it was when it enacted the Principal Act, but also such amendment or amendments in that Act which might be passed by the Madras legislature upto the time of the commencement of the Act, i. e., upto 1-4-1966. S. 2 (1) provided that:—

"The Madras General Sales Tax Act 1959 (1 of 1959) hereinafter referred to as the Act) as in force in the State of Madras immediately before the commencement of this Act shall extend to and come into the Union territory of Pondicherry subject to the following modifications and adaptations....."

Read with S. 1 (2) meant that the legislature adopted not only the Madras Act as it was when it enacted the principal Act but also such amendment or amendments in that Act which might be passed by the Madras legislature upto the time of the commencement of the Act i. e., upto 1-4-1966. In dealing with this contention it was held by their Lordships of the Supreme Court at page 104 (of Mad LJ) : (at p. 1487 of AIR SC).

"The question then is whether in extending the Madras Act in the manner

and to the extent it did under S. 2 (1) of the principal Act, the Pondicherry Legislature abdicated its legislative power in favour of the Madras legislature. It is manifest that the Assembly refused to perform its legislative function entrusted under the Act constituting it. It may be that a mere refusal may not amount to abdication if the legislature instead of going through the full formality of legislation applies its mind to an existing statute enacted by another legislature for another jurisdiction, adopts such an Act and enacts to extend it to the territory under its jurisdiction. In doing so, it may perhaps be said that it has laid down a policy to extend such an Act and directs the executive to apply and implement such an Act. But when it not only adopts such an Act but also provides that the Act applicable to its territory shall be the Act amended in future by the other legislature, there is nothing for it to predicate what the amended Act would be. Such a case would be clearly one of non-application of mind and one of refusal to discharge the function entrusted to it by the instrument constituting it. It is difficult to see how such a case is not one of abdications or effacement in favour of another legislature at least in regard to that particular matter."

Again at page 105 it is observed as follows:

"In the present case, it is clear that the Pondicherry Legislature not only adopted the Madras Act as it stood at the date when it passed the Principal Act but also enacted that if the Madras Legislature were to amend its Act prior to the date when the Pondicherry Government would issue its notification it would be the amended Act which would apply. The Legislature at that stage could not anticipate that the Madras Act would not be amended nor could it predicate what amendment or amendments would be carried out or whether they would be of a sweeping character or whether they would be suitable in Pondicherry. In point of fact, the Madras Act was amended and by reason of S. 2 (1) of the Principal Act, it was the amended Act which was brought into operation in Pondicherry. The result was that the Pondicherry Legislature accepted the amended Act though it was not and could not be aware what the provisions of the amended Act would be. There was in those circumstances a total surrender in the matter of sales tax legislation by the Pondicherry Assembly in favour of the Madras Legislature and for that reason we must agree with Mr. Desai, that the Act was void or as is often called 'still-born'."

In construing the scope of the decision, a Division Bench of this court in D. Gobalousami v. Union of India, 1969-2 Mad LJ 62 laid down thus:—

"In Shama Rao v. Union Territory of Pondicherry (1967) 2. S. C. R. 650 : (AIR 1967 SC 1480) it has to be carefully noticed that the power of the Pondicherry Legislature to extend the Madras Act to Pondicherry State was, in itself, never in doubt, the relevant enactment was struck down, not on the ground of incompetency, but because the Pondicherry Legislature adopted the Madras Act, as it stood, on the date when it passed the principal Act, but also enacted that future amendments of the Madras Legislature, in respect of its Act, would be ipso facto applicable to the Pondicherry measure, or read as incorporated in it. This was held by the Supreme Court to be an abdication by the Assembly, of its legislative function, which could not be supported. Indeed, the argument of Mr. Setalvad was accepted that there could be valid delegation to adopt other State Laws by extension".

5. It is exactly the situation as was mentioned in the Madras case cited above that is obtainable in this instant case. Therefore, it does not suffer from the vice of the Pondicherry General Sales-tax Act. Hence I hold the argument of the petitioner cannot be accepted. Consequently, this writ petition will stand dismissed with costs. Counsel's fee Rs. 150/-.

Petition dismissed.

AIR 1978 MADRAS 173

P. S. KAILASAM, C. J. AND BALASUBRAHMANYAN, J.

Associated Transports (Madras) Private Ltd., Appellant v. The Union of India and others, Respondents.

Writ Appeal No. 492 of 1976, D/- 7-12-1976.*

Constitution of India, Art. 356 (1) — Proclamation of President's Rule in State — Exercise of Presidential powers by Governor — Scope.

*(Against judgment of Mohan, J. in W. P. No. 2406 of 1976, D/- 15-11-1976).

AV/AV/A11/78/AS/LGC

Though the position of the Governor of the State under the proclamation is one in which he is empowered to exercise all the functions taken over by the President, subject to the superintendence, direction and control of the President, it will be totally inappropriate to call the Governor a delegate or an agent of the President. The result is that the Governor acts as if the President himself acts, subject of course, to the superintendence, direction and control of the President. For transaction of the business of the Government he could adopt the Rules of Business framed by the State Government under Art. 166 (3). The suspension of Art. 166 (3) during the proclamation does not mean that all the rules framed under Art. 166 (3), have been abrogated. There could be no objection to those rules being adopted by the Governor. as has been done in this case. (Para 6)

The Governor of Tamil Nadu by a Notification dated 1st Feb.. 1976 issued in pursuance of the proclamation. G.S.R. 55 (E) and the Order G.S.R. 56 (E) dated 31st Jan., 1976, issued by the President of India appointed two officers as his Advisers and allocated the business of the Government among them and also issued instructions regarding the transaction of the business of the Government. Another Order, G.O.Ms. No. 279 dated 1-2-1976 was issued by the Governor, directing that the distribution of the business among the Departments of the Secretariat shall continue to be the same as immediately before the said date. Therefore the draft scheme of nationalisation of bus routes under S. 68-C of the Motor Vehicles Act purported to be issued by the special Secretary to Government of Tamil Nadu in exercise of powers under R. 23-A of the Madras Business Rules was not by virtue of powers conferred by the Madras Business Rules which were framed under Art. 166 (3) of the Constitution, but by virtue of the notification of Governor made in G.O.Ms. No. 279 dated 1-2-76. The contention that the Secretary had no power to act under R. 23-A, as the operation of Art. 166 (3) was suspended could not therefore stand. (Paras 7, 8)

Anno: AIR Comm., Constn. of India. (2nd Edn.), Art. 356 (1), N. 4.

K. K. Venugopal for M. Krishnappan. for Appellant.

P. S. KAILASAM, C. J.: — This Writ Appeal is preferred by the Associated Transports (Madras) Private Limited, by its Managing Director against the order of Mohan, J., dismissing the appellant's writ petition for the issue of a writ of prohibition prohibiting the Union of India, the State of Tamil Nadu and the Special Secretary to Government, Home Department, Madras, from taking further proceedings pursuant to the notice of hearing in Memo No. 40-804/Tr. III-72-36 dated 5-5-1976.

2. The appellant is a stage carriage operator, and, among other permits, he is operating one permit on the inter-State Route Madras (Mint.) to Naidupet. The State of Tamil Nadu formulated a policy of nationalisation of bus routes, the distance of which exceeded 75 miles or when the route touched the city of Madras. The route was covered by a draft scheme of nationalisation under S. 68-C of the Motor Vehicles Act. A scheme of nationalisation was issued by the Secretary to Government by virtue of the delegated powers vested in him under R. 23-A of the Madras Business Rules. The appellant filed his objections to the draft scheme. The third respondent issued a notice of hearing to consider the objections filed by the appellant under S. 68-D of the Act. The hearing was posted to 24th May, 1976. The writ petition was filed for the issue of a writ of prohibition prohibiting the respondents from taking any further proceedings pursuant to the said notice dated 5th May, 1976, Mohan, J., who heard the writ petition, dismissed it. Hence this writ appeal by the operator.

3. Mr. K. K. Venugopal, the learned counsel for the appellant submitted that the Governor had acted without authority, as, according to him, it was not open to the Governor to bring into existence a Cabinet system of Government consisting of two Advisers appointed by him between whom he had distributed all the portfolios to enable them to finally decide all matters. Learned counsel further submitted that the functions of the Secretary acting under S. 68-D of the Act was quasi-judicial in nature, that those functions were withdrawn by the President and transferred to the Governor, and that the Governor alone could discharge those functions. Thirdly he submitted that, in the absence of the Cabinet system of Government and by reason of the suspension of Art. 166 (3) of the Constitution of India, the old Rules of Business would not continue to be in force.

converse of the seller's charges for the unpaid purchase price contemplated under S. 55 (4) (b) of the Transfer of Property Act.

No doubt, the intending buyer cannot claim a charge under S. 55 (6) (b) of the Transfer of Property Act after the sale-deed is executed and possession of the property is taken by him. This statutory charge is the outcome of the rule of justice, equity and good conscience, though there is no question of ownership involved while asserting the charge as above, as such ownership would still be in the seller. Yet in order to adjust the equity of the parties to the contract which are contained in S. 55 (6) (b) of the Transfer of Property Act, the buyer is privileged to claim a statutory charge under S. 55 (6) (b) of the Transfer of Property Act. There is even authority for the proposition that this statutory charge can be enforced even in Court sales. No doubt the position would be different if the agreement of sale is invalid or void or not genuine or in a case in which the seller has no personal interest in the property at all. Vide — Muthu Gounden v. Chellappa Gounden ((1910) 8 Mad LT 464); Shailendra Nath Patil v. Hade Kaza Mane (ILR 59 Cal 586): (AIR 1932 Cal 356) and Trimbak Narayan Hardas v. Babulal Motaji (AIR 1973 SC 1363). We have already observed that this statutory privilege resulting in a charge in favour of the intending buyer is based on the well-known principle of justice, equity and conscience. This is because that once the buyer has paid the whole or part of the property in question, the vendor becomes a trustee for him and to the extent to which the buyer has paid the purchase money the buyer acquires a lien over the property, "as if upon the payment of a part of the purchase money the vendor has executed a mortgage to him of the property to that extent." We have, therefore, no hesitation in holding that the charge over the property and after the sale of the property over the sale proceeds of the property as claimed by Govindaswamy and as accepted by the Insolvency Court earlier is valid and sustainable in law.

10. The last question is whether the State, which is represented by the Income-tax Officer in this appeal is entitled to priority over Govindaswamy. Under S. 49 of the Presidency Towns Insolvency Act in the distribution of the property of the insolvent there shall be paid in priority to all other debts, all debts due to the Government or to any local authority etc. Undoubtedly, the arrears of Income-tax due to the Government would certainly come within the meaning of debt which has been ascertained and has become due and payable by the insolvent. In particular, the tax payable need not be quantified by the assessing authority. This is because there is inherent in the tax liability a concept that the assessee is obliged to pay it as and when it is quantified. The proposition that the Government's priority to claim its dues over other dues is a common law right is unassailable and is preserved even after the coming into force of the Constitution by reason of Art. 372. But the question is whether the Government or the Crown can have priority over all dues. "Salus Populi suprema lex" (Regard for the public welfare is the highest law) is the origin for such claims of priority made by the Government. The Full Bench of our Court in Collector of Tiruchirapalli v. Trinity Bank Ltd., (AIR 1962 Mad 59) following another Full Bench of our Court in Manickam Chettiar v. Income-tax Officer, Madras (AIR 1938 Mad 360) observed as follows at page 62 —

"But this rule of priority in favour of the Crown for the realisation of its dues can only prevail and be enforceable as between unsecured creditors of equal degree, there being no question of any lien, charge or mortgage in favour of one or other of such creditors. The priority of the Crown cannot rank as against a secured creditor so as to deprive him of his security or to affect or to injure his rights as such secured creditor."

This charge of the secured creditor is not only traceable against the property over which it is charged but also against the proceeds obtained by a sale of the charged property. In this case, the property has been sold under orders of Court subject to the charge of Govindaswamy being maintained throughout and indeed over the sale proceeds as a result of the public sale of the property held by the Official Assignee. Following the ratio in the above two well-known decisions of our Court, we accept the first respondent's case that the appellant cannot claim a better right, since the first respondent Govindaswamy was a secured creditor and that the act of the Official Assignee in having recognised him as such in consequence has to be upheld. Paul, J., was right in having done so.

11. This appeal is, therefore, dismissed; but in the circumstances there will be no order as to costs.

Appeal dismissed.

AIR 1978 MADRAS 192

VARADARAJAN, J.

V. Bapu Kalingarayar, Appellant v. Rajam and another, Respondents.

S. A. No. 1312 of 1974, D/- 9-2-1977.*

(A) Civil P. C. (5 of 1908), S. 105 (1) — Error "affecting the decision of the case" — Order not allowing amendment of plaint — No revision or appeal filed — Final decree passed — Validity of the order can be considered in appeal from final decree. (Case law discussed). (Para 6)

Anno: AIR Comm., Civil P. C. (8th Edn.), S. 105, N. 6.

(B) Negotiable Instruments Act (26 of 1881), Ss. 8 and 78 — Persons entitled to file suit on pronote — Suit by beneficiary who is not payee—Held not maintainable.

Persons who are not the payees and had not filed the suit as the endorsees thereof, are not entitled to maintain the suit on the promissory note, though the consideration for the same proceeded from them and the promissory note had been executed in favour of a person who appears to have been the power of Attorney Agent of such persons. (Para 7)

Anno: AIR Manual (3rd Edn.), Negotiable Instruments Act, S. 8. N. 2.

(C) Civil P. C. (5 of 1908), S. 100 — New case — Point involving pure question of law—Point not raised in written statement — Can be entertained when record is sufficient for its decision.

The point that the suit on the pronote was not maintainable could be raised first time in second appeal as a mere perusal of the promissory note and the plaint would show that the plaintiffs were not payees or endorsees, and it was only necessary for the defendant-appellant to bring this fact to the notice of the Court in connection with the legal submission that the suit by the plaintiffs who were not either the payees or endorsees of the promissory note was not maintainable. AIR 1970 SC 839, Rel. on. (Para 9)

Anno: AIR Comm., C. P. C. (9th Edn.), S. 100, N. 56.

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*(Against decree of Dist. J., West Thanjavur at Thanjavur in Appeal Suit No. 82 of 1973).

KU/LU/E281/77/KHA

Cases Referred: Chronological **Paras**

AIR 1970 SC 839	9
AIR 1970 Cal 8	4
AIR 1970 Mad 81	4
AIR 1965 Mad 157	5
AIR 1961 Mad 518 : (1961) 2 Mad LJ 470 (FB)	8
AIR 1960 SC 941	4
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AIR 1940 Mad 90 : (1939) 2 Mad LJ 812	7
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AIR 1935 Mad 181 (FB)	6
AIR 1935 Mad 312	7
AIR 1922 PC 249 : ILR 48 Cal 832	4
AIR 1922 Lah 230 : 60 Ind Cas 772	3
AIR 1914 Lah 337 : 26 Ind Cas 441	3
(1911) 13 Cal LJ 139	3
(1910) ILR 34 Bom 250	4
(1908) 10 Bom LR 346	3
(1907) ILR 30 Mad 88 (FB)	5
(1905) ILR 28 Mad 205	5
(1904) ILR 31 Cal 195	3
(1900) ILR 23 Mad 597	5
(1898) ILR 21 Mad 30	5
(1898) ILR 21 Mad 391	5
(1895) C. R. P. No. 578 of 1895 (Mad)	5
(1891) S. A. No. 182 of 1891 (Mad)	5
(1859) 7 Moo Ind App 283 (PC)	4

T. R. Srinivasan and K. Ramamurthi, for Appellant; T. N. Manikanteswaran, for Respondent.

JUDGMENT: — The defendant, who failed in the Lower Appellate Court, is the appellant. The respondents filed the suit for the recovery of money due on the promissory note Ex. A-1 dated 26-8-1966 executed by the appellant and his brother's son Chockalingam in favour of one Ramanatha Iyer for Rs. 3.100/- alleged to have been advanced by the respondents, according to whom Ramanatha Iyer was their power of attorney agent. The respondents filed the suit through another power of attorney agent on 17-1-1972 and relied upon the letter Ex. A-2 dated 14-1-1969 given by the appellant to them as an acknowledgment of liability for the purpose of limitation.

2. The appellant's defence was that the letter Ex. A-2 was executed only in Jan. 1970 after the claim had become barred by limitation, though it is dated 14-1-1969, and that the suit is, therefore, barred by limitation. After arguments were advanced and judgment was reserved the respondents filed an application for amendment of the plaint on the date on which the suit was posted for judgment. The amendment prayed for was to the effect that the

appellant had acknowledged the liability by another letter Ex. A-3 bearing the postal date seal 23-8-1968 and addressed to Ramnatha Iyer and that, in any event, Ex. A-2 cannot be construed as an acknowledgment and it constitutes an express promise to pay the barred debt and it is not a void agreement in view of S. 25 (3) of the Contract Act. The trial Court dismissed that application and another application filed on the same date to reopen the case observing that the proposed amendment seeking to rely upon Ex. A-2 as an agreement to pay a barred debt introduces a new case, which has not been pleaded in the original plaint. The learned District Munsif found that Ex. A-2 had been executed in Jan. 1970 as contended by the appellant more than 3 years after the date of the suit promissory note Ex. A-1 and would not save limitation and he dismissed the suit without costs holding that the suit was barred by limitation. But on appeal, the learned District Judge, agreed with the trial Court in coming to the conclusion that Ex. A-2 was executed only in Jan. 1970, but however, held that it amounted to an agreement to pay the barred debt and would enable the respondents to recover the amount in view of S. 25 (3) of the Contract Act and he allowed the appeal with costs throughout.

3. Two points were urged before me by Mr. T. R. Srinivasan, the learned counsel for the appellant and they are: (1) that the letter Ex. A-3 bearing the postal date seal of 23-8-1968 is addressed to Ramanatha Iyer and has not been relied upon as an acknowledgment of liability for the purpose of limitation and the letter Ex. A-2 having been admittedly obtained only in Jan. 1970 would not save limitation and (2) that the respondents, who are not the payees in the promissory note, Ex. A-1, are not entitled to maintain the suit on the promissory note. The letter Ex. A-3 had not been relied upon in the Lower Appellate Court even in the memorandum of grounds of appeal and the learned District Judge has not relied upon it, as saving limitation in his judgment where he has proceeded on the basis that Ex. A-2 would amount to a promise in writing, signed by the person charged therewith to pay wholly the debt of which the creditor might have enforced payment but for the law of limitation of suits, as required by S. 25 (3) of the Contract Act and that the suit is, therefore, in time. The learned counsel for the appellant submitted that there is no allegation in the plaint that by Ex. A-2 the appellant had promised to pay wholly or in part the promissory note debt, that the claim in respect whereof would otherwise be barred by limitation and that it is, therefore, not open to the Court to give relief to the respondents on the basis of Ex. A-2. But the learned counsel for the respondents relied upon some decisions which would be referred to presently and submitted that the trial Court ought to have allowed the amendment prayed for and that it is open to the court to take note of Ex. A-2 as a promise to pay the barred debt and give relief to the respondents. The first decision relied upon by the learned counsel for the respondents in this connection is of a Bench of the Lahore High Court in Parmeshri Das v. Fakiria (60 Ind Cas 772) : (AIR 1922 Lah 230) where the learned Judges had observed:

"Gobinda Mal v. Santa (26 Ind Cas 441) : (AIR 1914 Lah 337) followed Jogeshwar Roy v. Raj Narain Mitter ((1904) ILR 31 Cal 195) and held that under Or. VII, R. 6. C. P. C., the plaintiffs were bound to show in the plaint, the grounds upon which exemption from the law of limitation was claimed and that, as there was no mention in the plaint of the alleged acknowledgment of liability by the defendants, plaintiffs "could not be allowed to rely on it ..... In Hingu Miya v. Heramba Chandra ((1911) 13 Cal LJ 139) it was pointed out that the case of Jogeshwar Roy v. Raj Narain Mitter ((1904) ILR 31 Cal. 195) did not lay down any inflexible rule of law, and it was held that if the plaint shows the ground of exemption the requirements of the Code were satisfied, but this does not preclude the plaintiff from taking another and an inconsistent ground to get over the bar of limitation if he believes that the latter is the true ground; and the Court allowed the plaintiff to urge that the suit was not barred by limitation for a reason different from the one assigned in the plaint ..... We agree with the interpretation put upon the law in Yukub Ebrahim v. Bai Rahimatbai ((1908) 10 Bom LR 346) and Hingu Miah v. Heramba Chandra ((1911) 13 Cal LJ 139) and consider that the plaintiffs should not be debarred from putting forward the admission of the defendants made by them in their written statement of the

25th June, 1906".

This decision of the Lahore High Court has been followed by Achhru Ram, J., of the East Punjab High Court in Thakar Das v. Sant Ram (AIR 1949 East Punj 219) in rejecting the contention urged before him that the plaintiff having claimed exemption from the law of limitation only under S. 20 on the ground of part payment of the principal cannot be permitted to claim exemption on the ground of acknowledgment under S. 19 of the Limitation Act.

4. The next decision relied upon by the learned counsel for the respondents is of a Bench of the Bombay High Court in Gunnaji Bhavaji v. Makanji Khushal Chand ((1910) ILR 34 Bom 250). In that case, as in the present case, after hearing of the suit brought by the plaintiff for the recovery of a sum due on the foot of an account the defendant raised the plea of limitation. The plaintiff thereupon applied for leave to amend his plaint by setting out an acknowledgment in writing signed by the defendant within the period of limitation. The trial Court presided over by Russell, J. refused the application. But on appeal, it was held by the Bench that the view of Russell, J. that the amendment asked for would convert the suit into one of a different and inconsistent character was incorrect and that it would remain the same based upon exactly the same cause of action except for the addition of one allegation and that the amendment should be allowed as shown in paragraph I of the memorandum of appeal. The learned Judges allowed the amendment and granted leave to the defendants to file a supplemental written statement if they were so advised. No doubt, the course adopted by the learned Judges in that case had not been adopted by the learned District Judge in the present case, for he had remained content with criticising the trial court for not allowing the amendment, but did not specifically allow the amendment and grant an opportunity to the appellant to file a supplemental written statement if he was so advised. Though, as already stated, he had proceeded on the basis that the letter Ex. A-2 would amount to a promise to pay the barred debt within the meaning of S. 25 (3) of the Contract Act, it is not necessary to go into this question in greater detail having regard to the view which I am going to take about the maintainability of the suit filed by the respondents on the promissory note in which they are not the payees or indorsees. However, it may be necessary to say that it was open to the learned District Judge to consider the question whether the amendment should have been allowed even though no revision or appeal had been filed against the order of the trial Court disallowing the application for amendment. The learned counsel for the respondents submitted that it was open to the Lower Appellate Court to go into that question under the provisions of S. 105 (1) C. P. C. In Nanak Chand v. Amin Chand (AIR 1970 Cal 8), Ray, J., as he then was, who spoke for the Bench had observed (at p. 10):

"The recent decision of the Supreme Court in Satyadhyan Ghosal v. Smt. Deorajin Debi, (AIR 1960 SC 941) considered the scope and meaning of S. 105, C. P. C.. The Supreme Court said that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay an appeal was not taken, could be challenged in an appeal from the final decree or order. This decision is an authority for the proposition that though an appeal could have been taken from the order refusing the application for amendment on the ground of limitation, yet the question could be agitated in appeal from the decree inasmuch as the order affects the decision from which an appeal has been preferred. The Supreme Court referred to the decision of the Judicial Committee in Maharajah Moheshur Singh v. Bengal Govt. (1859) 7 Moo Ind App 283) (PC) where the Judicial Committee said that it would be the duty of the Court to correct erroneous interlocutory orders though not brought under their consideration until the whole cause had been decided and brought by appeal for adjudication. I am therefore of opinion that it is open to appellants to contend that the amendment should have been allowed".

In view of this decision I agree with the learned counsel for the respondents that it was open to the learned District Judge to consider the question whether the amendment of the plaint prayed for by the respondents and disallowed by the trial court could be allowed and that the Lower Appellate Court had the right to allow the amendment. The learned counsel for the appellant relied unon a decision of Veeraswami, J., as he then was in Chinnaswami Naicker v. Kandaswami

Gounder (AIR 1970 Mad 81). There the learned Judge observed thus: (At P. 81).

"No doubt amendment of pleading should be freely allowed, at whatever stage it is asked for. But this can only be subject to the pleas as to limitation or other prejudice to the other party. If the suit had been instituted on 21st July 1967, it would undoubtedly be barred by limitation. Mr. Desikan for the petitioner urges that ILR (1940) Mad 808 : AIR 1940 Mad 789 is distinguishable on the ground that there application for amendment of the plaint was taken out after issues had been framed and the trial held thereon. But I see no difference in principle, whether the amendment is sought for after the expiry of the period of limitation and at the stage of trial, before or after. The principle is that an application for amendment of the pleading should be within the time allowed for the institution of the suit."

This decision does not help the appellant, for the amendment petition in the present case which was filed on 22-11-1972 did not seek to rely upon any new ground, but only sought to make it appear that the letter Ex. A-2 which had already been relied upon for the purpose of limitation would amount to an agreement to pay a barred debt, a valid agreement, within the meaning of S. 25 (3) of the Contract Act. In this connection the learned counsel for the appellant relied also upon a decision of the Privy Council in Ma Shwe Mya v. Maung Mo Hnaung (ILR 48 Cal 832): (AIR 1922 PC 249) where it was observed that the real question in controversy between the parties in those proceedings was the existence and the character of an agreement alleged to have been made in 1912 for the delivery of certain sites of oil wells specified and identified by the numbers stated in the plaint, which could only have been delivered in respect of that subsequent bargain and that when once that contract has been negatived, to permit the plaintiff to set up and establish another and an independent contract altogether would, in the opinion of their Lordships of the Privy Council be to go outside the provisions established by the Code of Civil Procedure, to which reference has been made before them. This decision also will not apply to the facts of the present case where the respondents did not seek to set up a new contract or a new ground, but only sought to contend that Ex. A-2 which had been relied upon for the purpose of limitation is a valid agreement within the meaning of S. 25 (3) of the Contract Act to pay the entire amount due under the barred promissory note, Ex. A-1.

5. The learned counsel for the appellant relied upon a decision of the Full Bench of this Court in Subba Narayana Vathiyar v. Ramaswami Iyer, ((1907) ILR 30 Mad 88) where the question for consideration was whether it was open to the defendant in a suit on a negotiable instrument to plead that the payee named in the instrument, or the indorsee, as the case may be, is a mere benamidar, and not entitled to recover the amount due under the promissory note. It was observed in that decision thus:

"In Paramasiva Mudali v. Kannikuthu (S. A. No. 182 of 1891 (Mad) Unreported) as already stated it was held, we think rightly, that an undisclosed principal cannot be used on a negotiable instrument. In Ganapati Naiken v. Saminatha Pillai (CRP No. 578 of 1895 (Mad) — unreported) it was held that a benamidar cannot sue on a negotiable instrument and in Guru-Murthi v. Sivayya ((1898) ILR 21 Mad 391) it was held (but without referring to the terms of the Act) that an infant was entitled to sue by his next friend on a note taken by his mother in her own name on account of his estate. These decisions have not been followed until the present case and must in our opinion be overruled. On the other hand, it was held in Bojjamma v. Venkataramayya ((1898) ILR 21 Mad 30) dissenting from Ganapathi Naicken v. Saminatha Pillai (CRP No. 578 of 1895 (Mad) — unreported) that it was not open to the defendant to plead that the payee or indorsee was a mere benamidar. and quite recently it has been held, we think rightly, in Ramanuja Aiyangar v. Sadagopa Aiyangar ((1905 ILR 28 Mad 205) that a minor cannot sue on a promissory note taken in the name of his adoptive mother. The decision in Krishna Ayyar v. Krishnasami Ayyar ((1900 ILR 23 Mad 597) as to the liability of the other members of a joint family on a bill accepted by the managing member proceeded upon considerations of Hindu Law and does not affect the present question." Yet another decision relied upon by the learned counsel for the appellant in this connection is of Veeraswami, J., as he then was, in Subbaraya Chettiar v. Abirami Ammal (AIR 1965 Mad. 157) where

the learned Judge has observed (at p. 158):

"He contends that the plaintiff could in no sense be described as a holder of the promissory note, and the suit, so far as his client was concerned, being wholly vested on the promissory note, she could not, in the absence of an endorsement or transfer of the promissory note in her favour, maintain the suit against the second defendant and recover on the basis of the promissory note. I accept this contention. No stranger to a contract can sue upon it. That is a basic principle of law. This principle is applied to Negotiable Instruments Act, which is but a part of the law of contract. Apart from that, S. 8 of the Negotiable Instruments Act clearly defines a holder as a person entitled, be it noted, in his own name to the possession of the promissory note and to receive or recover the amount due thereon from the parties thereto. The rights of an endorsee to sue on the promissory note vested on special statutory provisions. Though the plaintiff's case was that she was the beneficial owner of the promissory note as the consideration therefor proceeded from her, inasmuch as she was not the holder of the promissory note, it would follow that she could not, on the basis of merely being the beneficial owner thereof, sue to recover the money due on the promissory note."

6. This point was decided by Venkatarama Reddiar v. Valli Akkal, (AIR 1935 Mad 181) (FB) Varadachariar, J., speaking for the Full Bench, while holding that the "beneficial owner could not, on the strength of that title, maintain a suit on a promissory note, observed further:

"It may be that even upon getting a declaration to this effect (that he is the beneficial owner), the beneficiary will not directly be able to sue upon the promissory note; but that does not mean that a declaration of this kind will be futile. Under other provisions of the Trustee Act, the beneficiary can sue for the execution of the trust by compelling the trustee to take the necessary steps and have a Receiver appointed in the course of such proceedings so that the Receiver may sue for the debt, or the beneficiary may also insist upon the trustee conveying the legal title to himself and after such transfer there will be no difficulty in his suing upon the promissory note in his own name."

7. This decision is clear authority for the proposition that even after getting a declaration by the beneficial owner of his status as such, he could not sue upon the note unless he got a transfer of it in his name in a suit to compel the promisee to effect a transfer or he filed a suit on the strength of the declaration to enforce the trust in an appropriate manner. This principle has been followed in Chinnakuzhandi Ammal v. Veera-Sami Mudaliar (AIR 1935 Mad 312) and Veeraghavasami v. Mangamma (1939-2 Mad LJ 812) : (AIR 1940 Mad 90) in both of which the facts were more or less similar."

These two decisions amply support the contention of the learned counsel for the appellant that the respondents, who are not the payees in the suit promissory note, Ex. A-1, and had not filed the suit as the endorsees thereof, are not entitled to maintain the suit on the promissory note, though the consideration for the same proceeded from them and the promissory note, Ex. A-1 had been executed in favour of one Ramanatha Iyer, who appears to have been the power of attorney agent of the respondents, though he has not been described as such in Ex. A-1.

8. The learned counsel for the respondents contended that it is open to the respondents, the beneficiaries, to file the suit on the promissory note. In this connection he relied upon a decision of the Full Bench of this Court in Muthuveeran Chetty v. Govindan Chetty (1961-2 Mad LJ 470) : (AIR 1961 Mad 518) (FB). But that decision does not help the respondents, for that was a case where a promissory note which had been executed in favour of one member of a joint family, had been allotted to another member of a joint family at a partition of the joint family properties without any endorsement of transfer or deed of assignment and it has been held that the suit filed on the note by the member to whose share the promissory note had been allotted at a partition was maintainable. It is not the case of the respondents that in any partition between themselves and the promisee, Ramanatha Iyer, the suit promissory note had been allotted to their share and they have thereby become entitled to recover the amount.

9. The learned counsel for the respondents next relied upon a decision

of the Supreme Court in Mackertich v. Steuart & Co., Ltd. (AIR 1970 SC 839) where it has been observed that a point not raised in the written statement cannot be allowed to be raised during the trial. The learned counsel for the respondents submitted that the appellant had not taken the plea in the written statement that it was not open to the respondents, who are not the payees or the endorsees of the suit promissory note to maintain the suit on the promissory note. It is not possible to accept this contention having regard to the fact that the question raised by the learned counsel for the appellant is one of law and a mere perusal of the promissory note and the plaint would show that it has been executed in favour of Ramanatha Iyer and that the respondents are not payees or endorsees, and it is only necessary for the appellant to bring this fact to the notice of the Court in connection with the legal submission that the suit by the respondents, who are not either the payees or endorsees of the promissory note is not maintainable. Under the circumstances, I agree with the learned counsel for the appellant that the suit, which has been filed on the promissory note by the respondents, who are not either the payees or endorsees is not maintainable.

10. The Second Appeal is, therefore, allowed, but in the circumstances of the case without costs throughout. and the suit is dismissed.

Appeal allowed.

AIR 1978 MADRAS 197

ISMAIL AND NATARAJAN, JJ.

Shah Sukraj, Appellant v. The Official Assignee, Madras, Respondent.

O. S. Appeal No. 79 of 1977. D/- 20-12-1977.*

Presidency Towns Insolvency Act (3 of 1909), S. 55 — Order annulling transfer — Transfer found to be act of insolvency — Application for annulment must be granted.

Once a particular transfer has been found to be an act of insolvency and the adjudication is based on that transfer, though it is necessary for the official assignee to file a separate application to avoid the transfer, the moment such an application has been filed, the annulling of the transfer must follow as a matter of course on proof of the order of adjudication itself without anything more. In other words, an order of adjudication itself does not annul the transfer; a separate order on an application made by the official Assignee is necessary for annulling the transfer, but once such an application is made, the order of annulling follows as a matter of course on proof of adjudication itself. AIR 1960 SC 70, Followed. (Para 5)

The transferee was impleaded as a party to the insolvency petition and it was he who preferred an appeal against the adjudication and failed. Therefore, on proof of adjudication, the Official Assignee was entitled to have the order annulling the transfer on his filing the application under S. 55. (Para 6)

Cases Referred:	Chronological Paras
AIR 1960 SC 70	4
AIR 1958 SC 1	1, 3
AIR 1943 PC 130	4
(1879) 10 Ch D 3 : 39 LT 525 Ex parte Learoyd; In re Foulds	4

T. R. Srinivasa Iyengar, for Appellant. Respondent in person.

ISMAIL J.:— This is an appeal against the order of Ramaprasada Rao J. dated 8-7-1977 and made in Appn. No. 355 of 1977 in I. P. No. 31 of 1967. One R. A, Khaleel was adjudged insolvent by an order of this court dated 23-12-1970 in I. P. No. 31 of 1967 filed by two creditors of the said R. A. Khaleel. The act of insolvency alleged was that on 9-3-1967, the said Khaleel conveyed 12-89 acres of lands to the appellant herein, with intent to defeat and delay the creditors, for a grossly low sum of Rs. 43000. The appellant herein, who is the transferee, was also impleaded as a party to the main petition, namely, the second respondent. Ganesan J., who disposed of the insolvency petition came to the conclusion that the debtor had committed an act of insolvency, within the scope of S. 9 (b) of the Presidency Towns Insolvency Act, hereinafter referred to as the Act. namely, 'A debtor commits an act of insolvency, if, in (the States) or elsewhere, he makes a transfer of his property or of any part thereof with intent to defeat or delay his creditors.' The learned Judge, after elaborately considering the evidence, recorded the following findings—

(1) On a fair consideration of the entire evidence, he had no hesitation in

*(Against order of Ramaprasada Rao J., in Appln. No. 355 of 1977, D/- 8-7-1977.)

coming to the conclusion that the lands had been deliberately undervalued and sold for an inordinately low price.

(2) The lands in question were worth not less that Rs. 70000 on the date of the sale and to that must be added a sum of not less than Rs. 7000 for the value of the crops standing on the land.

(3) The appellant herein entered into this transaction with a view to help the debtor out of his financial difficulties and to screen his only property from the reach of his creditors.

(4) The transfer should have been made for an extra consideration of not less than Rs. 25000 and the document was conveniently registered at Madras presumably with a view to screen the transaction from the knowledge of the creditors.

(5) The transaction in question, though registered, had been brought about secretly and collusively by the debtor with the appellant and others with intent to defeat and delay the second petitioner in the main petition and other creditors. Against this order of adjudication, the appellant herein filed O. S. A. 6 of 1971 before this court and the said appeal came to be disposed of by Kailasam C. J. and Ramanujam J. by judgment dated 26-7-1976. The learned Judges held that on the materials it was not possible for them to take a different view from the one taken by Ganesan J. that they were inclined to agree with the learned Judge that there was considerable material to show that the price mentioned in the sale deed could not represent the fair or market price of the property sold thereunder and that once it was found that the property had been undervalued, it would lead to an inference that the debtor intended to defeat or delay payment to the creditors by entering into that bargain. Thereafter the learned Judges stated as follows —

"Learned counsel for the appellant would, however, contend that, even though the debtor might have had an intention to defeat or delay payment to the creditors, no such intention has been attributed to the appellant and that therefore the transaction in his favour cannot be avoided. He referred to the decision of the Supreme Court in Subramania Iyer v. Official Receiver AIR 1958 SC 1, in support of his submission that, unless the transferee is found to have colluded with the debtor, the transaction in his favour cannot be held to be void under S. 55 of the Presidency Towns Insolvency Act. We are, however, concerned in this appeal only with the question whether the transaction entered into by the debtor with the appellant is an act of insolvency or not, and not, with the question whether the transaction would fall under S. 55 or not. It is sufficient for our purpose to deal with the question whether the transaction between the debtor and the appellant amounts to an act of insolvency and we are clear, on the material on record, that the transaction amounts to an act of insolvency and that the order of adjudication passed by the learned Judge based on such a finding is correct. The appeal is therefore dismissed."

After the disposal of the O. S. Appeal the Official Assignee filed an application, Appln. No. 768 of 1976, for recovery of possession of the property dealt with under the sale deed dated 9-3-1967 from the appellant herein. The appellant took up the plea that the Official Assignee could not merely apply for recovery of possession and that he had to file an application under S. 55 of the Act for the purpose of avoiding the transfer. Thereafter, the Official Assignee filed Appn. No. 355 of 1977 under Sec. 55 of the Act. In that application, the report of the Official Assignee merely referred to what happened previously, namely, the proceedings in I. P. 31 of 1967 and O. S. A. No. 6 of 1971 and the findings thereon. In paragraph 3 of the report, the Official Assignee stated—

"It is therefore submitted that the order of adjudication dated 23-12-1970 and confirmed in O. S. A; 6 of 1971 holding that the transfer is fraudulent and made in collusion with the respondent herein (appellant in the present O. S. A.) having been made in the presence of the respondent herein is binding on him and therefore the respondent has no defence to this application".

2. The appellant herein filed his counter affidavit and the matter came to be disposed of by Ramaprasada Rao J. under the impugned order. The learned Judge, after referring to the findings of Ganesan J. and the conclusion of the Bench which disposed of the O. S. Appeal, extracted the following passage from the order of Ganesan J.:—

"R. Ws. 1 and 2 have disclaimed real knowledge about the details of the sale transaction. R. W. 2 claims to have acted merely at the behest of the advocate and

RW 1 claims to have evinced interest in the sale only a day before the transaction".

After the above extract, the learned Judge proceeded to state:—

"These findings, which were not challenged earlier, and not even before me, give a well instructed mind a reasonable impression that the transferee avoided the box because it was convenient for him to do so. Such a deliberate avoidance of responsibility in a litigation like this, wherein the court is called upon to find the intention of the transferee, is such conduct which has to be cautiously judged and conclusions arrived at thereafter. This is a case in which the learned counsel for the transferee himself would say that even if a sum of Rs. 25000 or more has passed behind the legitimate field of activity, yet, that would not reflect upon the intention of the parties. I am afraid that I am unable to share the view. This is because if the parties intending to conclude the bargain, discuss over the details and in the course of such a conference as between them come to the conclusion that a certain thing which ought to not to be done in law, could be done and the bargain concluded, then that is an indicia of the intention and lack of bona fides of the parties including the transferee of the property which is the subject matter of the discussion in such a conference. Taking all these circumstances into consideration and having regard to the impression gained by Ganesan J., which were not in fact disturbed by the Division Bench, I am of the view that there was a common intention as between the transferor, viz., the debtor and the transferee, who is the respondent in this application to deliberately undervalue the property so that the screened consideration may be kept out from the creditors and they be deprived of the benefit therefrom".

It is on this finding and the reasoning that the learned Judge ordered Appln. No. 355 of 1977 as prayed for, subject to the adjustment of the equities and stated that no orders were necessary in Appln. No. 768 of 1976 in view of his decision in Appln. No. 355 of 1977. The learned Judge also directed the transferee to deliver possession of the property within three months from the date of the order. It is this order that is challenged before us.

3. Mr. T. R. Srinivasa Iyengar, learned counsel for the appellant, contends that having regard to the decision of the Supreme Court in Subramania Iyer v. Official Receiver, Quilon. AIR 1958 SC 1, holding that unless a transferee is found to have colluded with the debtor, the transaction cannot be held to be void under Sec. 55 of the Act, the burden was on the Official Assignee to plead and prove that the transferee had the scheme of defeating or delaying the creditors of the debtor, or, in other words, the transferor and the transferee had the common intention to defeat or delay the claims of the creditors of the debtor, and that in this particular case the Official Assignee had neither alleged nor proved any such intention on the part of the transferee.

4. It is unnecessary for us to consider whether the reasoning of the learned Judge (Ramaprasada Rao J.) for allowing the application filed by the Official Assignee, namely Appln. No. 355 of 1977, was right or not, in view of the decision of the Supreme Court in Ramaswami Chettiar v. Official Receiver, Ramanathapuram, AIR 1960 SC 70. Before us, the Official Assignee relied on the decision of the Privy Council in Md. Siddique Yousuf v. Official Assignee of Calcutta, 70 Ind App. 93 : AIR 1943 PC 130, which in turn followed the decision of the English Court in Ex parte Learoyd In re Foulds (1879) 10 Ch D 3. According to the Official Assignee, once a debtor is found to have committed an act of insolvency under S. 9 (b) of the Act, the very transfer which constituted the act of insolvency need not be separately adjudicated upon as coming within the scope of S. 55 of the Act and that the fact of adjudication itself would invalidate the transfer. The Official Assignee contended that that was the reason why he filed originally an application merely for recovery of possession, that once the appellant had raised an objection that he should file an application under S. 55 of the Act, he filed the application in question and that it does not in any way affect or alter the legal position that for getting rid of the transfer which constituted the act of insolvency, he need not independently allege and prove that the transferee shared such a common intention with the transferor and it is enough if the transferee was adjudged insolvent on that particular act of insolvency. We are of the opinion that this contention appears to be sound, having regard to the decision of the Supreme Court in Ramaswami

Chettiar v. Official Receiver, Ramanathapuram. AIR 1960 SC 70 referred to already. The Supreme Court elaborately considered the decision of the Privy Council referred to above which itself was based on the decision in Ex parte Learoyd In re Foulds, (1879) 10 Ch D 3, and after such consideration laid down (at p. 73 of AIR SC) —

"It is therefore abundantly clear that all that the Judicial Committee held in Md. Siddique Yousuf's case, 70 Ind App 93 : AIR 1943 PC 130, was that in a case under the Presidency Towns Insolvency Act, when the act of insolvency upon which an order of adjudication is founded is a transfer amounting to a fraudulent preference, the transferee cannot so long as the order of adjudication stands, question that finding, namely, that the transfer was a fraudulent preference and that, therefore, in an application by the Official Assignee to have that transfer annulled on the ground that it was a fraudulent preference. the order of adjudication is conclusive proof that the transfer was by way of a fraudulent preference and it was not open to the transferee to lead evidence to prove that the transfer was not a fraudulent preference. In such a case, therefore, the order of annulment had to be made as a matter of course on proof of the order of adjudication. The Judicial Committee did not hold that in such a case the order of adjudication itself annulled the transfer and no separate order of annulment was required for the purpose. In fact, it is obvious that they thought that a separate order annulling the transfer would be necessary even in such a case for otherwise they would not have stated that 'the decision of the High Court avoiding the transfer is plainly right' nor while setting aside the order annulling the transfer reserved the right of the Official Assignee, should the occasion arise, to make a further application to have the transfer declared void. The case, therefore does not support the proposition for which it has been cited. On the contrary, it clearly proceeds on the basis that even where the order of adjudication is based on an act of insolvency constituted by a transfer of property found to be a fraudulent preference, the transfer stands till it is set aside. In our view this is the correct position and nothing to the contrary has been brought to our notice." (underlining is ours)

5. Subba Rao, J. who concurred with the majority decision by a separate judgment also took the same view. Consequently this decision is authority for the proposition that so far as the provisions of the Act are concerned, once a particular transfer has been found to be an act of insolvency and the adjudication is based on that transfer, though it is necessary for the Official Assignee to file a separate application to avoid the transfer, the moment such an application has been filed, the annulling of the transfer must follow as a matter of course on proof of the order of adjudication itself without anything more. In other words, an order of adjudication itself does not annul the transfer; a separate order on an application made by the Official Assignee is necessary for annulling the transfer, but once such an application is made, the order of annulling follows as a matter of course on proof of adjudication itself. In the present case, as we have pointed out already, the transferee was impleaded as a party to the insolvency petition and it was he who preferred an appeal against the adjudication and failed. In such a context, in view of the decision of the Supreme Court, we are clearly of the opinion that on proof of adjudication, the Official Assignee was entitled to have the order annulling the transfer on his filing the application, namely, Appln. No. 355 of 1977.

6. Mr. T. R. Srinivasa Iyengar, learned counsel for the appellant, contended that having regard to the reservation made by the Bench in O. S. Appeal, such a consequence cannot flow. We have already extracted the relevant passage in the judgment of the appellate Bench. It is true that the Judges of the Appellate Bench pointed out that they were concerned only with the question whether the transaction entered into by the debtor with the appellant was an act of insolvency or not and not with the question whether the transaction would fall under S. 55 of the Act or not. If we may say so with respect, the Bench could not have said anything else because the appeal itself was only against the order of adjudication and in such an appeal the court was concerned only with the question whether the debtor had committed an act of insolvency, namely, in the particular case under S. 9 (b) of the Act or not and the court was not concerned with anything else. Therefore, the re-

servation made by the appellate Bench can be construed as indicating the procedure to be followed and not dealing with any method of proof or burden of proof. The question we are called upon to consider did not arise before the learned Judges and therefore we cannot construe the reservation made by the Bench as imposing an obligation on the Official Assignee to allege and prove afresh that the transaction in question fell within the scope of S. 55 of the Act.

7. Under these circumstances, we dismiss the appeal and uphold the conclusion of Ramaprasada Rao, J. though for the reasons given by us.

8. The learned counsel for the appellant put forward one other submission, namely, that the learned Judge has directed the appellant to hand over the property to the Official Assignee subject to the equities which have to be adjudged upon by the Official Assignee and contends that the equities cannot be adjudged upon by the Official Assignee and they have to be adjudged by the Court itself, as the Official Assignee himself was a party to the proceedings. The Official Assignee obviously can have no objection to the equities being adjudged by the Court. Consequently the only change we would like to make in the order of Ramaprasada Rao, J. is that the equities between the parties will be adjudged by the Insolvency Court, itself. Subject to this change, the appeal is dismissed, as already stated. There will be no order as to costs. The appellant will have six months' time to deliver vacant possession of the land.

Appeal dismissed.

AIR 1978 MADRAS 201

RAMAPRASADA RAO AND PAUL, JJ.

The Revenue Divisional Officer, Chidambaram, Appellant v. A. N. Damodara Mudaliar and others, Respondents.

Appeals Nos. 367 and 603 of 1973, D/- 10-10-1977.*

(A) Land Acquisition Act (1 of 1894), S. 9 (2) and (3) — Notice — Period of 15 days granted for objections from when to be counted — Date of actual service of special notice and not constructive knowledge by public notice material.

Natural justice requires that any notice to be effective and to be positive, should have been served on the person against whom it is intended and without proof of such actual service of such notice, a bare inference of constructive knowledge of the obligation to prefer the claim within 15 days from the date of the notice, ought not to be pressed into service to the prejudice of the affected party. Reading S. 9 (2) and 9 (3) together the intendment of the prescription and mandate in sub-s. (2) of S. 9 of the Act is to see that the notice under S. 9 (2) as in S. 9 (3) should also be served on the persons affected and that ought to be the date which has to be reckoned for purpose of calculating the 15 days time available to the claimant for preferring his objections under the above sub-section. The prescription in S. 9 (2) of the Act read in conjunction with the well-known principles of natural justice, requires that it is the date of service of a statutory notice in any enactment which ought to be the relevant factor to consider whether the subsequent conduct of the addressee is in accordance with the statute or not. Thus the date of the public notices alone cannot govern the situation. But it is the date of service of such notices which is the essential criteria to consider whether the claimants have acted in accordance with the statute or not. AIR 1930 Mad 836, Rel. on. (Para 4)

Anno: AIR Manual (3rd Edn.), Land Acquisition Act, S. 9, N. 9.

(B) Land Acquisition Act (1 of 1894), S. 23 — Classification of land for purposes of compensation — Land whether agricultural or not — Determination — Public records — Relevancy.

Where the lands are surrounded on the west, south and east by public streets and on the north by a railway station and very near to these lands are colonies which had already developed, the proximity of such a residential locality to the acquired lands, gives a different status and classification altogether and a mere reliance on the public records for purposes of appreciating the use to which the lands can be put to, ought not to be always encouraged. Potential inhered in the land should also provide a guide for evaluation is more or less accepted. (Para 4)

The condition of the land together with its existing advantages, immediate

*(Against decree of Sub-J., Cuddalore, D/- 24-1-1972).

possibilities and prospective capabilities go into the mechanics of computation. The impact of a developed neighbourhood or the prospect of it in and around the sector of acquisition turns such potential of the land to account as well. Future utility which an owner of the land can take advantage of, ought not to be conjectural, but should reasonably be based on normal business principles. (1970) 83 Mad LW 621, Foll. (Para 7)

Anno: AIR Manual (3rd Edn.), Land Acquisition Act, S. 23, N. 7.

(C) Land Acquisition Act (1 of 1894), S. 23 — Severance compensation — Grant of — Well in acquired land taken resulting in loss of irrigation facility to neighbouring land — No ground for awarding severance compensation. (Para 9)

Anno: AIR Manual (3rd Edn.), Land Acquisition Act, S. 23, N. 1.

Cases Referred: Chronological Paras

(1970) 2 Mad LJ 628 4
(1970) 83 Mad LW 561 7
(1970) 83 Mad LW 621 7
AIR 1960 Bom 232 6
AIR 1930 Mad 836 : 60 Mad LJ 410 4

Govt. Pleader, for Appellant; N. S. Varadachari, for Respondents.

RAMAPRASADA RAO, J.: — These two appeals are against the judgment of the learned Subordinate Judge, Cuddalore, in O. P. Nos. 42 of 1968 and 43 of 1968 on his file. A. S. 367 of 1973 is by the State Government against the decision of the Court below in O. P. 42 of 1968. A. S. 603 of 1973 is against such a decision in O. P. 43 of 1968. The lands in O. P. 42 of 1968 are owned by a temple called Patalleswarar Devastanam. The lands which are the subject-matter of O. P. 43 of 1968, are owned by a private party. The Land Acquisition Officer, after the promulgation of the notice under S. 4 (1) of the Land Acquisition Act on 27-12-1961, issued notices to the claimants as above which are marked as Exs. B-2 and B-5. Both the notices are dated 24-4-1965. There is some controversy on the question as to whether the date of the notice should be taken as the date of service of such notice on the claimants. The case of the State is that the date of the notice should primarily be taken into consideration, for all purposes, whilst the case of the claimants is that the date of service of such notice governs all relevant considerations. We shall advert to it at the appropriate time. In O. P. 42 of 1968, lands belonging to the Devastanam and situate in T. S. 258, 267 and 268 were acquired. The extent of the land acquired in T. S. 258 is 3-02 acres with a well thereon. In T. S. 267, an extent of 3-61 acres with a well and in T. S. 268 an extent of 4-24 acres with a shed are acquired. In O. P. 43 of 1968, 51 cents in T. S. 264, 2.83 acres with an engine shed and a hut and a bore-well therein in T. S. 265 and 21 cents in T. S. 266 were acquired for the public purpose of providing house sites for low income group Government servants. The claimants were not satisfied with the award of Rs. 820 per acre, granted by the Land Acquisition Officer who classified the lands as agricultural dry lands and they sought for a reference under S. 18 of the Land Acquisition Act to the Civil Court. The learned Subordinate Judge of Cuddalore based his estimate of the market value of the lands on the situation of the lands and their potential value and after taking into consideration such other relevant factors for assessment, valued the lands at Rs. 6,000/- per acre. The State is dissatified with such assessment made by the Civil Court and hence the two appeals.

2. The first contention of the learned Government Advocate, appearing for the appellant. is that there has been a proper service of notice which is required under S. 9 of the Land Acquisition Act and such a notice having been properly served on the claimants, the fact that they did not prefer compensation in due form with the necessary particulars within the time prescribed, before the Land Acquisition Officer, is fatal to a grant of any sum over and above that granted by the Land Acquisition Officer. Secondly, it is said that the classification made by the Land Acquisition Officer that the lands acquired for the public purpose are agricultural lands, is correct and an interference by the Civil Court regarding the same is not warranted in the facts and circumstances. Thirdly it is said that the value fixed by the Court below is rather on the high side. We shall take up the first contention.

3. Exs. B-2 and B-5 are admittedly the notices issued by the Land Acquisition Officer under S. 9 (2) of the Act. It is not in dispute that the public notice contemplated under S. 9 (1) has been published. What is, however, said is that the date as it appears in Ex. B-2 and B-5 as the date of issuance of the notice under S. 9 (2) of the Act shall be deemed to be the date on which the claimants should have been served or in any event

be deemed to have been put on specific notice of the fact that the Collector expects a reply in the shape of a statement to be made in writing and signed by the claimant or his agent within 15 days after the date of such notice stating the interests of the claimant in the land and particulars of claim to compensation for such interests and other objections. Probably the provocation to put an accent on the date of the notice as the relevant circumstance for consideration under S. 9 (2) of the Act is given by the different language used by the Legislature in S. 9 (3) of the Act. In S. 9 (3), it is said that the Collector shall also serve the notice to the same effect on the occupier of such land. The word 'serve' does not appear in S. 9 (2) of the Act. But it merely contemplates that such notice shall state the particulars of the land and should require persons interested to appear personally before the Collector at a time and place mentioned therein, such time not being earlier than 15 days after the date of the notice and state their objections.

4. Natural justice requires that any notice to be effective and to be positive, should have been served on the person against whom it is intended and without proof of such actual service of such notice, a bare inference of constructive knowledge of the obligation to prefer the claim within 15 days from the date of the notice. ought not to be pressed into service to the prejudice of the affected party. Reading S. 9 (2) and 9 (3) together, we are of the view that the intendment of the prescription and mandate in sub-s. (2) of S. 9 of the Act is to see that the notice under S. 9 (2) as in S. 9 (3) should also be served on the persons affected and that ought to be the date which has to be reckoned for purpose of calculating the 15 days time available to the claimant for preferring his objections under the above sub-section. There is ample authority for the proposition that any deviation from the mandate as appearing in S. 9 (2) of the Act in the matter of the grant of interval of 15 days to the affected party to submit his objection, has been held to be a contravention of the mandate in the statute. In Venkatarama Iyer v. Collector of Tanjore, 60 Mad LJ 410 : (AIR 1930 Mad 836) it was held that the personal notice under S. 9 (3) of the Act should afford the occupier of the land the same interval of 15 days for stating the particulars of his claim for compensation as is provided for in the case of a public notice under sub-s. (2) of S. 9. In that case of course the Court was concerned with the notice under sub-s. (3) of S. 9. The principle appears to us to be the same and this prescription in S. 9 (2) of the Act read in conjunction with the well-known principles of natural justice, requires that it is the date of service of a statutory notice in any enactment which ought to be the relevant factor to consider whether the subsequent conduct of the addressee is in accordance with the statute or not. In the instant case, R. W. 2, examined on behalf of the referring Officer, admits that Exs. B-2 and B-5, were served only a week prior to the date of the hearing. Undoubtedly such service contravenes the main intention of the salutary provision in S. 9 (2) of the Act. There is also evidence on the side of the claimants in A. S. 367 of 1973. The Executive Officer of the Devastanam maintains a diary. He produced Ex. A-17, a certified copy of an extract from the diary kept by him during the relevant period. That shows that the temple was only served on 19-5-1965. Here again, it falls short of the 15 days time for appearance prescribed in S. 9 (2) of the Act. Thus this is a case where the date of the notices Exs. B-2 and B-5 alone cannot govern the situation. But it is the date of service of such notices which is the essential criteria to consider whether the claimants have acted in accordance with the statute or not. Obviously, the learned Government Advocate would stress upon this as this factor is linked with another provision in the Land Acquisition Act. namely, S. 25 of the Act. Sub-secs. (2) and (3) of S. 25 of the Act contemplate two different situations. Under sub-s. (2) of S. 25 of the Act, the applicant should have refused to make a claim or omitted, without sufficient reason, to make such a claim. In both the above cases, the amount awarded by the Court shall in no case, exceed the amount awarded by the Collector. What is contemplated in sub-s. (3) of S. 25 of the Act is that if the claimant has omitted for a sufficient reason (to be allowed by the Judge) to make such a claim, then the amount awarded to him shall not be less, but may exceed the amount awarded by the Collector. The objection therefore of the State is that as the claimants did not prefer their claims in time and as there was no sufficient reason for their omission to do so, they ought not to be

awarded any amount in excess of the amount awarded by the Land Acquisition Officer. We are unable to agree. On merits, we have already come to the conclusion that the 15 days time provided for under S. 9 (2) of the Act was not given to the claimants in both the appeals and that by itself is a sufficient reason for the learned Subordinate Judge to act under sub-s. (3) of S. 25 of the Act and award an amount in excess of that awarded by the Collector. This question also was considered by our Court in State of Madras v. Srinivasa Iyengar, 1970-2 Mad LJ 628. The Court held that if there was a deliberate refusal on the part of the claimant to make a claim and if the omission to make it was without sufficient reason, then the Court would be justified in not awarding a compensation in excess of that awarded by the Land Acquisition Officer. But if there are circumstances to show that the omission was for a sufficient reason, then sub-s. (3) of S. 25 of the Act would come into play.

5. The merits of this case disclosed that the claimant in O. P. 43 of 1968 who was only served with a notice a week before the hearing, filed a partition deed Ex. B-3 (petition to R.D.O. Chidambaram) as also a medical certificate Ex. B-4 to show that he could not file his statement of objections in time. The Land Acquisition Officer ignored such objections, but passed the award on the date of hearing fixed by him. The explanation given by the Executive Officer that he took some time to get instructions from the higher hierarchy cannot be lightly brushed aside as one without substance or without reason. Therefore the Court below was right when it upheld the claimant's contention that the omission to file their claims and their objections on or before the date fixed for hearing by the Land Acquisition Officer under S. 9 of the Act, was with sufficient cause and that the omission was neither deliberate nor wanton. We therefore agree with the claimants-respondents that this is not a case in which S. 25(2) of the Land Acquisition can be invoked and the claimants be refused a compensation higher than that awarded by the Land Acquisition Officer.

6. The third argument of the appellant is that the market value fixed by the Civil Court is rather on the high side. We have already made it clear that the classification of the lands as agricultural lands, by the Land Acquisition Officer is not at all justified. No doubt the mere fact that the lands are situate in a Municipality or in a town cannot by itself be urged as one and sole factor to decide that though in public records the lands are described as agricultural lands, they ought to be treated as house sites or lands fit for house sites. The decision relied upon by the learned Government Pleader in V. C. Deo v. Special L. A. Officer, AIR 1960 Bom 232 is not apposite as would be seen hereafter. There the Division Bench of the Bombay High Court said that every piece of land within the Municipal area acquired by the Government may not be assumed to have an immediate building potentiality. The circumstance that some temporary huts ments had, during the period of requisition of the agricultural land by the Government, included in the Municipal area had been constructed on the land would not attribute to the land a building potentiality at the date of the acquisition.

7. What is the reasonable classification to which the acquired lands can be pigeon-holed in this case? The lands are surrounded on the west, south and east by public streets and on the north by a railway station. Very near to these lands are colonies which had already developed and the proximity of such a residential locality to the acquired lands, gives a different status and classification altogether and a mere reliance on the public records for purposes of appreciating the use to which the lands can be put to, ought not to be always encouraged. The evidence in this case also is a pointer to the potential use to which these acquired lands can be put to. P. Ws. 1 and 2 speak of such an inhered potential in the lands. They were not cross-examined and nothing against such a reasonable assumption was brought out. That such potential inhered in the land should also provide a guide for evaluation is more or less accepted by this Court. Vide Egappa Gounder v. Special Tahsildar, Madras, (1970) 83 Mad LW 561 and State of Madras v. Ramaswami, (1970) 83 Mad LW 621. In one of the cases to which one of us was a party, we made it clear that the condition of the land together with its existing advantages immediate possibilities and prospective capabilities go into the mechanics of computation. The impact of a developed neighbourhood or the prospect of it in and around the sector of acquisition turns such

potential of the land to account as well. But certain limitations to the adoption of the above principle were also pointed out. The court said that such future utility which an owner of the land can take advantage of, ought not to be conjectural, but should reasonably be based on normal business principles. In the Bombay case cited, there was only a chance of the properties developing. But in contradistinction to the observation of the learned Judges of the Bombay High Court, in the case under review, there is certain potential in the land and such potential being referable to its certain future improvements as a building site, it cannot be treated as agricultural lands. We are therefore unable to agree with the third contention of the learned counsel for the appellant that the lands have to be still valued only as agricultural lands. The court below has rightly treated the lands as potential house sites and valued the same.

8. As regards the price reliance was placed upon Exs. A-2 to A-4 by the civil court. The important date is provided under Ex. A-2 which is dated 5-9-1962. This of course is a post notification sale. But in the absence of any other sale in the vicinity of a building site, the court had to refer to Exs. A-2, A-3 and A-4 which sales took place in the years 1962 and 1964 for purposes of a fair evaluation of the just compensation payable to the land. The witness examined for the Referring Officer, R. W. 2, in his evidence stated that the lands sold in S. No. 365 are in no way different from the lands acquired. The lands sold in S. No. 365 are lands which were the subject-matter of the sale in Ex. A-2. It cannot be said that Exs. A-3 and A-4 relate to sales which are dissimilar to the lands comprised in the sale deed Ex. A-2. Having regard to the fact that PWs. 1 and 2 were not even cross-examined on their testimony as to the fitness of the acquired lands as building sites and the adaptability of the value in Ex. A-2, we are unable to say that the value fixed by the court below at Rs. 6000 per acre on the date of the notification under Sec. 4 (i) of the Act is in any way unreasonable.

9. The last point urged before us is that the cross objections in A. S. 603 of 1973 are without merits. Learned counsel for the cross-objector in A S 603 of 1973, would say that he is entitled to severance compensation. According to him, the well in the land acquired, having been compulsorily taken away and severed from the neighbouring lands which the well was watering and irrigating, he has suffered thereby and therefore, he would be entitled to severance compensation. We are unable to agree that this head of compensation provided for in Sec. 23 of the Act, would ever take in any such claim at all. "Severance compensation" as the term itself indicates, is compensation awardable to the affected person because of the severance of the land into different parcels by reason of the compulsory acquisition. What is said is that because of the well in the land has also been acquired and for which compensation has also been paid, the surrounding lands of his have suffered damage. Learned counsel for the cross objector did not point out to us any specific provision under which such a grant can be made and we are unable to find one ourselves under which this claim can be sustained. There is fallacy equally in this argument because the compensation has been granted to the claimants not as an agricultural land, but as a house site. When we querried Mr. N. S. Varadachari, whether he could still insist on his case for severance compensation, and whether the cross objector would be willing to take compensation for the land on the basis that it is agricultural lands, he expressed his difficulty. On that ground also, this claim for severance is not sustainable. The appeals fail and even so the memorandum of cross objections. They are dismissed. There will be no order as to costs.

Appeals dismissed.

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RAMAPRASADA RAO AND RATNAVEL PANDIAN JJ.

Kumudavalli and another, Appellants, v. P. N. Purushotham, Respondent.

O. S. A. No. 61 of 1974 D/- 16-8-1977.*

(A) Civil P. C. (5 of 1908), S. 92 (1) — Public Charities — Suit to remove existing trustee — Competency to file — plaintiff having remote relationship with founder of trust — His interest in trust, held not sufficient to maintain suit.

(Para 5)

*(Against judgment and decree of Paul J., in C. S. No. 73 of 1972, D/- 23-3-1974.)

Anno: AIR Comm. C. P. C. (9th Edn.), S. 92, N. 8.

(B) Civil P. C. (5 of 1908), S. 92 (1) — Public Charities — Suit to remove trustee "Person having interest" — Trust endowed for running School — Old student of School and person in locality — Held, have interest — Suit maintainable — Judgement in C. S. No. 73 of 1972, D/- 23-3-1974 (Mad), Reversed.

A resident of the locality who has some nexus or connection with the trust in the sense that he has interest in its well-being and prosperity can under certain circumstances, be taken to be a person having an interest in the trust. In the case of a public School such presumption could also be raised if he is an old student of the School, which necessarily involves a connection with it and if he is also a resident of the locality in which the School is situate he is doubly qualified to lay an action along with another under S. 92. (Para 4)

If a fair inference could be drawn that a resident in the locality is subjectively interested in the well-being of the School and, therefore, the trust, since his object is that his descendants as also the children of the parents in the locality should conveniently get their education in the nearby school, then such an interest would come within the meaning of the expression 'having an interest' and cannot be held to be illusory or hypothetical. Judgment in C. S. No. 73 of 1972, D/- 23-3-1974 (Mad), Reversed. (Para 6)

Anno: AIR Comm., C. P. C. (9th Edn.), S. 92, N. 8.

RAMAPRASADA RAO, J.: — The plaintiffs in a suit filed u/s 92, C. P. C., in C. S. No. 73 of 1972, on the file of the Original Side of this court, are the appellants. After obtaining the sanction from the Advocate General, Madras, the plaintiffs have filed the present suit to remove the defendant from trusteeship, for appointing a fit and proper person as trustee for a public trust endowed for the purpose of running and maintaining what is known as Nagammal Hindu Higher Elementary school, which was dedicated by late Nathamuni Chetti under a deed of trust dated 2-6-1941. For the said purpose certain immoveable properties were also ear-marked by the author of the trust. The plaintiffs complained of mismanagement by the respondent, who is now functioning as trustee. They would claim to be interested in the trust, the first plaintiff being the widow of late Nathamuni Chetti and the second plaintiff being a close relation and old boy of the elementary school besides being a resident of the locality. They catalogued several events in the plaint according to which their main complaint is that the defendant failed to maintain the school as per the directions of the trust and the author of the trust and has also caused wanton and continuous breach of the express terms thereof. They would also demand an account from the defendant from 1969 till date and sought for ancillary reliefs. The defendant in the written statement questions the status of the second plaintiff as a plaintiff in a suit under S. 92 C. P. C; as he is not a descendant of the founder and as he cannot be said to have any real or substantial interest in the trust. He would, therefore, allege that the suit is not properly framed and therefore, not maintainable, as the primary requirements under S. 92 C. P. C. is that there should be two or more persons interested in the trust, who could seek for any reliefs set out in the section. Besides challenging the sanction given by the Advocate General the defendant would complain that the plaintiffs' objective is to enrich themselves and not to further the objects of the trust. He would deny that he has committed any acts of waste and would plead that if any other trustee is appointed to manage the trust in the place of the defendant it would amount to a violation of the founder's express desire and considered intention. Paul J. who tried the suit, framed the following issues—

1. Whether the suit is not maintainable for any reason?

2. Whether valid sanction has been obtained from the Advocate General under S. 92 C. P. C. ?

3. Whether the trust is being mismanaged by the defendant?

4. Whether the grant is suspended on account of mismanagement on the part of the defendant?

5. Whether any breach of the wish of the founder of the trust was caused by the defendant?

6. Whether the first plaintiff is entitled to file the suit?

7. To what relief is the plaintiff is entitled?

2. On the first issue, the learned Judge found that the suit was not maintainable since in the related circumstances the second plaintiff cannot be said to have

the requisite interest to file and prosecute the action. He held that the plaintiffs obtained due sanction and the plaintiffs are entitled to file the suit. On issues 3, 4 and 5, which covered the main points of controversy between the plaintiffs and the defendant. the learned Judge after an elaborate discussion into the oral and documentary evidence held that the main item of trust, namely, the Nagammal Hindu Higher Elementary school is being mismanaged by the defendant and that the grant by the Government was suspended on account of such mismanagement and that the defendant did act against the wishes of the founder. In the end, however, the learned Judge observed as follows—

"In view of my findings on issues Nos. 2 to 5, the plaintiffs would have been entitled to all the reliefs which they have claimed in the plaint, but in view of my finding on issue No. 1, that the suit is not maintainable since the second plaintiff does not have the requisite interest, this suit has to be dismissed and the plaintiffs will not be entitled to the reliefs claimed in this suit. Hence this suit is dismissed, but, in the circumstances of the case, I direct each party to bear their own costs."

The plaintiffs have come up in appeal.

3. The respondent is not represented before us. It, therefore, became necessary for us to consider the question in some detail. We may at once state that as the respondent is not before us and has not cared to challenge in any manner the findings of the learned Judge on issues 3, 4 and 5, which is to the effect that the defendant did commit acts of waste and mismanaged the trust and acted against the wishes of the founder, it is not necessary for us to retread the ground. We however perused the judgment and we have no reason at all to differ from the findings on these issues of the learned Judge. We therefore, confirm the same.

4. The only substantial question which arises for consideration in this appeal is whether the suit as framed is maintainable. S. 92 C. P. C., which operates as a shield against the mismanagement of public trust whether charitable, religious or otherwise, is as far as possible exhaustive so as to afford protection for the due and proper maintenance, upkeep and processing of public trusts and to guard as against mismanagement, misappropriation and wild indulgence on the part of those who are for the time being enjoined to administer such trusts. The infringement of private rights is undoubtedly outside the scope of enquiry under the Section. As long as it is apparent from the pleadings and from the evidence led in a particular action that the suit was not for vindication of personal or individual rights, but the suit was brought in a representative capacity for the advancement of the objects of the trust, then there can be no possible bar to the maintainability of such a suit. It should be established that the persons, who are complaining against the administrators of the trust have a real interest in praesenti and not a mere sentimental interest. The purposeful use of the expression two or more persons having a direct interest in the trust was intended to widen the class of persons entitled to institute the suit under the section. Here again the interest should be real, substantive and an existing interest and not a mere remote, fictitious or contingent one. It would, therefore, appear from the meaningful expansion of the word 'interest' in S. 92 C. P. C., that a person in order to lay a suit under it should plead and establish that he has some tangible interest towards the maintenance and progress of the public trust. Such an interest could be established in a number of ways. A resident of the locality who has some nexus or connection with the trust in the sense that he has interest in its well-being and prosperity, can. under certain circumstances, be taken to be a person having an interest in the trust. In the case of a temple a fair presumption of the existence of such a right in a person can be raised in the case of a resident in the locality, who visits the temple and who takes part in normal rituals and religious functions. In the case of a public school such presumption could also be raised if he is an old student of the school, which necessarily involves a connection with it and if he is also a resident of the locality in which the school is situate he is doubly qualified to lay an action along with another under S. 92 C. P. C. What is to be primarily established is that the suit relates to a trust created for a public purpose (2) it should contain allegations against the person-in-breach, such as breach of trust, misappropriation or mismanagement and (3) the necessity in the particular circumstance of a given case for administration of the trust by a body other than the body in management. If

two or more persons having an interest in the trust file such a suit, then it is maintainable. The question in the instant case before us is whether the second plaintiff has such an interest.

5. It is, therefore, necessary for us to deal with the evidence led in this case before we consider further legal requirement and its aspects. One argument which was addressed before us was that the second plaintiff is the son of the founder's wife's sister. Such a relationship cannot be said to be a substantial compliance of the primordial requirement under S. 92 C. P. C. for the maintainability of a suit under it. A remote relationship through the female line by itself cannot, as rightly pointed out by the learned Judge, be such an interest which is sufficient for him to lay an action along with the first plaintiff against the defendant, particularly under the special procedure prescribed under S. 92 C. P. C.

6. Nextly, can the second plaintiff be said to be interested in the trust because he is a member of the public and a resident of the locality. We have already hinted at the weightage to be given to this aspect. No doubt, mere residence and the badge of being a member of the public of the locality may not by itself be sufficient to hold that the second plaintiff has sufficient interest within the meaning of S. 92 C. P. C. The school in question as founded by late P. V. Nathamuni Chetti is admittedly a public school in the sense all members to whichever community they belong are admitted. In the peculiar case under consideration which relates to the creation of trust for the running of a school several peculiar features enter into the discussion. A resident of the locality in which the school is situate and in which the trust is functioning may not have a direct nexus with the management of the institution, but is undoubtedly interested in keeping the school truthful, upright and well-managed. After all a school is established by a donor so as to propagate education amongst the children in the lcality and any parent therefore, living nearby would obviously be interested in raising an expectation within himself that the school is a fit and proper institution in which his children could study. If it is a case of a temple or choultry evidence may be necessary to show that a resident visits the choultry or the temple or that the choultry was put up therein for the benefit of the community to which the donor belongs. But in the case of a school such an objective test is not possible. If a fair inference could be drawn that a resident in the locality is subjectively interested in the well-being of the school and, therefore, the trust, since his object is that his descendants as also the children of the parents in the locality should conveniently get their education in the near by school, then such an interest would in our view come within the meaning of the expression 'having an interest' and cannot be held to be illusory or hypothetical. Indeed the line of cases cited before the learned Judge (were) all related to either a temple or a choultry and the ratio in such decisions was that in order to uphold an interest in such trusts, it should be a present and substantial one and not a remote and a fictitious one. The learned Judges, in the cases cited before Paul J. were concerned with either a temple or a mosque or a choultry. In all such cases it was held that the visitations to a temple and resort to a choultry or frequent visits to a Mosque could only create such a present and a substantial interest, but can that theory automatically be extended to a school which is the fountain of education to which children are sent by the people in the locality to get their children educated. Excepting for their subjective satisfaction that the school is run well and on sound ground by persons who are fit and proper to administer the same, they cannot be said to have any more interest in the well-being of the school. Nevertheless, such an interest cannot be said to be a fictitious or an illusory one. In our view it has a present and a meaningful interest also in the trust because the residents are interested in the well-being of the school and its proper regulation. It is not necessary that a particular person to have an interest under S. 92 C. P. C. should be personally interested or personally affected by any act done by the administrator of the trust. If it could be established that they are interested in the proper conduct and running of the trust and are involuntarily involved in evincing interest in its being regulated and conducted in accordance with the terms of the trust, it could reasonably be said, that such a person has enough of an interest in the trust concerned.

7. In the instant case, it is not in dispute that the second plaintiff is a resident of the locality and is thus a member

of the public. The claim of the second plaintiff is that he has studied during 1947-48 in this school. This is corroborated by P. W. 7, the first plaintiff. The defendant did not produce any records of the school of the year 1947-48 to disprove that the plaintiff was not an old student of the Nagammal Hindu Higher Elemenary School of which he is the trustee. P. W. 1's evidence is that the second plaintiff's parents were living outside Madras and that even during the lifetime of her husband the second plaintiff was brought up by her and was educated in the early days in Nagammal's school. Paul J. was of the view that since the second plaintiff did not summon the production of the transfer certificate issued to him by the Nagammal Hindu Higher Elementary School, his case should not be believed. But on the other hand by making a specific and a serious allegation which touches the core of the suit in so far as its maintainability is concerned, the onus shifted to the defendant to disprove such an allegation. We have no special ground to disbelieve the plaintiffs that the second plaintiff was an old student of the school. The point made out was that no such allegation was made in the plaint. In the plaint no doubt. the second plaintiff pleaded that he was entitled to file the action and he was a member of the public and interested in the growth, welfare and good management of the trust. The fact whether he was an old boy of the school is only a matter of evidence and need not be a matter of pleading. He swore to this aspect in the witness box and was supported by the first plaintiff as PW 7. We have already made it clear that in the case of a temple, visitations to it on important occasions like marriage festivals or other religious functions in the temple itself might be a substitute of evidence to show that a resident within two or three miles of the temple site might be said to have an interest in the temple. But, in our view, when it is established that the second plaintiff was a resident of the locality and was also a member of the family of the first plaintiff and her husband though in the female line and claims to have studied in the school during the particular period for which there is no contrary evidence, it cannot be said that the second plaintiff has no interest at all in the well being and upright management of an educational institution which, as we reiterated already, is intended to benefit every one in the locality in the sense that it has been created for the purpose of bringing into its fold the children who are the children of the residents in the surrounding and train them as citizens of our country.

8. We agree with the learned Judge that plaintiffs are not actuated by any personal interest or personal motives in filing this action. But we are unable with respect to share his view that the second plaintiff cannot be said to be a person having an interest in the trust.

9. For the foregoing reasons we are of the view that the second plaintiff, in the circumstances of the case and having regard to the fact that the subject matter of the trust is a public school it should be held that he is a person having a substantial interest in the well-being of the institution and that the second plaintiff along with the first plaintiff do comply literally with the mandates regarding the number of persons to institute the action under S. 92 C. P. C. We set aside the finding under issue No. 1 and hold that the suit has been properly filed.

10. We have already held that the learned Judge in all other respects condemned the action of the defendant and in fact expressed the view that but for his finding on issue No. 1, that the suit is not maintainable, the plaintiffs should be entitled to all the reliefs which they have claimed in the plaint. As according to us the suit is maintainable, and as there is no challenge on the findings rendered by the learned Judge on issues 2 to 5 the suit has to be decreed as prayed for and the defendant is directed to render a true and proper account of the income derived in the management of the school from 1968 till date. The subject matter, however, is remitted back to the learned Judge sitting on the Original Side for him to frame a suitable scheme for the administration of the trust and after the scheme is so framed, direct the defendant to deliver the suit properties to the new trustees to be appointed under the scheme and pass such further orders as are necessary for the vesting of the properties in the trustees to be constituted under the scheme.

11. The appeal is allowed; but there will be no order as to costs.

Appeal allowed.

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P. S. KAILASAM, C. J. AND BALASUBRAHMANYAN, J.

R. Thathadesika Thathachariar and another, Appellants v. K. V. Alagia Manavala Jeerswamy (Died) and others, Respondents.

Letters Patent Appeal No. 45 of 1974, D/- 9-9-1976.*

(A) Letters Patent (Mad), Cl. 15 — Points on which appeal may be heard — Concurrent finding of fact refused to be disturbed.

Concurrent findings of fact by all the three Courts below that the temple did not own any elephant between 1894 and 1940 was not disturbed : S. A. No. 98 of 1973, D/- 27-6-1974 (Mad) by Ramanujam, J., Affirmed. (Para 13)

Anno: AIR Manual, 3rd Edn., Letters Patent, Cl. 15, N. 13.

(B) Civil P. C. (5 of 1908), O. 7, R. 7 — Relief — Relief based on finding on the real and substantial question in issue was sustained notwithstanding that it was not strictly in accordance with the prayer.

Where the relief granted was found based on the finding on the real and substantial question in issue in the suit, it could not be challenged merely because it was not in terms of the relief prayed for. The plaintiff in this suit sought a direction to the defendants (Temple Trustees) to accept the plaintiff's gift of an elephant to the temple and a permanent injunction restraining the defendants from putting Vadagalai namam (particular face mark) to the living elephant donated. Their contention was that the well established and legally recognised usage in that behalf was sought to be interfered with by the defendants. The defendants pleaded that the temple elephant was always given Vadagalai namam and that was being followed. After the plaint was filed the defendants acquired an elephant and put Vadagalai namam on its forhead. The plaintiffs' application for amending the plaint to include reliefs of perpetual injunction against putting Vadagalai namam on the elephant surreptitiously brought into the temple and a direction to remove Vadagalai namam and put Thengalai namam instead was dismissed on the only ground that the judgment in the suit was being delivered on the same day. The suit was decreed directing the defendants to paint the living elephant in the temple with Thengalai namam and permanently restraining the defendants from putting Vadagalai namam on the living elephant maintained or possessed by the temple: Held (in the High Court) rejecting the defendants/appellants' plea that the prayer being different and the plaintiff's amendment application having been dismissed, the suit ought not to have been decreed in the manner done. The reliefs granted held reflected the finding on the real and substantial question in issue in the suit, viz., as to what namam should be put on the living elephant: S. A. No. 98 of 1973 Dt. 27-6-1974 (Mad) Affirmed. (Para 16)

Anno: AIR Man. 3rd Edn. Civil P. C. O. 7, R. 7. N. 1.

(C) Civil P. C. (5 of 1908), S. 11 — Competency must be of trial court in former suit — Decision beyond the scope of a Tribunal, not final as per the statute governing it and concerning a particular issue would not bar a suit involving wider issue. (Madras Hindu Religious and Charitable Endowments Act (2 of 1927), Ss. 18 and 73).

Two persons of Thengalai sect of Vaishnavites in their individual capacity and not as representing their community filed an application u/ss. 18 and 73 of the Madras Act 2 of 1927 to Board for direction to the temple trustees to preserve Thengalai namam on the elephant. The Act as it then stood enabled the aggrieved party to move a civil court for setting aside the order that the Tribunal under the Act may pass. While dismissing the application it held that Vadagalai namam should continue for reasons (1) that the elephant being part of the temple it should bear the Vadagalai namam which the Chief deity in the temple admittedly bears and (2) that the condition laid by the donor that Vadagalai namam should be put on the elephant should be honoured. It also stated that the order was subject to any decision by the Civil Court in a suit that may be filed by the aggrieved party. The respondents' plea that ever since 1854 when the usage of putting Thengalai namam was legally recognised it was being observed was rejected on the ground that the decision related only to the elephant then living and that the decision did not hold good after the elephant died in 1894.

*(Against judgment of Ramanujam, J. in S. A. No. 98 of 1973, D/- 27-6-1974).

In the circumstances this suit filed for deciding the wider issue of the existence of the usage, considering the statute as it stood and the terms of the order of the Board, held, was not barred by res judicata. The observation by the Board that the 1854 decision related only to the elephant then living and did not apply after the elephant died in 1894, was held beyond its scope since it could not question the correctness of a civil court's decree. AIR 1956 An. Pra. 74, AIR 1945 Mad. 101 and AIR 1945 Mad. 242 Foll. A. S. No. 13 of 1854 (Mad) Ref. S. A. No. 98 of 1973 dt. 27-6-1974 (Mad) Affirmed. (Para 17)

Anno: AIR Man. 3rd Edn. Civil P. C., S. 11 Note 72.

(D) Civil P. C. (5 of 1908), S. 11 — Dismissal for non-prosecution — Suit filed in a court which had no jurisdiction — Plaint was returned — Plaintiff's appeal against the order returning the plaint was dismissed as not pressed — Plaintiff appellant also undertook not to proceed with the suit — Held that there having been no trial on issues at any stage the dismissal of the appeal did not operate as res judicata. S. A. No. 98 of 1973 dt. 27-6-1974 (Mad) by Ramanujam, J. Affirmed. (Para 18)

Anno: AIR Man. 3rd Edn. Civil P. C. S. 11 N. 83.

(E) Evidence Act (1 of 1872), S. 115 — Estoppel by acquiescence — Plea cannot succeed in the absence of proof of exercise of contra right.

The plaintiffs sought direction to the temple trustees to give Vadagalai namam to the temple elephant contending that the defendants had abandoned the usage of putting Thengnalai namam and acquiesced in the changed usage of putting Vadagalai namam between 1894 and 1940. In the absence of any proof of the temple owning any elephant during the period, it was held that there could be no abandonment or acquiescence by the defendants. On the contrary the Thengalai sect was all along found protesting against the user of Vadagalai namam and taking the matter to the courts. S. A. No. 98 of 1973 dt. 27-6-1974 (Mad) by Ramanujam, J., Affirmed. (Paras 19 & 20)

Anno: AIR Man., (3rd Edn.), S. 115, No. 42.

(F) Limitation Act (36 of 1963), S. 10 — Instances of trust for specific purpose — Long established and legally recognised usage the trustees were bound to follow — Departure from such usage would not extinguish such usage and prescribe any right as against a beneficiary.

By a long established and legally recognised usage the temple trustees were bound to observe they had to put Thengalai namam on the face of the temple elephant. In defence to a suit to compel them to follow the usage they pleaded that the suit was barred by limitation since such usage was being infringed beyond the period of limitation. Held that the cause of action arose on every occasion when the right was infringed and that the trustees could not prescribe any right as against a beneficiary. S. A. No. 98 of 1973 dt. 27-6-1974 (Mad) by Ramanujam, J. Affirmed. (Para 21)

Anno: AIR Man. 3rd Edn. Limitation Act (36 of 1963), S. 10 N. 10.

Cases Referred : Chronological Paras

(1970) 83 Mad L W 407	22
AIR 1956 Andh Pra 74	17
AIR 1947 PC 53 : (1947) 1 Mad LJ 159	8
AIR 1945 Mad 101 : (1945) 1 Mad LJ 63	17
AIR 1945 Mad 242 : (1945) 1 Mad LJ 357	17
AIR 1916 Mad 686 : 1915 Mad WN 916	22
(1912) 23 Mad. L J 134	12
(1907) ILR 30 Mad. 158	12
(1854) A. S. No. 13 of 1854 (Mad)	17
(1882) ILR 5 Mad. 313	12

R. Thangarajan, for Appellants, V. N. Venkatavaradachari and P. S. Srisailam, for Respondents.

P. S. KAILASAM, C. J.: — Defendants 2 and 3 in the suit are the appellants in the Letters Patent Appeal. The suit was filed by plaintiffs 1 to 4. They are residents of Kancheepuram and are Thengalai Vaishnavites holding offices in Sri Devaraja Swami Temple. The suit was filed for themselves and as representatives of the entire body of Thengalai Vaishnavites of Kancheepuram, who are office holders and mirasdars of Sri Devaraja Swami Temple. The dispute mainly relates to the namam which the temple elephant should bear. The elephant died on 28-3-1965. According to the planitiffs, the trustees were making an attempt to get an elephant themselves and introduce it with Vadagalai namam. According to the plaintiffs, the established usage of the temple is that the elephant should have only a Thengalai namam. As the plaintiffs apprehended that the trustees would induct an ele-

phant with a Vadagalai namam, they offered to present an elephant provided it bore the Thengalai namam. They also apprehended that the trustees, who belonged to the Vadagalai sect, might introduce an elephant with a Vadagalai namam and therefore sought to prevent it. The reliefs they sought in this suit were a direction to the defendants to accept the gift of an elephant to the suit temple by the plaintiffs or their nominees and have it painted with Thengalai namam on all occasions inside and outside the temple and in temple processions with Deities or when connected with the worship and other ceremonies of the temple as per the decree in A. S. No. 13 of 1854 and a permanent injunction restraining the defendants or their agents or servants from putting Vadagalai namam to the living elephant donated, maintained or possessed by the temple and using the same for any festivals, processions, functions or occasions of the temple.

2. The Executive Trustee and two other trustees were made defendants in the suit and they raised various contentions opposing the grant of the reliefs prayed for in the suit. The Executive Trustee filed a written statement and the other two defendants, who were Honorary Trustees, also filed separate written statements.

3. The plaint was filed on 23-11-1965. The plaintiffs offered an elephant to the temple, but that offer was declined by the Trustees. The suit, though filed in July 1965, was numbered only by the end of Nov. 1965. In the meantime, on 17-11-1965, an elephant with a Vadagalai namam was introduced in the temple. The plaintiffs filed I. A. No. 1176 of 1965 on 14-12-1965 for an injunction complaining against the surreptitious introduction of the elephant. In Jan. 1966, the defendants admitted the presentation of the elephant with a Vadagalai namam and contended that as a Vadagalai namam had already been put on the elephant, no temporary injunction need be granted. The plaintiffs filed I. A. No. 439 of 1968 praying for an amendment of the plaint on the ground that after the filing of the plaint, an elephant with a Vadagalai namam had been introduced. They sought for a direction to the defendants to erase the Vadagalai namam put on the face of the elephant and for placing instead a Thengalai namam.

4. Various contentions were raised in the trial Court. The trial Court framed six issues on 2-2-1966 and subsequently on 3-4-1968 framed an additional issue. Again on 25-4-1968, it deleted issues 1 and 5 framed on 2-2-1966, but framed 19 additional issues.

5. The trial court held that the established usage of the temple was to paint the temple elephant with Thengalai namam, that it was only in the year 1941 the temple trustees for the first time began parading the temple elephant with Vadagalai mark on the pretext that the elephant was one which was presented by the donor with a condition that it should bear Vadagalai namam, that the painting of Vadagalai namam on the temple elephant was contrary to the established usage of the temple which had been found and recognised in A. S. No. 13 of 1854, that the said decision was binding on the trustees, that the elephant which was painted with Vadagalai namam after 1941 was gifted to the temple with the condition that only Vadagalai namam had to be painted, that the decision in O. A. No. 466 of 1940 was based on the fact that the elephant maintained at that time by the temple had been gifted with a condition that it should bear only the Vadagalai namam and that therefore the decision in O. A. No. 466 of 1940 could not be said to be conclusive on the question of the established usage of the temple, that the suit was not barred by the provisions of the Hindu Religious and Charitable Endowments Act and that the plaintiffs were entitled to maintain the suit for giving effect to the usage which had been found in A. S. No. 13 of 1854. In the result, the trial court decreed the suit directing the defendants to paint the living elephant in the temple with Thengalai namam on all occasions, inside and outside the temple and in temple processions as per the decree in A. S. No. 13 of 1854 and restraining the defendants from putting Vadagalai namam to the living elephant maintained by the temple and using the same for any festivals, processions, functions or occasions of the temple.

6. On appeal by defendants 2 and 3, the lower appellate Court also agreed with the view taken by the trial court and confirmed the decree.

7. In the second appeal, Ramanujam, J. confirmed the findings of the Courts below, holding that the established usage

in the temple was that the elephant should have only a Thengalai namam and rejecting all the contentions advanced by the defendants, he dismissed the second appeal, but granted leave. Hence this Letters Patent Appeal.

8. It would not be out of place to give a short history of this 150 years war of the namams. A short account of the temple, the worship of Vishnu in Southern India and of the rituals and ceremonies in Vaishnavite temples are found in the decision of the Privy Council in Pedda Jiyyangarlu Varlu v. Venkatacharlu (1947-1 Mad LJ 159) : (AIR 1947 PC 53). The earliest scriptures. dating from 2500 years ago, are the Sanskrit Vedas of hymns, held sacred by all Hindus. Very much later, Prabandhams consisting of 4000 compositions in the Tamil language were compiled by Alwars who were Vaishnava devotees in Southern India. Subsequently, the Acharyas or learned Brahmins acted as religious preceptors. Of these, the most famous was Ramanuja, who flourished between 1017 and 1137 A. D., Vedanta Desikar who flourished between 1268 and 1369 A. D., and Manavala Mahamuni who lived between 1370 and 1443 A. D. These Acharyas composed a number of Sanskrit verses in praise of the Deity called Sthothra Patams. The Prabandhams being earlier in origin became part of the ritual of the Vaishnavite temple services and later the Sthothra Patams were also recited on special occasions.

9. Differences arose among Vaishnavites by about the 14th century as to the form of worship. One section followed Vedanta Desikar and they specialised in the study and exposition of the Sanskrit Vedas and regarded the Alwars and the Prabandhams as entitled to less reverence. They became known as Vadagalais or followers of the Northern cult. The other section, the followers of Manavala Mahamuni, specialised in the study and exposition of the Tamil Prabandhams of the Alwars, and became known as Thengalais or the followers of the Southern cult. There are several Vaishnavite temples in which the Vadagalai cult prevails, while in others, the Thengalai cult prevails. While generally the services are the same in both classes of temples, there are certain features which distinguish Vadagalai and Thengalai rituals. It is unnecessary to go into the details except to say that the first stanza according to the Thengalai cult begins with the words "Sri Sailesa Dayapathram" and invokes the Thengalai guru Manavala Mahamuni, whereas, according to the Vadagalai cult, the first stanza begins with the words "Ramanuja Dayapathram" and invokes the Vadagalai guru Vedanta Desikar. At the conclusion of the recitation of the Prabandhams benedictory verses called Vazhi Tirunamam are recited consisting of 9 stanzas of which the first four are common to both sects, while the last five differ. While both the Vadagalais and Thengalais share a common religious origin and faith and also adhere to their own school of thought, neither of them condemns or rejects the sacred character of the other cult. While so, the divergence between the two rituals outlined above has given rise to the most bitter, unreasonable and vicious fight between the two groups for nearly 200 years.

10. In this litigation, the dispute centres on the question as to the namam which should adorn the temple elephant. The namams of Vadagalai and Thengalai differ from each other. It is unnecessary to go into the origin or the difference between the two namams. It is sufficient to state that the namam is considered as a very important religious symbol and any violation of the practice of using a particular namam is looked upon as a serious inroad into the religious practice of the other. The dispute as regards the namam in this temple started as early as 1792. The nature of the dispute is revealed in the several decisions of this Court and certain documents relied on by the plaintiffs. The particulars of the dispute as revealed by the documents and the decisions show that the Thengalai community had the right of painting the Thengalai namam on the temple elephant from the year 1823. The documents that are filed by the plaintiffs in this suit and accepted by all the Courts and which related to this aspect, are Exs. A-1, A-2, A-3, A-4, A-8 and A-12. Ex. A-1 is a copy of the list of the Thengalai namams prepared by the Temple Superintendent Narahari Rao on 17-1-1823. Ex. A-1 shows that there were constant disputes between Vadagalai and Thengalai sects as regards the nature of the namam put on the various places in the temple and that for resolving the dispute, he had been asked to take out a list of the namas found in the temple precincts. deities etc. He submitted a report and according to the

report, the temple elephant had only a Thengalai namam. Ex. A-2 is a document marked in A. S. No. 14 of 1854, on the file of the Civil Judge, Chingleput. The document is a copy of the Urzee, which was sent with the list by Ramaswamy Maistry, Superintendent to the Collector. Ex. A-2 is found in pages 158 to 160 of Ex. A-12. The order of the Collector reveals that by his own inspection he ascertained that Ex. A-2 was correct. The inventory of four amins (Ex. A-3) and the report of the peon Kasiram, which is found in pages 170 to 173 of Ex. A-12, were compared and the conclusion was arrived at that Manavala Mahamuni was purely a Thengalai priest and that the Vadagalai people changed the Thengalai namam of Manavala Mahamuni. The learned appellate Judge in A .S. No. 14 of 1854 came to the conclusion that the namams were changed on the living elephant, the northern wall of Gangaikondan Mandapam, the Yali Vahanam and the elephant suspended thereto. The learned District Munsif in this suit had considered all these documents and accepting Ramaswami Maistry's report found that it was established beyond doubt that prior to Aug. 1827 the living elephant in the suit temple was wearing only Thengalai namam. This finding has been accepted by all the Courts and it cannot be questioned in second appeal or in the Letters Patent Appeal.

11. In the year 1850, O. S. No. 14 of 1850 was filed in the Civil Court by the Theertham and Aroopadaoo and Adhyapaka Mirasdar, as the principal man of Thengalai for the removal of Vadagalai namams in the Mandapam and on the living elephant. Another suit, O. S. No. 15 of 1850 was filed complaining of further mutilations of Thengalai namams after the filing of the earlier suit. The suits were dismissed. But the two appeals preferred in A. S. Nos. 13 and 14 of 1854 before the Civil Judge, Chingleput, were allowed with a direction that the Thengalai namam should be restored on the temple elephant. The Civil Court considered all the oral and documentary evidence and after personal inspection held that an attempt had been made by the Vadagalais to mutilate the Thengalai namam and to make it a Vadagalai namam and therefore the plaintiffs were entitled to the restoration of the Thengalai namam not only in the mandapam, vahanams etc., but also on the living elephant. Clause 21 of the decree in A. S. No. 13 of 1854 directed the trustees to restore the Thengalai namams on the living elephant. The judgments in the appeals are marked as Exs. A-4 and A-5. These judgments reveal that the established usage prior to 1854 was to paint Thengalai namam on the temple elephant. These judgments became final as a further appeal to the Sadar Adalat Court against the judgment in A. S. No. 13 of 1854 was dismissed on 28-4-1857. Ex. A-8 dated 10-4-1858 reveals that a Hukum Nama was issued by the Civil Judge to the Amin for the restoration of the Thengalai namam on the living elephant. The Court Amin complained that on 30-4-1858 he was obstructed by the trustees when the Thengalai namam was put on the elephant. He reported that the elephant was refused to be taken by the trustees for the uthsavams. On receipt of the report, the Civil Judge passed an order on 8-5-1858 directing the removal of obstruction and stating that if any further obstruction was given by anyone, they would be dealt with for disobedience and for disregarding the process of court. Subsequently the direction of the Court was carried out and a Thengalai namam 1 foot in length and 3/4 foot in breadth was painted on the living elephant. A proclamation was issued by the Civil Judge on 2-6-1858 that the Thengalai namam according to the mamul had been caused to be put on the living elephant and on other things and that anyone who disfigured or removed the namams would become liable to serious punishment and for damages according to law. Still the Vadagalais would not accept defeat and the temple trustees covered the head of the elephant having the Thengalai namam with a cloth on which Vadagalai namam had been put. A complaint was made in 1858 in Miscellaneous Petition No. 166 of 1858 by the Thengalais against the trustees that they were purposely covering the head of the elephant with a cloth so that the Thengalai namam would not be seen. The Court imposed a fine of Rs. 50/- on the trustees for contempt of its order. But subsequently the order was set aside by the appellate Judge on the ground that evidence was not sufficient to show that the trustees themselves infringed the orders of the Court, though the direction to restore the namams was affirmed.

12. The dispute between the parties had come up before this Court on various occasions. Apart from the documents

referred to above. the details of the dispute can be found in Krishnaswami Thathachariar v. Krishnamachariar ((1882) ILR 5 Mad 313) and Veeraghava Thathachariar v. Srinivasa Thathachariar ((1912) 23 Mad LJ 134). In the latter decision, the rights of the Thengalais have been declared. It was found that the Thengalais owned the right to a good proportion of the 13 offices. Many of the namams in the temple are Thengalai namams. The Thengalais have also the right of Abirvathams and a Thengalai is entitled to the office of Mulji Dharmakartha. The various documents filed in the above two cases and in Krishnasami Ayyangar v. Samiram Singaracharier ((1907) ILR 30 Mad 158) show that the Thengalais had various rights and held the important office of Mulji Dharmakartha. The irreconcilable dispute and the bitter enmity between the Thengalais and the Vadagalais in the temple is recorded in the above decisions.

13. The temple elephant which was having the Thengalai namam died in the year 1894. One of the points at issue between the parties is as to whether the temple owned any elephant between 1894 and 1940 and, if so, what namam the elephant bore. According to the plaintiffs, the temple did not own any elephant during that time. But the trustees paraded an elephant with Vadagalai namam and when objected to by the Thengalai sect, the elephant was withdrawn. According to the defendants, the temple owned an elephant during that time and it was painted with Vadagalai namam as usual. The finding on this point is that it has not been shown that the temple owned any elephant between 1894 and 1940. The Courts below as well as the learned Judge in second appeal have found that there is absolutely no evidence to prove that the temple acquired any elephant between 1894 and 1940. The trustees have not produced any accounts to show that the temple owned and maintained any elephant during that period at the temple expense. The learned Judge accepted the concurrent finding of the trial Court as well as the first appellate Court that the temple did not own any elephant between 1894 and 1940. The finding is one of fact and we see no reason for not accepting the concurrent finding of all the three Courts. We have therefore to proceed on the basis that the temple did not own any elephant till 1940.

14. In the year 1942, the Maharaja of Travancore presented an elephant to the temple with a condition that the elephant should bear only a Vadagalai namam. That elephant was painted with Vadagalai namam and was taken out during temple festivals and processions. Two members of the Thengalai sect filed O. A. No. 466 of 1940 under Ss. 18 and 79 of the Madras Hindu Religious Endowments Act, 1927 for a direction to the trustees to put only Thengalai namam on the living elephant. That application was resisted by the trustees. The Hindu Religious Endowments Board by an order dated 3-2-1942 held that the temple elephant should bear only Vadagalai namam. Various reasons were given for coming to this conclusion. The Board of Commissioners were of the view that the decision in A. S. No. 13 of 1854 would apply only to the elephant then living and would not apply to the subsequent elephants that might be owned by the temple. They also found that the main deity bore Vadagalai namam and that therefore the temple elephant also should bear Vadagalai namam. In any event as the elephant was donated by the Maharaja of Travancore and the donor's wish was that the elephant should have Vadagalai namam, it was ordered that the elephant should bear only Vadagalai namam. A direction was issued to the trustees to continue to paint the living elephant with Vadagalai namam subject to the result of any suit which any aggrieved party might file. Thereafter five of the members of the Thengalai sect filed O. S. No. 7 of 1945. In that suit the plaintiffs questioned the correctness of the order of the Board of Commissioners and sought a direction to the trustees to paint the living elephant with Thengalai namam in accordance with the long established usage. That suit was dismissed by the District Court of Chingleput on the ground that it had no jurisdiction to entertain the suit as it should have been filed before the Court of the Subordinate Judge. The plaint was returned for presentation to the proper Court. The plaintiffs filed C. M. A. No. 111 of 1948 to this Court. But, ultimately, the appeal was dismissed as it was reported that the matter had been settled out of Court and permission was sought for to withdraw the appeal. A representation was also made that the appellants would not proceed

with the suit. The appeal was dismissed as withdrawn.

15. The temple is governed by a scheme, which was framed by this Court in A. S. No. 175 of 1934. The scheme provides that an Executive Trustee shall be appointed, who is a smartha or a Madhwa Brahmin, aged not less than 30 and not more than 62 on the date of appointment and who is willing to reside permanently in Kancheepuram for the period of his office. Clause 5 provides that the person appointed as Executive Trustee shall hold office for a period of five years subject to good conduct. The functions and powers of the trustee under the Madras Hindu Religious Endowments Act shall ordinarily be exercised by the Executive Trustee alone. But provision was made for two honorary trustees of whom one shall be the member of the Eastern Branch and the other of the Western Branch of the family of Koti Kannikadanam Shri Thathadesikar. The Honorary Trustees were to hold office for five years. Clause 12 of the scheme provided for consultation with the Honorary Trustees by the Executive Trustee in the administration of the affairs of the temple. It is the contention of the plaintiffs that the two Honorary Trustees whose function is merely advisory are unduly influencing the Executive Trustee and giving the administration a tilt in favour of the Vadagalai sect, that the present litigation itself is at the instigation of the two Honorary Trustees and that in fact the second appeal to the High Court and this Letters Patent Appeal are not strictly competent as the Executive Trustee has not preferred the appeals.

16. On the above facts, several contentions were raised by the learned counsel for the Honorary Trustees before the learned Judge in second appeal and before us. The first contention of Mr. K. Parasaran, the learned counsel for the appellants was that the trial Court was in error in granting a decree directing the defendants to paint the living elephant in the suit temple with Thengalai namam and permanently restraining the defendants from putting the Vadagalai namam on the living elephant maintained or possessed by the temple. The contention is that the decree granted is not in accordance with the reliefs claimed. The reliefs claimed in the plaint are a direction to the defendants to accept the gift of an elephant to the suit temple by the plaintiffs and a permanent injunction restraining the defendants from putting Vadagalai namam to the living elephant donated. As after the filing of the plaint, an elephant was donated and accepted by the temple with Vadagalai namam put on it, the relief claimed cannot include a direction to paint the living elephant, which had already been painted with Vadagalai namam, with Thengalai namam and the defendants cannot be restrained from putting Vadagalai namam which had already been put on the elephant. It may be stated that after the filing of the plaint an elephant was accepted and Vadagalai namam was put on it and the plaintiffs came forward with I. A. No. 439 of 1968 for amending the plaint to include the relief of perpetual injunction against putting Vadagalai namam on the elephant which was surreptitiously brought into the temple on 17-11-1965 and for a direction to the defendants to remove the Vadagalai namam and paint the Thengalai namam. They also prayed for a mandatory injunction directing the defendants to remove the Vadagalai namam put on the elephant and to put Thengalai namam instead. This application for amendment of the plaint was dismissed. As the amendment was refused, it is contended by Mr. Parasaran that the relief which was ultimately given should not have been given. This contention does not take note of the fact that the learned District Munsif held that it was unnecessary to consider this application as the orders on the application and in the suit were passed simultaneously. The learned District Munsif delivered the order on this application on 8th May, 1968, the date on which the judgment in the suit was delivered. The learned District Munsif stated that he did not agree with the defendants' contention that if the amendment was allowed, it would change the cause of action and introduce a new cause of action. The real and substantial question was what namam should be put on the living elephant in the suit temple and that would be the question even if the amendment was allowed. The trial Court therefore held that the amendment had to be allowed to determine the real question in controversy between the parties. But it dismissed the petition on the ground that it was filed after a long time. The learned District Munsif concluded his order with the following words:

"I am pronouncing judgment in the suit today. In the circumstances this petition has to be dismissed."

It is seen that the amendment petition was dismissed only on the ground that the judgment in the suit was being delivered on that day. The judge considered what it called the real and substantial question. that is, what namam should be put on the living elephant in the suit temple, and gave a decision on that point. The plea of the learned counsel for the appellants that the trial court having dismissed the amendment petition ought not have given a decree in the terms in which it did is therefore without substance.

17. The next contention of the learned counsel is that the suit is barred by res judicata. The contention of the learned counsel is that the decision of the Hindu Religious Endowments Board in O. A. No. 466 of 1940 dated 3-2-1942 that the temple elephant should bear Vadagalai namam has become final. The application was filed by two persons under sections 18 and 79 of Madras Act II of 1927 for a direction to the trustees to preserve Thangalai namam. The Board dismissed the petition on various grounds. The main ground was that the decision in A. S. No. 13 of 1854 applied only to the then living elephant and therefore after the death of the elephant in question in 1894, the judgment in A. S. No. 13 of 1854 was no longer applicable. This is clearly beyond the scope of the powers of the Commissioners of the Hindu Religious Endowments Board as they cannot question the correctness of a civil court's decree. It is no doubt true that the Board ordered that Vadagalai namam should be painted on the elephant. But it appears that the decision was mainly based on the ground that it was the donor's wish that the elephant should be painted with Vadagalai namam. The learned Judge dealing with this question held that the two reasons given by the Board as to why the then living elephant should bear the Vadagalai namam are (1) that the elephant formed part of the paraphernalia of the chief deity and the chief deity in the temple admittedly bears Vadagalai namam and (2) that the elephant having been gifted by the Maharaja of Travancore with a condition that the elephant should have Vadagalai namam, the donor's wishes should be respected and complied with. As rightly pointed out by the learned Judge, both the reasons given by the Board, do not relate to any question of usage in the temple. Further, it has to be noted that the application was made in an individual capacity by two persons under Ss. 18 and 79 of Madras Act II of 1927 for direction from the Board to the trustees to preserve the Thenkalai namam. The question of the established usage regarding the namam to be painted on the elephant was not in question. The order of the Board has made it clear that the decision was subject to any decision by the Civil Court in a suit that may be filed by the aggrieved party. Section 18 of the Madras Hindu Religious Endowments Act, 1927, conferred powers of general superintendence of all religious endowments on the Board and empowered the Board to do all things which are reasonable and necessary to properly maintain the institution. S. 79 of the Act preserved the established usage of a math or temple or the rights, honours, emoluments and perquisites to which any person may by custom or otherwise be entitled in such math or temple. S. 18 of Madras Act II of 1927 while conferring on the Board the right of general superintendence over the temple, does not confer any right on the Board to decide or adjudicate the rights of parties. In the subsequent Act, namely, Madras Hindu Religious Endowments Act, 1946, S. 79-A conferred the power on the Board to decide disputes arising under S. 79 and S. 79-A (3) provided that the order of the Board shall be final in all cases where the dispute related to mere ritual or religious observances or honours and shall not be liable to be modified or set aside in a court of law. In other cases provision was made for the aggrieved person to apply to the court for modification or for setting aside of the order, but subject to the result of such application, the order of the Board was made final. As there was no such provision in the 1927 Act, the order of the Board is not final. In Venkaiah v. Raghavacharyulu (AIR 1956 An Pra 74), Viswanatha Sastri. J. has held that under S. 18 the rights of parties cannot be decided by the Board. See also the decisions in Sri Kothandaramaswami Temple v. Veezhinatha Ayyar (1945-1 Mad LJ 63) : (AIR 1945 Mad 101) Amirthalinga Padayachi v. Chandrasekhara Padayachi (1945-1 Mad LJ 357) : (AIR 1945 Mad 242). Apart from the fact that Madras Act 2 of 1927 has not made the order of the Board final, even on merits we agree with the view of the learned Judge that the order cannot be construed as decid-

ing the usage of the temple. It can only be taken as an order relating to the living elephant presented by the Maharaja of Travancore. In this view, we reject the contention that the order passed by the Board would constitute res judicata.

18. It was next contended that the judgment of this Court in A. A. O. No. 111 of 1948 finally decided the rights of the parties and therefore the present suit is not maintainable. It was an appeal against the order of the District Judge of Chingleput in O. S. No. 7 of 1945. O. S. No. 7 of 1945 was filed in the court of the District Judge of Chingleput by five persons for a direction against the hereditary trustee of the Sri Devaraja Swami temple that the Alwars and the Acharyas and the living elephant of the temple and the big bell should only bear Thangalai namam. Issue No. 6 framed in the suit related to the mark that has to be put on the then temple elephant. The written statement filed by defendants 1 and 2 are Exhibits B. 3 and B. 4 respectively. The District Judge returned the plaint for presentation to the Sub Court on the preliminary question of jurisdiction. The District Court held that it had no jurisdiction and that under S. 15 of the Civil P. C. the suit should have been instituted in the Sub Court. Against that decision, the plaintiffs filed A. A. O. No. 111 of 1946. When the appeal was taken up, it was reported that the matter had been settled out of court and permission was requested to withdraw the appeal. It was represented that the appellants should not proceed with the suit. The Court ordered that the appeal be dismissed as withdrawn. It is clear that the appeal was not disposed of on merits. The suit was dismissed as having been filed in a court which had no jurisdiction. The plaint was returned. The appeal was not disposed of on merits. The only contention raised by the learned counsel for the appellants is that the Court had recorded an undertaking that the appellants should not proceed with the suit. We fail to see how this statement would affect the rights of the present plaintiffs. The plaint was returned on the ground that the District Court had no jurisdiction. It is therefore clear that there was no trial of the issues at any stage and the dismissal of the appeal would not improve matters. In the circumstances, we agree with the view of the learned Judge that the judgment in in A. A. O. 111 of 1948 cannot operate as res judicata.

19. It was next contended that the suit is barred by limitation. According to the learned counsel for the appellants, ever since 1894 only Vadagalai namam was painted on the temple elephant and the Thengalai Vaishnavites have acquiesced for such a usage, and such conduct would amount to waiver or abandonment of their claims. But this plea cannot stand a moment's scrutiny, for, the appellants' assertion that the temple elephant bore only Vadagalai namam from 1894 has not been established. The finding of the courts is that there is absolutely no evidence to prove that the temple owned any elephant between 1894 and 1940. The learned Judge has referred to the fact that the trustees have not produced any account to show that the temple owned and maintained any elephant between 1894 and 1940, at the cost of the temple. The finding is that during that time, the Thathachari trustees paraded an elephant with Vadagalai namam; but that was not a temple elephant. The learned Judge has accepted the finding of the two courts below that the temple did not own any elephant between 1894 and 1940. On such a finding which cannot be challenged, no questions of acquiescence or waiver or abandonment of the rights of Thengalai Vaishnavites arise. After 1940 an elephant presented by the Maharaja of Travancore was accepted and Vadagalai namam was painted on that. It was submitted that the relief by way of an injunction is not the proper remedy and that as the Vadagalai namam was painted on the elephant at any rate from 1940. the plaintiffs to succeed ought to have filed a suit for a declaration of the established usage in the temple and for restoration of the earlier practice. This contention was rightly rejected by the learned Judge and we do not see any substance in it. The right of the plaintiffs has been satisfactorily established in A. S. No. 13 of 1854 and the suit for injunction is clearly maintainable. It was submitted that the relief by way of injunction ought to have been negatived as the plaintiffs are guilty of laches in that they did not pursue the remedies from the year 1940, when the elephant presented by the Maharaja of Travancore was painted with Vadagalai namam. This plea is also unsustainable as the Thengalai sect whom the plaintiffs represent has all along been protesting. They took the matter up to the Board and subsequently filed a suit. The learned Judge therefore rightly came to the con-

clusion that this is a fit case in which remedy by way of an injunction should be granted.

20. Elaborate arguments were advanced by the learned counsel for the appellants that the right even if it was declared in favour of the Thengalai sect in 1894, it was lost by non-user. We see no basis at all for this contention. As already found, from 1894 to 1940 there was no temple elephant and after that there were disputes between the parties and the question of the plaintiffs losing their established right by non-user does not arise at all on the facts.

21. It was finally contended that the suit is barred by limitation. The contention is that the period of limitation starts running from the date on which the declared right of the plaintiffs to have Thengalai namam was infringed, and on that basis, the suit is barred. This plea is again unsustainable as the cause of action arises on every occasion when the right is infringed. It is not open for the defendants to contend that the trustees by their acting contrary to the rights of the parties started prescribing a title or extinguished the existing title. It has been repeatedly held that the trustees cannot prescribe any right as against a beneficiary. As rightly observed by the learned Judge, it would be anomalous to hold that the defendants in their capacity as trustees can prescribe a right to destroy the long established usage of the temple. On a careful consideration of the elaborate arguments of the learned counsel for the appellants, we see no reason to differ from the conclusion arrived at by the learned Judge in disposing of the Second Appeal. The learned Judge has dealt with all the points that were raised by the defendants fully, and we have no hesitation in confirming the decision of the learned Judge.

22. Before leaving this appeal, we are constrained to take note of a submission that was put forward by the learned counsel for the plaintiffs-respondents. The suit was filed on behalf of the Thengalai Vaishnavites by the plaintiffs against the executive trustee as well as against the two Thathachariars who are honorary trustees. The suit was decreed by the trial court. An appeal was preferred, not by the executive trustee, but by defendants 2 and 3, the two Thathachari honorary trustees. The Second Appeal and the Letters Patent Appeal before us are also preferred by the Thathachari honorary trustees. and not by the executive trustee. While Mr. Venkatavaradachari, the learned counsel for the respondents before us informed us that he was reluctant to challenge the maintainability of the appeal by the honorary trustees in the place of the executive trustee, as he would like to have a decision on the merits, he submitted that the course of this litigation would show that it is the unreasonable attitude of the honorary Thathachari trustees which is the cause of the unfortunate litigation and ever (never?) ending trouble in the temple administration. This submission, we must say is not without foundation. In the narration of the history of the litigation subsequent to A. S. No. 13 of 1854, we have seen that the Vadagalai sect was most reluctant to accept the decision of the courts. The attempt of the court amin for the restoration of the Thengalai namam on the living elephant was obstructed. The Court directed the arrest of the persons who opposed the execution of the court orders and the Dharmakerthas who happened to be the Thathacharis managed to collect a body of persons and resisted enforcement of the civil court decree. The order was enforced and a proclamation was made by the Civil Court. But the Vadagalai Vaishnavites sought to get over the decree by covering the head of the elephant with a cloth painted with Vadagalai namam to cover the Thengalai namam that was painted on the elephant. Contempt proceedings had to be taken for this action. We see sufficient basis in Mr. Venkata Varadachari's grievance that the trouble is mainly due to the unreasonable attitude of the Thathachari trustees. It is sufficient to quote a passage from Srinivasachariar v. Thatha Desika Thathachariar ((1970) 83 Mad LW 407) in which the Bench has quoted the remarks of Sadasiva Aiyar, J. in Thathachariar v. Tiruvengadachariar (1915 Mad WN 916) : (AIR 1916 Mad 686):—

"Mr. Venkatavaradachariar, appearing for defendants 4 and 5 urged with some amount of justification that this attitude of the Vadagalais in putting forward some innovation or other in one form or another from time to time has been responsible for the series of litigations pertaining to this temple going on for the last two centuries. In Thathachariar v. Thiruvenkatachariar (1915 Mad WN 916): (AIR 1916 Mad 686) Sadasiva Aiyar, J. had occasion to make some adverse "remarks against the attitude of the

Vadakalais wherein the learned Judge has pointed out that the litigation in that case was the result of the action of a small, though influential, faction of Vadakalai sectarians residing in Kancheepuram by introducing innovations in customary practices during the period of regular official worship in the temple." We fully agree with the views expressed by the learned Judges in both these decisions. It is unfortunate that even though the remarks were made over sixty years ago, the Honorary Trustees do not seem to have realised their responsibilities. It is the ineffectiveness of the Executive Trustee and his playing into the hands of the Honorary Trustees that has led to this deplorable litigation. A scheme was framed for the administration of the temple in A. S. No. 175 of 1934. The relevant provisions of the scheme are that the Devasthanam shall be administered by a paid Executive Trustee who shall be appointed by the Board and by two Honorary Trustees who shall be elected in the manner laid down in the scheme. The Executive Trustee shall be a Smartha or Madhwa Brahmin not less than thirty years and not more than 62 years of age on the date of first appointment and willing to reside permanently in Conjeevaram for the period of his office. The Executive Trustee is to hold office for five years and he is required to give security for Rs. 2,000/-. He should be paid an honorarium, which shall not exceed Rs. 100/- per mensem. Clause (6) of the scheme significantly provides that the functions and powers of the trustee under the Madras Hindu Religious Endowments Act shall ordinarily be exercised by the Executive Trustee alone. Cl. (12) provides the rights of the Honorary Trustees. They are entitled to receive any information which they may require regarding the affairs of the Devasthanam. The executive trustee shall call a trustees' meeting once a month and shall place before that meeting all matters of importance relating to the administration of the temple and in the case of difference of opinion between the trustees when the majority consists of the executive trustee and one honorary trustee, its decision shall prevail. But when the majority consists of the two honorary trustees, the matter shall be referred to the Board whose decision shall be final. The executive trustee shall perform the functions of the land holder with respect to the villages belonging to the Devasthanam, and all the income of the Devasthanam shall be received by the Treasurer and paid by him into a bank to be approved by the Board. Under Cl. (15) the Board is empowered to make rules for carrying into effect the purposes of the scheme. The scheme makes it clear that the temple should be administered by the Board by appointing an executive trustee. All functions and powers of the trustee under the Madras Hindu Religious Endowments Act shall ordinarily be exercised by the executive trustee alone. The function of the honorary trustees is restricted to receiving information which they may require regarding the affairs of the Devasthanam and to take part in the monthly meetings. It is significant that if the executive trustee differed from the honorary trustees, the matter will have to be decided by the Board. These precautions were put in the scheme to see that the Board and the executive trustee function without undue hindrance by the honorary trustees. We find in this litigation that the honorary trustees have taken and were allowed to take undue and unhealthy interest in this litigation. The honorary trustees have taken a partisan attitude which had interfered with the smooth functioning of the religious institution. The Vadagalai sect as such are not parties to this litigation and we have no material to come to the conclusion that the Vadagalai sect is supporting the honorary trustees in their improper acts. Sri Devarajaswami temple at Conjeevaram is one of the most famous Vaishnavite temples like Tirupati and Srirangam. It is the bounden duty of the Government and the Endowment Board to see that this famous pilgrim centre of all India importance functions without let or hindrance by a small influential faction of Vadagalai Vaishnavites. We hope the Government and the Endowment Board will take immediate and adequate steps to see that a competent executive trustee is appointed to the temple for effectively administering the affairs of the temple and to safeguard the interest of the various sections of the devotees. It is the bounden duty of the Endowment Board and the executive trustee to see that this influential minority do not over-step their limits and disturb the peace and solemnity of the holy temple. A copy of the judgment would be sent to the Government for appropriate action.

23. In the result, agreeing with the reasoning and conclusion arrived at by the learned Judge of this court, we

dismiss the appeal with costs Rs. 1000 payable by the appellants.

Appeal dismissed.

AIR 1978 MADRAS 221

SURYAMURTHY, J.

Viswanathan, Petitioner v. Muthuswamy Gounder and others, Respondents.

C. R. P. No. 331 of 1974, D/- 6-7-1977.*

(A) Civil P. C. (5 of 1908), S. 114 — Scope of — Section does not confer on the Court general power to review its earlier Order suo motu. AIR 1967 Bom 355, Foll. (Para 3)

(B) Civil P. C. (5 of 1908), O. 21, R. 52 — Order for 'payment out' — Subsequent attachment of said moneys — Validity.

Once an order for payment out has been made, it must be treated that payment out has been actually made, and that whatever amount was ordered to be paid out belongs to the person in whose favour the 'payment out' was ordered and that amount cannot be made available to the claim of third parties. Therefore the amount ordered to be paid out cannot be attached. AIR 1952 Mad 540 and C. S. No. 773 of 1923 (Mad), Foll. (Para 4)

(C) Civil P. C. (5 of 1908), O. 21, R. 52 — Attachment of property — Order for when takes effect — Order takes effect from the moment it is brought to the notice of the Court and not from the moment it is passed. AIR 1967 SC 1386, Foll. (Para 5)

Cases Referred:	Chronological Paras
AIR 1967 SC 1386	5
AIR 1967 Bom 355	3
AIR 1952 Mad 540	4
(1923) C. S. No. 774 of 1923 (Mad)	4

A. S. Venkatachalamurthi, for Petitioner; A. Venkatasubbamma, for Respondents.

ORDER:— This is a revision petition against the order of the learned Principal District Munsif, Gobichettipalayam, made in E. A. No. 2307 of 1973 in E. P. R. 1945 of 1972 in O. S. No. 1528 of 1969 cancelling the order to issue cheque in favour of the revision petitioner.

2. Viswanathan, the revision petitioner herein, obtained a decree against Sellammal and her minor children in O. S. No. 579 of 1970 on the file of the District Munsif Court, Gobichettipalayam, on the foot of a promissory note. The properties of the second respondent, viz. Sellammal, were brought to sale by another decree-holder in O. S. No. 1528 of 1969, in pursuance of a money decree. The properties were sold in court auction and after the decree-holder in the said O. S. No. 1528 of 1969 realised the amounts due to him, a sum of Rupees 4,785.16 was available as surplus sale proceeds to the credit of the judgment-debtors in the District Munsif Court Gobichettipalayam. A sum of Rs. 3,500 out of this was attached by the revision petitioner in execution of the decree in O. S. 579 of 1970. The attachment was made absolute on 14-11-1973. He applied for the issue of a cheque for Rs. 3,198.05 being the amount to which he is entitled under the decree in his favour. On 20-11-1973, the learned Principal District Munsif, Gobichettipalayam, ordered the issue of a cheque for Rs. 3,198.05 in favour of Thiru K. Nandagopal, advocate for the revision petitioner (decree-holder in O. S. 579 of 1970). Subsequently, at about 3-45 p.m. on the same date, an attachment by pro-order was received in the court of the District Munsif, Gobichettipalayam, from the Sub-Court, Erode. The Sub-Court, Erode, by its pro-order in E. P. 298 of 1973 in O. S. 20 of 1970 on its file, ordered the attachment of the entire amount in court deposit. Thereafter the office of the learned District Munsif put up a note which reads as follows—

"In this case a cheque for Rs. 3,198.05 was ordered to be issued in favour of K. Nandagopal, advocate for the decree-holder in O. S. No. 579 of 1970 on 20-11-1973, out of Rs. 4,785.15 in court deposit. The entire surplus sale proceeds of Rupees 4,785.15 was ordered to be attached by pro-order in E. P. No. 298 of 1973 in O. S. 20 of 1970 on the file of the Sub-Court, Erode, and the pro-order to that effect was received by this court on 20-11-1973 by 3.45 p.m. Under these circumstances the cheque ordered to be issued for Rs. 3,198 in E. A. 2307 of 1973 in favour of K. Nandagopal advocate for decree-holder in O. S. 579 of 1970 may be ordered to be cancelled and the Full satisfaction recorded on the Memo in O. S. 579 of 1970 may also be cancelled." Thereupon the learned District Munsif cancelled the order for the issue of a cheque for Rs. 3,198.05 in favour of

*(To revise order of Dist. Munsif Gobichettipalayam in E. A. No. 2307 of 1973.)

Mr. K. Nandagopal, which he had passed earlier in the day.

3. The learned counsel for the revision petitioner contends that the order passed by the learned District Munsif subsequently is an order reviewing his earlier order and that he has no jurisdiction to pass suo motu an order reviewing an earlier order. This contention of the learned counsel for the revision petitioner finds support in a decision of the Bench of the Bombay High Court in Danomal v. Union of India, AIR 1967 Bom 355 wherein it has been observed that (at p. 360)—

"The power to review a prior order is principally the power vested in an officer to review an order previously made by himself and not by anybody else. It is to be noticed that the powers to review an order conferred on these officers under he said rule are only co-extensive with the powers vested in the civil court under the C. P. Code when trying a suit. The rule was made in the year 1954. Section 114 C.P.C. confers a power on a person considering himself aggrieved to apply for a review of the judgment to the court which passed the decree or made the order and the said court on reviewing such an application is empowered to make such order thereon as it thinks fit. It is abundantly clear that the power to review, whatever be its limits, arises only when an application by a person aggrieved in that respect has been made. The Civil Procedure Code does not confer on courts any general power of reviewing its decision suo motu."

With great respect, I am in entire agreement with the principles laid down by the Bench of the Bombay High Court. A mere reading of S. 114 C.P.C. would suffice to show that the powers of the court can be invoked only by a person considering himself aggrieved by a decree or order from which an appeal is allowed by the Civil P. C., but from which no appeal has been preferred or by a person considering himself aggrieved by a decree or order from which no appeal is allowed by the Civil P. C. The learned District Munsif had, therefore, no jurisdiction to review his own order suo motu.

4. It is further contended that once an order of payment out has been made, the money was not available to the credit of the judgment-debtor and that, therefore, the amount which was ordered to be paid out could not be attached. In Chokkammal v. Sambandam, AIR 1952 Mad 540 at p. 541 : ILR (1952) Mad 1019, 1021, Krishnaswami Nayudu J. following an earlier decision of Kumaraswami Sastri J. in C. S. No. 774 of 1923, has held that once an order for payment out has been made, it must be 'treated that payment out has been actually made', and that whatever amount was ordered to be paid out belongs to the person in whose favour the payment out was ordered and that amount cannot be made available to the claim of third parties. The learned Judge has held that—

"There can therefore be no valid attachment of these moneys subsequent to the order for payment out. On the passing of the order which is the judicial act, the property is transferred to the person in whose favour the order is made and the issue of a cheque, or payment of the money is a ministerial act, and any delay in the performance of which could not prejudice the right to the person who has obtained the order for payment out."

With great respect, I agree with the principles enunciated in the aforesaid decision of Krishnaswami Nayudu J.

5. However, the learned counsel for the respondents urges that the order of attachment takes effect from the moment it was passed and that the order of the learned District Munsif for payment out passed after the order of attachment was passed by the Sub-Court, Erode, is not a valid order. I am unable to agree with this contention. An order of attachment takes effect from the moment it is brought to the notice of the garnishee and not from the moment it is passed. In Mulraj v. Murti Raghunathji, AIR 1967 SC 1386, the Supreme Court considered the question as to when a stay order takes effect, and held that in the case of a stay order as opposed to an order of injunction, the court to which the stay order is addressed does not lose jurisdiction to deal with execution unless it had knowledge of stay. By parity of reasoning, it has to be held that an order of attachment takes effect only from the moment it is brought to the notice of garnishee. As the order of attachment passed by the Sub-Court, Erode, came to the knowledge of the learned Principal District Munsif, Gobichettipalayam, only after he passed the order for payment out, the attachment has taken effect only after the order for payment out was made. In these circum-

stances, the learned District Munsif erred in setting aside the earlier order passed by him.

6. The revision petition is, therefore, allowed, and the order of the learned District Munsif cancelling the order for payment out by the issue of a cheque is set aside and the earlier order is restored. There will be no order as to costs.

Revision allowed.

AIR 1978 MADRAS 223

MOHAN, J.

V. Thiagarajan, Petitioner v. Mohammed Umar Sait and another, Respondents.

C. R. P. No. 1323 of 1975, D/- 28-4-1977.*

Evidence Act (1 of 1872), S. 44 — Powers of Court — Order setting aside decree on ground of fraud — Court has no jurisdiction to pass such order under this section.

Section 44 relates to procedure. It does not confer any right on the party. If a judgment is sought to be relied upon in a proceeding, it is open to the party to contend that the judgment sought to be relied on was obtained by fraud. This is far from saying that a court has jurisdiction to set aside a decree under this section at the instance of one of the parties to it, saying that it was obtained by fraud. (Para 5)

Anno: AIR Manual (3rd Edn.), Evidence Act, S. 44, N. 8.

K. Hariharan, for Petitioner; M. N. Krishnamani, for Respondents.

ORDER:— On 14-11-1969, the respondent in the revision petition executed a promissory note in favour of the revision petitioner herein for a sum of Rs. 10,000. On the foot of the promissory note, O. S. No. 7311 of 1970 came to be filed under O. 37 C.P.C. on 23-12-1970. The respondents herein filed I. A. 9065 of 1971 seeking leave to defend. It was his case that no consideration had passed. The court by an order dated 11-2-1972 granted conditional leave directing the respondent to deposit a sum of Rupees 6,000 on or before 29-2-1972 failing which the said petition would stand dismissed and the suit was directed to be called on 1-3-1972. The deposit was not made in accordance with this order, therefore the suit was taken up on 1-3-1972. At that time, the counsel for the respondent was stated to be present and it was decreed. In the meanwhile what had happened is against the grant of conditional leave in I. A. 9065 of 1971, the matter was taken up to this court in C. R. P. 509 of 1972 and that was dismissed in limine. However, time was extended to deposit the sum of Rupees 6,000 by one week from 1-3-1972. On 6-3-1972, the deposit was made. It has to be presumed under these circumstances, that the decree dated 1-3-1972, was passed without being aware of the order by this court, which was communicated only on 2-3-1972. Having regard to these important facts, no objection could be taken to the decree as such. Nevertheless, on 31-7-1974, I. A. 14962 of 1974 was filed by the respondent herein under O. 37, R. 4 C.P.C. to set aside the decree. By an order dated 24-9-1974 the said application was dismissed. On 26-9-1974, I. A. No. 22623 of 1974 was filed, purporting to be under S. 44 of the Evidence Act alleging that the decree in O. S. No. 7311 of 1970 passed on 1-3-1973 came to be obtained by fraud, since on inspection of the said promissory note, the respondent came to know that the promissory note was originally insufficiently stamped and later on another stamp was affixed and it was crossed so as to make it a valid promissory note. The learned City Civil Judge, Madras passed an order setting aside that decree on payment of costs Rs. 50 on or before 10-4-1975 and directed the suit to be called on 11-4-1975. Aggrieved by this order, the present civil revision petition has come to be filed.

2-3. Mr. M. R. Narayanaswami, learned counsel for the petitioner contends as under—

Firstly, S. 44 of the Evidence Act does not confer any substantive right on the parties. It is a matter relating to the procedure. Therefore, the application under revision itself is misconceived. Secondly, assuming that the application is maintainable, under S. 44 of the Evidence Act, the court which passed the order under revision was oblivious to the important fact that I. A. 14962 of 1974 was dismissed as early as 24-9-1974, thereby the finality had reached concerning the decree in O. S. 7311 of 1970 and thereafter, the court has no jurisdiction to reopen the matter and lastly

*(To revise order of City Civil Court, Madras, in I. A. No. 22623 of 1974.)

it is submitted that it is not correct on the part of the court to hold that the decree dated 1-3-1972 is an ex parte decree.

4. Mr. M. N. Krishnamani, learned counsel for the respondent would urge in meeting the contentions that the decree dated 1-3-1972 was passed by the City Civil Court in ignorance of the order of this court whereby the time was extended on 1-3-1972 by one week to deposit Rs. 6,000. In compliance of that order, a sum of Rs. 6,000 had been deposited and, therefore, the decree itself cannot be said to be valid. Only on inspection of the suit promissory note, the affixture of the additional stamp came to be noticed and, therefore, the defendant (respondent herein) was well justified in invoking S. 44 of the Evidence Act and no exception could be taken to the order under revision.

5. I must confess my inability to appreciate the order under revision, which only shows that the learned Judge, City Civil Court, had not even cared to look at the provisions of S. 44 of the Evidence Act. Section 44 of the Evidence Act occurs under the heading— "Judgments of courts of Justice, when relevant". This provision relates to procedure. It does not confer any right on the party. Therefore, the respondent herein is not enabled to move the court under S. 44 of the Evidence Act. A mere reading of that section, which is in the following terms—

"44. Fraud or collusion in obtaining judgment or incompetency of court, may be proved. Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under S. 40, 41 or 42 and which has been proved by the adverse party, was delivered by a court not competent to deliver it, or was obtained by fraud or collusion,"

will clearly show that if a judgment is sought to be relied upon in a proceeding, it is well open to the party to contend that the judgment sought to be relied on, was obtained by fraud. This is far from saying that a court has jurisdiction to set aside a decree under this section at the instance of one of the parties saying that it was obtained by fraud. Though the order under revision in terms does not refer to S. 44, the very application for the invoking the jurisdiction of the City Civil Court was under S. 44. Therefore, it was necessary on the part of the learned Judge to have adverted to this section before entertaining the application. He had not cared to do so. Not only that; as if adding insult to injury no reference is made to the order in I. A. No. 14962 of 1974. He is completely oblivious to that proceeding which has got a material bearing on the issue, namely, I. A. No. 14962 of 1974, as the narration of the facts would disclose that was an application under O. 37, R. 4 C.P.C. filed by the respondent herein to set aside the decree dated 1-3-1972. That was dismissed on 24-9-1974. That order, not having been appealed against or questioned has given finality to the decree dated 1-3-1972. Thereafter, the City Civil Court will have absolutely no jurisdiction to set aside the decree in any manner. Notwithstanding this the present application was entertained and considering the same as an ex parte decree, an order was passed setting aside the decree on terms. I am only surprised about the casual manner in which the learned City Civil Judge has approached the matter, which is hardly commendable.

6. Therefore, the revision has to be allowed and it is hereby allowed with costs.

Revision allowed.

AIR 1978 MADRAS 224

MOHAN, J.

State Trading Corporation of India Ltd., Appellant v. K. P. V. Shaik Mohammed Rowther and Co. and another, Respondents.

Appeal No. 450 of 1972, D/- 25-4-1977.*

(A) Contract Act (9 of 1872), S. 182 — Agency — Privity of contract between principal and agent.

A though only a consignee appointed B as agent for the charterer relationship as principal and agent springs up between A and B by such appointment by A. (Para 6)

(B) Civil P. C. (5 of 1908), O. 1, R. 3 — Necessary party — Who is.

B filed a suit against A, a consignee, on the strength of a letter by A appointing B as agent for the charterer. The charterer is not a necessary party as

*(Against decree of City Civil Court, Madras in O. S. No. 6065 of 1968.)

there is no privity of contract between B, the plaintiff and the charterer.

(Para 7)

G. Narayanan, for Appellant; The Central Govt. Standing Counsel and Sampath Kumar, for Respondents.

JUDGMENT:— The first defendant (the State Trading Corporation of India, represented by Regional Manager of its Madras branch) is the appellant before me.

2. The appeal arises out of O. S. No. 6065 of 1968 on the file of the Second Assistant Judge, City Civil Court, Madras. The first respondent filed the suit for a mandatory injunction against the defendants for directing the appellant to pay the second defendant (Collector of Customs, Madras) the sum of Rupees 9854.91, being the penalty in respect of the alleged shortage of imported sulphur at Madras on 25-1-1966 or, in the alternative, for reimbursement in the event of the plaintiff being obliged to pay the amount.

3. The first defendant chartered a vessel for the import of sulphur in bulk from Vancover to Calcutta and Madras and appointed the plaintiff as its agent to clear the goods under Ex. A-26. The vessel arrived at Madras Port on 25-1-1966 and the cargo was discharged. The plaintiff represented the first defendant in the observance of the Port and Customs formalities for the purpose of clearing the cargo. Later it was found that there was a shortage of imported sulphur to the tune of 404-754 Megatonnes and the second defendant levied a penalty of Rs. 9854.91 under S. 116 of the Customs Act of 1962. In law, the plaintiff being the agent of the first defendant is not in any way personally liable to for this shortage. It is really the liability of the first defendant and hence the suit for mandatory injunction. If, however, the plaintiff is obliged to pay that penalty, the plaintiff would be reimbursed. These were the allegations in the plaint.

4. In defence, it was contended that the Chief Controller of Chartering, Union Ministry of Transport, Government of India, New Delhi was the real party who should have been impleaded and for whom alone the plaintiff acted as the agent. It is not correct to state that the first defendant is the principal and the plaintiff is the agent. In fact, the plaintiff is actually the charterer's agent and the first defendant is not a charterer but only the importer and the holder of the Bill of Ladings. The first defendant merely instructed the plaintiff by a letter dated 25-1-1966, Ex. A-26, that the plaintiff will function as the charterer's agent and sent a copy of the charterparty agreement, which itself proves the contention of the first defendant. So long as the first defendant is not in charge of the conveyance, the liability relating to penalty could not be fastened on it under S. 116 of the Customs Act 1962. Further, even though the order of penalty is dated 26-6-1968, and was received by the plaintiff on 9-7-1968, the plaintiff did not inform the first defendant till 14-10-1968, as a result of which the appeal against the levy became time barred. This negligence is solely attributable to the plaintiff and on this score also the first defendant cannot be made liable. The second defendant filed a written statement stating that the plaintiff being the authorised agent was liable to pay the penalty for the manifested quantity brought by the vessel and that the second defendant acted within the power vested in him under S. 116 read with S. 148 (2) of the Customs Act of 1962. On these pleadings, the following eleven issues came to be framed—

1. Whether the plaintiff is entitled to the mandatory injunction prayed for as against the first defendant?

2. Whether in the alternative, the plaintiff is entitled to recover a sum of Rs. 9854.91, from the 1st defendant?

3. Whether the suit is bad for non-joinder of the Chief Controller of Chartering, Union Ministry of Transports, Government of India?

4. Whether the plaintiff was the agent of the first defendant?

5. Whether the plaintiff alone is liable to pay the penalty amount for the reasons stated in the written statement of the first defendant?

6. Whether the plaintiff as the authorised agent at Madras Port for the vessel is primarily responsible and liable for accounting for the entire manifested quantity brought by the vessel?

7. Whether the plaintiff under S. 148 (2) of the Customs Act, is primarily and ultimately liable to account for the shortage to the satisfaction of the Customs authorities?

8. Whether the suit is bad for misjoinder of parties?

9. Whether the suit is bad for want of notice under S. 80 C.P.C.?

10. Whether the suit is not maintainable in view of S. 155 of the Customs Act?

11. To what relief, if any, is the plaintiff entitled?

5. The learned trial Judge came to the conclusion that the levy of penalty was proper under S. 116 read with Section 148 (2) of the Customs Act. There was no privity of contract between the plaintiff and the Ministry of Transport and therefore, the Ministry of Transports was not a necessary party. Having regard to the terms of Ex. A-26, the plaintiff was the agent and the principal was the first defendant. On these pleadings, a decree for mandatory injunction was passed. Hence the appeal.

6. Mr. G. Narayanan, learned counsel appearing for the appellant, strenuously urges before me that it is incorrect to hold that because of Ex. A-26 the relationship of principal and agent came to be established between the first defendant and the plaintiff. Inasmuch as a copy of the charter party agreement, viz., Exs. B-1 and B-3 had been sent along with Ex. A-26, it will be clear that there was no such relationship. On the contrary, the appellant was merely a consignee, while the Chief Controller of Chartering, Union Ministry of Transport, Government of India, New Delhi alone could be considered to be the principal. Learned counsel for the respondent would submit that whatever may be the nature of relationship in other cases, having regard to the terms of Ex. A-26, it cannot but be held that the relationship of a principal and agent existed between the first defendant and the plaintiff. In order to appreciate the contention, it will be useful to extract Ex. A-26, which runs as follows—

"The captioned vessel which is carrying forward 4883 M. tons of Canadian Sulphur to our account is consigned to us. We have pleasure in appointing you as the Charterers agent for this vessel during her voyage to Madras. The relative charter party is enclosed. The agency fee will be paid by the owners as is customary. As the vessel is due this afternoon, we request you to file all the papers immediately".

Though there is force in the contention of the appellant that the appellant is actually the consignee, inasmuch as the charter party agreement viz., Ex. B-1 was sent to the plaintiff, in this particular case, I cannot but hold that the relationship of principal and agent had come in, having regard to the terms of Ex. A-26, extracted above. The sentence which is important for our purpose is—

"We have pleasure in appointing you as the Charterer's agent for this vessel during her voyage to Madras."

This really spells out the case of the plaintiff that the relationship of principal and agent had sprung. Viewed in this light, I find absolutely no difficulty in upholding the judgment under appeal.

7. I am also in agreement with the finding of the court below that it is unnecessary to implead the Ministry of Transport since there is no privity of contract between the plaintiff and the Ministry of Transport. Consequently, I hold the appeal fails and is hereby dismissed. However, there will be no order as to costs.

Appeal dismissed.

AIR 1978 MADRAS 226

BALASUBRAHMANYAN, J.

Ponnuthayee Ammal, Appellant v. Kamakshi Ammal, Respondent.

A. A. A. O. No. 91 of 1976, D/- 22-3-1977.*

Hindu Marriage Act (25 of 1955), S. 11 — Petition for annulment of marriage filed after death of one spouse — Held, maintainable. AIR 1974 Mad 321 and AIR 1962 Mad 510, Dissented.

Whether the application for nullity is filed by the spouse for establishing the invalidity of the marriage for its own sake or for collateral purpose of deciding the legitimacy of the issue, the real purpose of such a proceeding is only to establish the petitioner's own status and for establishing that question it is not necessary that the other spouse should be living. AIR 1964 Mad 118, Relied on, AIR 1974 Mad 321 and AIR 1962 Mad 510, Dissented. (Paras 5, 6)

This matter has, however, become academic by reason of the amendment of S. 16 made by the Marriage Laws (Amendment) Act, 68 of 1976. (Para 5)

Anno: AIR Manual (3rd Edn.), Hindu Marriage Act, S. 11, N. 3.

*(Against order of Dist. J., Madurai in C. M. A. No. 184 of 1974.)

Cases Referred: Chronological Paras
AIR 1974 Mad 321 : (1974) 2 Mad LJ 34 6
AIR 1964 Mad 118 3, 4, 5
AIR 1962 Mad 510 : 75 Mad LW 559 6

K. Sarvabhauman and R. Nandkumar, for Appellant; R. Krishnamurthy, D. Raju and A. R. Lakshmanan, for Respondent.

JUDGMENT:— This civil miscellaneous second appeal is brought before this court by one Ponnuthayee Ammal, widow of Veerabadra Pillai, in the following circumstances: Veerabadra Pillai has a daughter by another wife. This daughter filed a suit for partition in O. S. No. 25 of 1969. In that suit Ponnuthayee Ammal figured as a party. One of the issues in that suit was whether her marriage with Veerabadra Pillai was void, it having been contracted during the subsistence of an earlier marriage. The finding was that the marriage was void for that reason.

2. Ponnuthayee Ammal had children by Veerabadra Pillai. She was anxious to legitimize them, but it was possible to obtain legitimization only if her marriage with Veerabadra Pillai were declared a nullity under the Hindu Marriage Act, 1955. The finding in a collateral suit would not avail the children.

3. It is in these circumstances that Ponnuthayee filed an independent proceeding O. P. No. 36 of 1974 under Sections 5 (1), 11 and 16 of the Hindu Marriage Act, 1955, for a decree for nullity of marriage on the basis that her husband had contracted the marriage with the petitioner during the subsistence of an earlier marriage. At the time this petition was filed, the husband was dead and gone. She however impleaded the daughter by the first wife as the defendant. The learned Subordinate Judge went into the merits of the petition, and, allowing the petition, granted a decree for nullity. He rejected the contention raised by the respondent that a petition for nullity by the wife is not maintainable over the dead body of the husband and that an application under S. 11 of the Hindu Marriage Act can only be maintained as against a husband living. The learned Judge rejected this contention relying upon certain observations of a Division Bench of this court consisting of Srinivasan and Venkatadri JJ. in Thulasi Ammal v. Gowriammal, AIR 1964 Mad 118.

4. Against the decision of the learned Subordinate Judge, the respondent filed an appeal on the one and only ground that the petition for nullity was not maintainable having been filed by the wife after the death of the husband. The learned Additional District Judge of Madurai accepted the contention put forward by the respondent and allowed the appeal and set aside the decree for nullity granted by the learned Subordinate Judge of Dindigul. The learned Additional District Judge seems to have regarded the observations made by Srinivasan and Venkatadri JJ. in Thulasi Ammal v. Gowri Ammal, AIR 1964 Mad 118, as in the nature of obiter dicta. Relying on certain other decisions of this court rendered by learned single Judges, the learned Additional District Judge held that an application by a spouse for declaring the marriage null and void would not lie unless it was filed during the lifetime of the other spouse. The decision of the learned District Judge is now questioned in this civil miscellaneous second appeal.

5. The matter indeed has now become academic by reason of the amendment made to the Hindu Marriage Act in S. 16. Section 16 has beeen newly amended by Section 11 of the Central Act 68 of 1976. Under this section, as amended, it is declared that notwithstanding that a marriage is null and void under S. 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 and whether or not a decree of nullity is granted in respect of that marriage under the Act and whether or not the marriage is held to be void otherwise than on a petition under this Act. It will be seen that under the amended section any child of a void marriage shall be legitimate notwithstanding the fact that a decree of nullity had not been granted in respect of that marriage under the Hindu Marriage Act 1955. It is further provided under the amended section that the children of void marriages shall be regarded as legitimate whether such children had been born before or after the amendment of S. 16 under the Marriage Laws (Amendment) Act 1976. In these circumstances, the filing of the original petition No. 36 of 1974, itself would now seem, in retrospect, to be an exercise in superfluity. This amendment has rendered the technical issue raised as to the maintainabi-

lity of the O. P. as a purely academic question. Nevertheless, I think I must go into the question to give this appeal a proper disposal. I must say that I do not agree with the views expressed by the learned Additional District Judge as to the maintainability of a petition by a spouse for declaring a marriage null and void after the death of the other spouse. As has been pointed out by Srinivasan and Venkatadri JJ. in Thulasiammal v. Gowriammal, AIR 1964 Mad 118 it seems to me that whether the application for nullity is filed by the spouse for establishing the invalidity of the marriage for its own sake or for collateral purpose of deciding the legitimacy of the issue, the real purpose of such a proceeding is only to establish the petitioner's own status and for establishing that question it is not necessary that the other spouse should be living. This was so held by Srinivasan J. and with respect, I agree with that opinion.

6. With respect, I do not share the views of Ramanujam J. in Ramayammal v. Muthammal, 1974-2 Mad LJ 34 : (AIR 1974 Mad 321) and also an earlier decision of Ramakrishnan J. in Gowriammal v. Thulasiammal, 75 Mad LW 559 : (AIR 1962 Mad 510). In the result, I allow this civil miscellaneous second appeal, but in the circumstances, without costs.

Appeal allowed.

AIR 1978 MADRAS 228

ISMAIL, J.

Balasubramaniam and another, Appellants v. Purushothaman and others, Respondents.

Second Appeal No. 2172 of 1974, D/- 18-3-1977.*

Civil P. C. (5 of 1908), O. 33, R. 5 — Applicability.

Order XXXIII, Rule 15 C.P.C. applies only to a case where a prior application for permission to sue in forma pauperis is rejected on merits, and not to a case where the application is dismissed for default, as in the present case. AIR 1926 Mad 875, Foll. (Para 3)

Anno: AIR Comm. C. P. C. (VIIIth Edn.), O. 33, R. 15, Notes 1 & 2.

*(Against decree of Sub-J., Cuddalore in A. S. No. 508 of 1973.)

BV/CV/A842/78/AGT/VSS

Cases Referred: Chronological Paras

AIR 1926 Mad 875 : ILR 50 Mad 63 3
AIR 1925 Mad 986 3

JUDGMENT:— Defendants 3 and 5 who are the legal representatives of the first defendant in O. S. No. 97 of 1968, on the file of the Court of the District Munsif, Kallakurichi, who lost before the courts below, are the appellants herein. Respondents 1 and 2, the plaitniffs, instituted the suit for declaration of title to, and recovery of possession of the suit properties after setting aside two sale deeds dated 25-4-1955 marked as Ex. B-3 and 4-8-1959 marked as Ex. B-4, executed by the second defendant, mother of the plaintiffs, on her own behalf and as guardian of the plaintiffs, in favour of the first defendant. There is no dispute about the fact that the properties were settled on the second defendant and the plaintiffs. Equally there is no dispute about the fact that the second defendant executed the two sale deeds, Ex. B-3 for a consideration of Rs. 600 and Ex. B-4 for a consideration of Rs. 1800 purporting to act on her behalf as well as on behalf of her minor children. The suit was instituted for cancelling these two sale deeds and for recovering possession of the properties on the ground that the sale deeds were not binding on the minors. Both the courts below found that the sale deeds were executed for binding purposes, but still they held that Ex. B-4 sale deed would not be binding on the plaintiffs, while Ex. B-3 sale deed would be binding. The reason for holding the Ex. B-4 sale deed would not be binding on the minors was that on the date of the sale deed the Hindu Minority and Guardianship Act of 1956 was in force and under S. 8 of that Act, the guardian had no right to dispose of the minors' interest without the permission of the court. It is on this basis the courts below held that Ex. B-4 would not be binding, and they passed a preliminary decree for partition of the plaintiffs' two-third share in items 1 to 3, viz., those items covered by Ex. B-4 sale deed. The first defendant succeeded with regard to Ex. B-3 sale deed. Against the decree passed by the trial court with regard to Ex. B-4 sale deed, the appellants herein preferred an appeal. The learned Subordinate Judge of Cuddalore, by judgment dated 12-7-1974, dismissed the appeal. Hence the present second appeal by defendants 3 and 5.

2. The learned counsel for the appellants put forward three contentions to

challenge the decrees of the courts below; the first is that prior to the institution of the present suit, there was an original petition for permission of the court to sue in forma pauperis and that petition, viz., O. P. No. 36 of 1967, was dismissed though for default, with costs in favour of the first defendant. Consequently under O. XXXIII, R. 5 C.P.C. without his costs of that petition being paid, this suit should not have been entertained. The second contention is that the first plaintiff having been born on 3-12-1945 and the suit having been instituted on 16-12-1967, the suit was barred by limitation not merely with regard to the first plaintiff but with regard to the second plaintiff also, as the cause of action was the same. The third contention is that when the courts below granted a decree in favour of the plaintiffs, having regard to the finding that the purpose for which the sale deed was executed was binding on the plaintiffs, the court below should have directed the plaintiffs to refund two-thirds share of the consideration for Ex. B-4.

3. As far as the first contention is concerned, I am clearly of the opinion that the same is unsustainable. Order XXXIII, R. 15 C.P.C. reads as follows—

"An order refusing to allow the applicant to sue as an indigent person shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that the plaint shall be rejected if he does not pay, either at the time of the institution of the suit or within such time thereafter as the court may allow, the costs, if any, incurred by the State Government and by the opposite party in opposing his application for leave to sue as an indigent person."

Consequently this provision will be attracted only if the earlier petition was dismissed on merits. The word 'refusing' occurring in O. XXXIII C.P.C. supports this inference. Independent of this, there is a Bench decision of this court in Polepeddi Krishnamurthi v. Polepeddi Ramayya, ILR 50 Mad 63 : (AIR 1926 Mad 875). In that judgment, it was held—

"The principle underlying R. 15 appears to be that of res judicata viz., that the court will not entertain a second application when the first has been dismissed on the ground that the petitioner is not entitled to sue as a pauper. Any order passed under R. 5 (a) is of a summary nature based on the petition itself or on facts which are apparent at the time of presentation of the petition. For instance, if the petition does not contain a schedule of property or if it is presented by the alleged pauper's agent, it has to be rejected, and if we are to apply the ruling of the Calcutta High Court, it can never be represented. This goes a good deal further than the principle of res judicata for it gives the force of res judicata to a summary order passed without enquiry or contest and consequently, I think it is doubtful whether that is the intention of the Legislature. It is noticeable that R. 15 refers to an order 'refusing to allow an applicant to sue as a pauper' and these words are the identical words used in R. 7 cl. (3) and it is clear that R. 15 applies to such an order. I can see no reason for extending it to include an order rejecting an application when such order does not either in terms, or by implication, refuse to allow an applicant to sue as a pauper. For instance the rejection and return of a petition presented by an agent can hardly be said to amount to a refusal to allow the petitioner to sue as a pauper for there is no provision specifically prohibiting its representation by the pauper himself. In the present case the order rejecting the application is very specific. The District Munsif states that he has to reject the petition but that he ought not to be understood as expressing any opinion on the question whether the plaintiff is a pauper or not. There is clearly no adjudication on the merits by this order. I am therefore of opinion that such an order is not a bar to the subsequent presentation of a petition based on the same right to sue. The view was adopted by my learned brother in Chinnammal v. Papathiammal, AIR 1925 Mad 986 which was a case where the first petition had been dismissed for default. I would therefore hold that when there has been no enquiry under R. 6 and a consequent order under R. 7 the order rejecting the application is not a bar to a second application."

In view of this judgment it is clear that O. XXXIII, R. 15 C.P.C. applies only to a case where a prior application for permission to sue in forma pauperis was rejected on merits, and not to a case where the application was dismissed for default, as in the present case.

4. The second contention of the learned counsel for the appellants, as I pointed out already, relates to the suit having been barred by limitation, on the ground that the first plaintiff was born on 3-12-1945 and the suit was instituted on 16-12-1967. However, the courts below, on examination of the evidence placed before them, have come to the conclusion that the first plaintiff was born not on 3-12-1945, but on 6-6-1947, and that therefore the suit filed on 6-12-1967 was within time. This finding is amply supported by evidence and the same will have to stand.

5. As far as the third point is concerned, at no stage of the proceedings, the appellants ever put forward the contention that in the event of it being held that Ex. B-4 sale deed is not binding on the plaintiffs, the plaintiffs should be called upon to refund two-thirds of the consideration under Ex. B-4. It may be that the one-third of the properties, the share of the mother, the second defendant, sold under Ex. B-4 was worth entire consideration; and that may be the reason why the appellants had not put forward any such claim. Under these circumstances, I am unable to entertain that claim put forward for the first time in the second appeal.

6. Hence the second appeal fails and is dismissed. There will be no order as to costs.

Appeal dismissed.

AIR 1978 MADRAS 230

RAMANUJAM, J.

Meenambal and others, Appellants v. Chockalinga Chettiar and others, Respondents.

Appeals Nos. 389 of 1969 and 103 of 1970 and Memo of Cross-Objections in A. S. No. 103 of 1970 and C. M. P. No. 10696 of 1975, D/- 10-2-1977.*

(A) Hindu Law — Minor— Partition — Mother, as guardian of minor son, effecting partition — Minor, after attaining majority, cannot ignore that partition to which he was eo nomine a party and ask for fresh partition without getting earlier partition set aside either on ground of fraud or illegality or on ground that it is unfair and unequal and prejudicial. (Para 23)

(B) Limitation Act (36 of 1963), Art. 60 — Suit to set aside partition by quondam minor — Limitation — To be filed within 3 years of his attaining majority.

The minor, as soon as he attains majority should be taken to have knowledge of the transactions entered into by the guardian during his minority. Therefore, the plaintiff should be taken to have had knowledge of the transaction on his attaining majority. Therefore, the period of limitation before which he should file a suit for setting aside the document of partition will be three years of his attaining majority. Case law reviewed. (Para 24)

Anno: AIR Comm., Limitation Act (5th Edn.), Art. 60, N. 7B.

Cases Referred: Chronological	Paras
AIR 1976 SC 1	22
AIR 1933 Mad 890 : ILR 57 Mad 95 (FB)	23
(1903) ILR 30 Cal 738 (PC)	23
(1894) ILR 19 Bom 593	23
(1892) ILR 14 All 498	22

JUDGMENT:— Both these appeals arise out of the decision in O. S. No. 45 of 1964 on the file of the Sub-Court, Vellore, A. S. No. 389 of 1969 has been filed by defendants 18 to 22 and A. S. No. 103 of 1970 has been filed by the plaintiff in the said suit.

2. The said suit was one for partition of the lands described in schedule C to the plaint into four shares and of the house described in schedule B and the properties described in schedule D into five shares and for allotting the plaintiff one such share after setting aside the partition deed dated 20-4-1951 and the alienations of some of the suit properties by defendans 1 to 3, if need be and for directing the first defendant to render accounts in respect of the joint family properties which were in her management from 1-10-1951 till the date of the filing of the suit. The plaintiff and defendants 2 and 3 are brothers, being the sons of one Vengan Chetti, who died on 19-11-1944, by his third wife, the fourth defendant. Vengan Chetti had another son, Perumal Chetti by his second wife and the said Perumal Chetti died on 1-4-1951 and the first defendant is his widow.

3. According to the plaintiff the properties described in schedules B, C and D to the plaint are properties left by Vengan Chetti and that on his death the

*(Against decree of Sub-J., Vellore, D/- 8-11-1968.)

plaintiff and defendants 2 and 3 and the deceased husband of the first defendant each became entitled to a one-fourth share in the agricultural properties and a one-fifth share in the non-agricultural properties, the fourth defendant being entitled to the balance one-fifth share in the non-agricultural properties. After Vengan's death, the deceased husband of the first defendant being his eldest son was the manager of the joint family. On his death the first defendant, his wife, continued to manage the properties belonging to the joint family. On or about 20-4-1951, a registered partition came to be entered into between the first defendant, second defendant and the fourth defendant acting as guardian of the plaintiff and the third defendant who were the minors. It is the case of the plaintiff that the said partition brought about by the partition deed dated 20-4-1951, was unequal, unfair and unjust, that though the plaintiff and defendants 2 to 4 were together entitled to a 4/5th share in the non-agricultural properties and a 3/4th share in the agricultural properties, the first defendant had been allotted half share in the joint family properties absolutely for herself, that the first defendant has played a fraud on the plaintiff's mother and took a much larger share than to what she was legally entitled to, that the plaintiff's mother was not competent to act as his guardian and she did not properly safeguard the minor's interest that though the plaintiff's mother was entitled to a share in the properties she was not given any share in the partition, that valuable properties had been allotted to the first defendant while useless properties have been allotted to the share of the plaintiffs and defendants 2 and 3, that most of the moveables belonging to the joint family were not divided but were allowed to be in the possession of the first defendant, that fictitious debts were allotted to the share of the first defendant while real debts were allotted to the share of the plaintiff and defendants 2 and 3 and that, therefore, the partition deed cannot be taken to be valid and binding on the plaintiff.

4. Perumal Chettiar while he was the manager of the family had sold the lands described as items 14 to 16 in the plaint C schedule to the 12th defendant under a registered sale deed dated 12-11-1948 for an alleged consideration of Rs. 3,000. The plaintiff's case is that the said sale is not supported by consideration nor was it made for any necessity or benefit of the family, that there was no need to sell any property belonging to the joint family as the income therefrom was considerable and that the said alienation is not binding on him or his share in the properties.

5. Subsequent to the death of Perumal Chettiar, defendants 2 and 3 have alienated the lands described in items 6 to 12 in the plaint C schedule and the houses described as items 3 and 6 in the plaint B schedule to defendants 5 to 10 and 13 under various sale deeds. The first defendant had sold to the 11th defendant the oil mill and the machinery and the building described as item 1 of the plaint D schedule with a view to defraud and defeat the rights of the plaintiff. According to the plaintiff the said sale deeds executed by defendants 1 to 3 are all fraudulent, void and not binding on him as they are not supported by consideration and they have been made without any necessity or benefit and that the recitals as to consideration in those sale deeds are all false and fictitious.

6. Defendants 2 and 3 had executed a mortgage in favour of the 7th defendant. The plaintiff alleges that the said mortgage is not also supported by consideration and is, therefore, not binding on him.

7. The 13th defendant had sold the house described as item 3 in the plaint B schedule to one Parthasarathi Chetti and he having died, his legal representatives defendants 18 to 22 are in possession and enjoyment of the same. The plaintiff states that the said sale also is not binding on him.

8. The house described as item 4 in plaint B schedule has been sold by defendants 2 to 4 during the minority of the plaintiff to one Mrs. Francis after taking an agreement of reconveyance in their favour. One Padmavathi Ammal, the 23rd defendant has purchased the right of reconveyance in court auction. Subsequently she purchased the said property on 24-4-1965. The plaintiff contends that the said sale is not binding on him as the consideration for the transaction is quite inadequate and that there was no necessity for the said sale.

9. Subsequent to the institution of the suit, the first defendant died and her legal representatives, defendants 14 to 17 have been brought on record.

10. Defendants 14 to 17, the legal representatives of the first defendant con-

tended as follows: After the death of Perumal Chettiar, the first defendant was not in management of the family properties and it is the fourth defendant who was in management. Sometime after the death of Perumal Chetti all the heirs of Vengan Chetti desired to effect an amicable partition of the family properties. At the instance of Panchayatdars a registered partition deed dated 20-4-1951 was executed between the parties. The fourth defendant did not act negligently in the said transaction and no fraud was played upon her by the first defendant or by the Panchayatdars. The division is fair and equitable and, therefore, the plaintiff is not entitled to have it set aside. Even otherwise, the said partition deed has been acted upon by all the parties including the plaintiff. Some of the properties having been alienated to strangers by the sharers, it is not possible to go back on these transactions. The plaintiff having been born on 18-9-1939, the present suit questioning the partition is barred by limitation as it has been filed more than three years after his attaining majority. The third defendant filed O. S. No. 373 of 1956 in the court of the District Munsif Vellore, for the same relief but it was not prosecuted. The plaintiff was a party to the said suit and, therefore, the present suit was incompetent. As regards moveables, their case was that the first defendant was not in possession of any of the moveables, cash, jewels, and other valuables belonging to the family and it is defendants 2 to 4 who were in possession of the same and are accountable.

11. Defendants 2 to 6 remained ex parte. The seventh defendant resisted the suit contending that the mortgage in his favour was executed by the plaintiff along with defendants 2 and 3 for Rupees 2,500 and the borrowing was for necessary purpose. Hence it is binding on the plaintiff. In any event, the suit is barred by limitation since the plaintiff was more than 21 years of age on the date of the filing of the suit.

12. The 8th defendant contested the suit contending that defendants 2 and 3 who were minor members of the joint family sold the lands described as items 9 to 12 in the plaint C Schedule for Rupees 2,000 on 17-11-1961, that the sale was made for raising funds for installing a pump set to a well belonging to the family situate in S. No. 301 and for purchasing accessories thereto and for the discharge of a decree debt due to one Periasami Chettiar, that Rs. 500 was paid to in cash on the date of the execution of the sale deed and the balance of Rs. 1,500 was paid in the presence of the Sub-Registrar to defendants 2 and 3 at the time of the registration and, therefore, the plaintiff cannot seek to set aside the said alienation. The 8th defendant who is also a purchaser of items 6, 7 and 13 of plaint C schedule at Rs. 2,000, who had in turn purchased the same from defendants 2 and 3 by a sale deed dated 7-2-1958 has filed an additional written statement stating that the sale of these items was made by defendants 2 and 3 and the 4th defendant acting as guardian of the minor plaintiff for the purpose of discharging the debts incurred by the family for litigation and, therefore, the said sale is binding on the plaintiff.

13. The 9th defendant defended the suit contending that the mortgage in his favour was executed by the second defendant in his capacity as joint family manager on 25-5-1956 for discharging family debts and agricultural expenses and, therefore, it is binding on the plaintiff.

14. The 11th defendant resisted the suit contending that she is a bona fide purchaser of the oil mill described as item 1 of the plaint D schedule and that even if there is a re-partition, the said item should be allotted to the share of the alienor in equity.

15. The 12th defendant who is the purchaser of items 14 to 16 of the plaint C schedule contended that Perumal Chetti and the 4th defendant were in need of money, for their business and therefore they persuaded her and her husband to purchase the said items for Rs. 3,000 that subsequent to the purchase she had made considerable improvements to the land by levelling them and putting up a well at a cost of Rupees 2,000 and, therefore, the plaintiff is not entitled to question the sale and that in any event, she is entitled to get reimbursement of the cost of improvements.

16. The 13th defendant defended the suit contending that she has purchased item 3 of B schedule to the plaint in court auction in pursuance of a decree obtained by one Parthasarathi Chetti in O. S. No. 143 of 1954 against the plaintiff and defendants 2 and 3. The legal representatives of the said Parthasarathi Chetti are defendants 18 to 22 and their case is that Perumal Chetti in his capa-

city as the manager of the joint family had become indebted to Messrs. T. Abboy Chettiar and Sons of Kancheepuram in the matter of purcahse of javuli, that the said debt was allotted to the share of the plaintiff and defendants 2 and 3 in the partition entered into in 1951, that Parthasarathi Chetti filed a suit against the plaintiff and defendants 2 and 3 in O. S. 143 of 1954 and obtained a decree, that in pursuance of the decree he brought item 3 of the plaint B schedule for sale and the 13th defendant purchased it in court auction and took possession through court on 4-4-1957, that subsequently the 13th defendant transferred it to her deceased husband by a registered sale deed dated 11-7-1960 and that since then they are in possession of the same. Thus, the case of defendants 1, 3 and 18 to 22 is that the plaintiff being eo nomine party to the suit O. S. 143 of 1954 the Court auction sale is binding on him and, therefore, he is not entitled to question the validity of the same.

17. The 23rd defendant who is in possession of the house in item 4 of the plaint B schedule has filed a written statement stating that the said item was sold by the plaintiff and defendants 2, 3 and 4 to one Pushpammal on 10-8-1957, that the vendee executed an agreement to reconvey the property on 26-8-1957, that subsequently the vendors exercised their option and sold the same to one Mrs. Francis executing an agreement to reconvey in favour of defendants 2 to 4, that subsequently Pushpammal obtained a decree against the plaintiff and defendants 2 to 4 in O. S. 8 of 1961 and in execution of the said decree brought the said right of reconveyance to sale and that she had purchased it in court auction on 26-8-1963. She therefore states that the plaintiff cannot challenge the various transactions. She also contended that she having been brought on record only on 12-3-1966, the claim as against her is barred by limitation.

18. On these rival contentions, the trial court framed as many as 23 issues. Out of these issues, the substantial issues relate to the question of the validity and the binding nature of the partition deed and the question of limitation. After analysing the evidence adduced by the parties with reference to the various issues, the court below held on the main question that the partition brought about under Ex. A-8 dated 20-4-1951, between the first defendant, plaintiff and defendants 2 to 4 was unfair, unjust and unequal and is also prejudicial to the interests of the plaintiff who was a minor. It however held on the question of limitation that the suit to set aside the partition deed under Ex. A-8 not having been filed by the plaintiff within 3 years after attaining majority, the claim for setting aside the partition deed is barred by limitation but that the plaintiff's claim to a share in the joint family properties alienated by defendants 2 to 4 subsequent to the partition was not barred by limitation as the suit was well within 12 years of the date of alienation. On its view that the claim for setting aside the partition deed is barred by limitation, the lower court has not chosen to give any relief to the plaintiff for fresh partition as sought for by him. As regards the relief claimed as against the alienees from defendants 2 to 4 the lower court rejected the plaintiff's claim in respect of alienations of items 1, 2 and 4 of B schedule and items 1 to 7 and 13 to 16 of C schedule. The plaintiff has therefore filed A. S. 103 of 1970 against the decision of the lower court holding that the claim for setting aside the earlier partition deed under Ex. A-8 is barred by limitation as also the finding of the lower court in relation to items 1, 2 and 4 of B schedule and items 1 to 7 and 13 to 16 of C schedule. The plaintiff has not chosen to question the findings of the trial court in respect of other alienated items.

19. As against the finding of the lower court relating to the setting aside of the alienation of item 3 of B schedule, defendants 18 to 22 have filed A. S. 389 of 1969 contending that the alienations made by defendants 2 and 3 to the 13th defendant is valid and binding on the plaintiff and that the subsequent alienation by the 13th defendant in favour of Parthasarathi Chetti was legal and valid.

20. Thus the main question that has to be considered in the plaintiff's appeal A. S. 103 of 1970 is as to whether the plaintiff can seek to set aside the earlier partition to which he was eo nomine a party beyond 3 years after attaining majority. The learned counsel for the plaintiff contends before me that once the partition is found to be unequal, unfair, unjust and prejudicial to the minor, it need not be set aside within three years of attaining majority but that it can be ignored altogether, and that in any event even if such a partition is to be set aside, the limitation has to start

only from the date of the knowledge of the unfairness of the partition. The question is how far the above contention can be accepted.

21-22. As already pointed out, the lower court has given a finding that the partition under Ex. A-8 is unfair, unequal and prejudicial to the interests of the minors. This finding which is in favour of the plaintiff has not been challenged by the respondents or by the appellants in A. S. No. 389 of 1969. I have to, therefore, proceed on the basis of the said finding. The learned counsel, in support of his submission, that once the partition deed is found to be unfair and unequal, it can be ignored and no setting aside is necessary, refers to the following decisions:

In Lal Bahadur Singh v. Sispal Singh (1892) ILR 14 All 498) certain members of the joint family partitioned the family properties among them in such a way as to give one member of the family who, at the time of the partition was a minor, less than the share to which he was entitled. The minor was represented in the partition by his uncle who was not a natural guardian. The minor, on attaining majority brought a suit for recovery of the full share to which he was entitled. It was held by a Division Bench that the suit was not one for relief on the ground of fraud or mistake, inasmuch as the partition could not under the circumstance affect in any way the rights of the minor and that therefore the suit was not subject to the limitation of three years prescribed by Articles 95 and 96 of the second Schedule of Act. 15 of 1877. But said ruling is based on the special facts of that case where the minor was not bound by his uncle's act, that the uncle had no authority to barter away the minor's rights and, that therefore, the minor can ignore the partition entered into by his uncle. In Ratham Chettiar v. S. M. Kuppuswami, AIR 1976 SC 1 a partition effected between the members of a Hindu undivided family was challenged on the ground that it unfair, unjust and detrimental to the interests of certain minor co-parceners. The Supreme Court pointed out that when the partition is effected between the members of the Hindu undivided family which consists of minor co-parceners it is binding on the minors also if it is done in good faith and in bona fide manner keeping into account the interests of the minors, that where, however, a partition effected between the members of the Hindu undivided family which consists of minors is proved to be unjust and unfair and is detrimental to the interests of the minors, the partition can certainly be reopened, whatever the length of time when the partition took place. But this decision cannot be taken to be an authority for the proposition that wherever the partition is found to be unfair and unequal the same can be set aside without reference to the question of limitation. In the same decision the Supreme Court has pointed out:—

"It is true that minors are permitted in law to reopen a partition on proof that the partition has been unfair and unjust to them. Even so, so long as there is no fraud unfair dealing or overreaching by one member as against another, Hindu law requires that a bona fide partition made on the basis of the common consent of coparceners must be respected and is irrevocable."

In this case, in the partition under Exhibit A-8, the plaintiff was represented by his mother, the fourth defendant. The partition has also been acted upon. Even assuming that the partition is found to be unfair, unequal and unjust, the plaintiff having been represented by his natural guardian is bound by the said partition until it is set aside at his instance on attaining majority. The above decision of the Supreme Court does not deal with the question of limitation for a suit to set aside a partition by a quondam minor but it only deals with the right of the quondam minor to have the partition set aside on the ground that the partition is unequal and unfair.

23. In Chanvirapa v. Danava ((1894) ILR 19 Bom 593) it was held that partition made by a mother as guardian of her minor son is valid, that if it is just and legal it will bind the minor, that when the minor arrives at full age, he can however have it set aside if it can be shown to be illegal or fraudulent, and that a suit to set aside a partition by a minor is governed by Art. 91 or 95, Sch. II of the Limitation Act 15 of 1877 and must be brought within three years after the minor attained majority. In Balkishan Das v. Ram Narain Sahu (1903) ILR 30 Cal 738) the Privy Council observed:—

"The question upon which their Lordships have felt most difficulty is whether the document can be considered as binding upon the coparceners, who were minors at the date of it. But they think

that in these proceedings they must treat it as binding upon them. There is no doubt that a valid agreement for partition may be made during the minority of one or more of the coparceners. That seems to follow from the admitted right of one co-parcener to claim a partition; and (as has been said) if an agreement for partition could not be made binding on minors a partition could hardly ever take place. No doubt if the partition was unfair or prejudicial to the minor's interests, he might, on attaining his majority, by proper proceedings, set it aside so far as regards himself."

In Rangasayi v. Nagarathnamma, ILR 57 Mad 95: (AIR 1933 Mad 890) a Full Bench of this Court pointed out that a valid partition could be made outside the Court by the members of a joint family though some were minors at that time, that it is open to the adult coparceners to express their intention to separate from others, that even though some coparceners are minors such intention to separate may be communicated to the mothers or other natural guardians of the minors, that a partition effected by the adult coparceners with the mothers or other natural guardians of the minor coparceners representing the minors would be a valid partition and would be binding on the minors though it would be open to the minors when they come of age to take steps to have such a partition modified if their proper shares of the joint family property have not been secured to them. From the above decisions it is clear that the plaintiff in this case cannot ignore the earlier transaction of partition to which he was eo nomine a party and proceed to ask for a fresh partition without setting aside the earlier partition either on the ground of fraud or illegality or on the ground that it is unfair and unequal and prejudicial.

24. If the earlier partition is to be set aside by the plaintiff, the question is as to what is the period of limitation for such a suit. According to the learned counsel limitation will begin from the date of knowledge of the illegality or unfairness and not from the date of the plaintiff attaining majority. It is said that the plaintiff became aware of the fact that the partition is unfair and unequal only on 16-2-1960. I am not inclined to agree with the learned counsel that the three years will not commence from the date of the plaintiff attaining majority. The minor, as soon as he attains majority should be taken to have knowledge of the transactions entered into by the guardian during his minority. Therefore, the plaintiff should be taken to have had knowledge of the transaction on his attaining majority. Therefore, the period of limitation before which he should file a suit for setting aside the document of partition will be three years of his attaining majority. I have to, therefore, agree with the Court below that the plaintiff cannot ignore or set aside the partition that took place under Exhibit A-8 as the suit has been filed on 2-7-1962, three years after his attaining majority. Though the plaintiff came forward with a case that his date of birth is 2-7-1941 the lower court has not accepted his case and it has specifically found that the plaintiff was born on 15-9-1939, and no material has been placed before this Court to take a contrary view. The next question is whether the plaintiff can challenge the alienations in relation to items 1, 2 and 4 of B Schedule and 1 to 7 and 13 to 16 of C Schedule and item 1 of D Schedule. A perusal of the partition deed Ex. A 6 indicates that items 1, 2 of B Schedule, items 1 to 5 of C Schedule and item 1 of D Schedule were allotted to the 1st defendant. So long as the partition stands without being set aside, the first defendant is entitled to deal with the properties allotted to her. Therefore, the alienations made by the first defendant of the items allotted to her cannot be questioned by the plaintiff unless he succeeds in setting aside the partition under Ex. A. 8. Therefore, the plaintiff's attack relating to the alienations of items 1and 2 of B schedule and items 1 to 5 of C Schedule and item 1 of D Schedule has to be straightway rejected. As regard item 4 of B schedule it is seen that this house property has been sold to one Mrs. Francis under Ex. B-21 by defendants 2 to 4 and the plaintiff as minor represented by the 4th defendant, retaining a right to repurchase it by paying a sum of Rs. 3950 between 10-6-1963 and 9-6-1965. It is not the case of the plaintiff that he had ever offered to Mrs. Francis or the 23rd defendant the subsequent purchaser the sum of Rs. 3950 and asked for a reconveyance of the property. The plaintiff has not chosen to exercise that right within the stipulated period after attaining majority. Therefore, he cannot now ask for any relief questioning the sale under Ex. B. 21. Items 6, 7 and 13 to 16 of plaint C Schedule are wet lands

of an extent of 1.62 acres. These were sold by defendants 1 and 2 and the 4th defendant acting for herself and as guardian of the plaintiff to defendants 5 and 6 for a sum of Rs. 2000, under Ex. B. 12 dated 7-2-1958. Though this alienation has been questioned by the plaintiff, defendants 5 and 6 remained ex parte and they did not contest the suit presumably because they have executed Ex. B 11 dated 7-2-1958 in favour of the second defendant agreeing to reconvey the lands after the expiry of 7 years from the date of sale but before the expiry of 9 years for a sum of Rs. 2000. On 7-3-1962 the second defendant had executed Ex B 45 in favour of the 8th defendant agreeing to sale the lands to the latter for Rs. 7500. It is recited in Ex. B 15, that Rs. 2000 was paid to the second defendant by the 8th defendant as advance and that the balance of Rs. 5500 should be paid on or before 6-2-1965 and on such payment the second defendant should execute a sale-deed to the 8th defendant. On 4-2-1965, defendants 2, 3, 5 and 6 had executed Ex. B 16 in favour of the 8th defendant for a sum of Rs. 10875. The plaintiff has challenged the sale in favour of the 8th defendant on the ground that the said sale deed has been executed when he was actually a major and, therefore, the sale will not bind his share. But the property having been sold to defendants 5 and 6 by all the members of the family including the plaintiff who was represented by his guardian, the 4th defendant, the said sale will be binding on him. Subsequently, defendants 5 and 6 along with defendants 2 and 3 had executed the sale deed Ex. B 16 in favour of the 8th defendant. If the plaintiff was eo nomine a party to the earlier sale-deed Ex. B 12 dated 7-2-1958 the said sale deed will be binding on him unless he attacks the conduct of the guardian. Since the plaintiff has questioned the sale under Ex. B-16 only on the ground that he was a major at the time of the execution of that sale deed, he cannot challenge the earlier sale deed Ex B-12, in favour of defendants 5 and 6. Therefore, the view taken by the lower court that Ex B-16 having been executed by defendants 2 and 3 and 5 and 6 at a time when the plaintiff was a major will not bind his interest if any acquired under the agreement Ex. B-15 dated 7-5-1962 appears to be correct. The lower court has, however, felt that the binding nature of the Ex. B-15 was not necessarily to be considered in this suit as the only question to be considered is whether the sale under Ex. B-12 in favour of defendants 5 and 6 is valid and binding on the plaintiff. The consideration mentioned in Ex. B-12, has gone for the discharge of the debts incurred in connection with the litigation between the executants and the first defendant and for meeting further expenses. Two attestors to Ex. B-12 sale deed and the 6th defendant have been examined respectively as D. Ws. 3, 4 and 5 with reference to the alienation under Ex. B-12. On the basis of their evidence the lower court found that the sale was not for an adequate price as alleged by the plaintiff and that it was for binding purposes. In this view, the lower court held the sale under Ex. B.12 to be binding on the plaintiff. Since Ex. B-12 was followed up by an agreement for reconveyance Ex. B-11, the plaintiff is entitled to enforce his rights under Ex. B-11. But under Ex. B-11, the properties have to be repurchased by the vendors after 7-2-1965 and before 6-2-1967. It is not the case of the plaintiff that he offered to repurchase the property by tendering the price and that defendants 5 and 6 or the 8th defendant refused the tender. The plaintiff not having exercised his option within the time stipulated, has no right to claim reconveyance of these properties. The plaintiff is not therefore entitled to any relief in respect of the said items of properties. App No. 103 of 1970 has, therefore, to fail.

25. App. No. 389 of 1969 has been filed by defendants 18 to 22 as regards item 3 of B Schedule which has been decreed by the lower court in favour of the plaintiff. This item has been brought to sale, by one Parthasarathi Chetti in O. S. 143 of 1954 filed against the plaintiff and defendants 2 and 3 and the 13th defendant had purchased the same in court auction. Ex. B-27 delivery receipt dated 4-4-1957 clearly shows that the 13th defendant took possession of the property through court. Later, the 13th defendant had sold the property to the decreeholder Parthasarathi Chetti by a registered deed dated 11-7-1960. The plaintiff has challenged not only the court auction sale in favour of the 13th defendant but the subsequent transfer by him in favour of Parthasarathi Chetti. Defendants 16 to 22 are the legal representatives of Parthasarathi Chetti. Parthasarathi Chetti's wife, and 18th defendant

has been examined as DW 9. She has deposed that her husband filed a suit against the plaintiff and defendants 2 and 3 and obtained a decree and in execution of that decree item 3 of B Schedule was brought to sale and the 13th defendant purchased it in court auction and later on conveyed it to her husband. The evidence of DW 9 has been rejected by the court below on the ground that she does not know personally about the suit conducted by her husband and, therefore, her evidence cannot be accepted. It is also pointed out by the lower court that no extract from the suit register nor a copy of the decree passed in O. S. 143 of 1954 on the file of the Court of the District Munsif, Kancheepuram, has been filed and that, therefore the court auction sale in favour of the 13th defendant cannot be taken to be binding on the plaintiff. I do not see how the lower court came to the conclusion that the court sale in favour of the 13th defendant has not been established. It may be that DW 9 had no personal knowledge about the proceedings conducted by her husband against the plaintiff and defendants 2 and 3. But that does not prevent the court from considering the other documents in the case to find out whether there was in fact a decree against the plaintiff and defendants 2 and 3 and whether in execution of that decree item 3 was sold to the 13th defendant in court auction. Ex. A-8 the partition deed dated 20-4-1951 clearly shows that the debt due to Subbarayalu Chetti and Co. was allotted to the plaintiff and defendants 2 and 3. Parthasarathi Chetti claims to be a member of Subbarayalau Chetti and Co. Whatever it be, Ex. B-27 shows that the 13th defendant took possession of the property purchased by him in court auction in E. A. 442 of 1957 in O. S. 143 of 1954 on the file of the district Munsif, Vellore, on 4-4-1957. Therefore, having regard to the fact that the plaintiff was eo nomine party in the suit in O. S. 143 of 1954, and the execution proceedings thereon, the plaintiff cannot now challenge the validity of the decree or the said court auction sale. On a due consideration of the matter, I am of the view that the lower court is in error in upholding the plaintiff's claim as regards item 3 of B schedule defendants 18 to 22 have acquired a valid title in relation to the item by a transfer from the 13th defendant who had in turn purchased the same in court auction in execution of a decree obtained against the plaintiff and other defendants by the husband of the 18th defendant. A. S. No. 389 of 1969 has, therefore, to be allowed.

26. The 7th respondent in A. S. 103 of 1970 has filed a memorandum of cross objections and those objections relate to three minor matters: (1) the disallowance of his cost of Rs. 406-50 by the court below, (2) one-third share in the well in the third item of C schedule which has been declared in favour of the plaintiff, and (3) the decree of the lower court is not in accordance with the judgment in that though the operative part of the judgment says that the suit as against the 8th defendant and item 13 is dismissed 8th defendant's name and item 13 do not find a place in the decree. As regards the matter relating to the costs, I am not inclined to interfere with the discretion of the court below in not awarding costs to the 8th defendant. As regards the second matter, since the suit has been dismissed as against the 8th defendant, the 7th respondent in A. S. 103 of 1970, he cannot complain that the lower court should have decided as regards one-third share in the well in item 3 of C Schedule. As regards the third matter it appears to arise out of an obvious mistake. The last paragraph of the judgment clearly shows that the suit as against the 8th defendant is dismissed. But the decree does not refer to the 8th defendant. Similarly item 13 is found omitted in the decree. Therefore this objection of the cross objector has to be upheld. Therefore, the decree of the lower court will be modified to indicate that the suit as against the 8th defendant as also item 13 is also dismissed so as to bring it in accord with the judgment. The cross objections are ordered accordingly.

27. In the result, A. S. 103 of 1970 is dismissed with costs of contesting defendants, one set. A. S. 389 of 1969 is allowed with costs. The cross-objections in A. S. 103 of 1970 is partly allowed. There will, however, be no order as to costs in the memorandum of cross objections. C. M. P. 10696 of 1975 is dismissed as unnecessary.

Order accordingly.

AIR 1978 MADRAS 238

BALASUBRAMANYAN J.

V. Ramaswami Naidu and others, Appellants v. Syndicate Bank, Respondent.

A. A. O. No. 433 of 1976, D/- 11-1-1977.

Civil P. C. (5 of 1908), O. 21, R. 30 — Option as to mode of execution — Money decree declaring charge on certain property — Decree-holder can proceed first against other property. AIR 1943 Bom 158, Diss. from.

Where, the decree is simply a personal decree for money, the decree holder is free to proceed against any property of the judgment debtor, without constraint of any kind. It is not necessary that he should first proceed against the charged property or else establish his bona fides for proceeding against the other properties of the judgment debtor. AIR 1943 Bom 158, Diss. from. AIR 1941 Bom 90 (FB) and AIR 1934 Nag 140 Rel. on. AIR 1953 Mad 876 and AIR 1933 Mad 33 (1) Dist. (Para 13)

The answer to the question whether the decree-holder is disentitled or disabled from proceeding against the properties of the judgment-debtors other than those charged under the decree must be found, in the terms of the decree. Where the decree directs the judgment debtors to pay certain sum and states that certain shares would be charge for the due payment of the amount to the plaintiff. The decree would seem to be only a personal decree for money, and none the less so for its also declaring a charge over the shares. For the decree does, in terms, direct that the decree-holder should only proceed against the charged shares for the realization of the decree amount, or even that it should proceed against those shares in the first instance. (Para 5)

Anno: AIR Comm. C. P. C. (8th Edn.) O. 21. R. 30, N. 4.

Cases Referred: Chronological	Paras
AIR 1953 Mad 876	11, 13
AIR 1943 Bom 158	6, 7, 8
AIR 1941 Bom 90 (FB)	7, 8
AIR 1934 Nag 140	10
AIR 1933 Mad 33 (1)	11

A. Vedantam, for Appellants; S. Sampathkumar and A. P. S. Kasturirangan, for Respondent.

JUDGMENT:— The Syndicate Bank, which is the respondent in this appeal, obtained a decree against the appellants for payment of Rs. 1,50,766-89 and costs, on a charge of 4000 shares in Pankaja Mills Ltd., and 101 shares in Pioneer Fertilisers Ltd. To execute the decree aforesaid, the Bank filed E. P. No. 380 of 1975 in the Sub-Court, Coimbatore for attachment and sale of the judgment debtors properties. But the properties sought to be proceeded against in execution were not the joint stock company shares mentioned in the decree as a charge, but were quite different. They consisted of an item of immoveable property which was a cinema house called "Central Theatre" and various item of machinery, furniture and fittings therein. The judgment-debtors resisted the execution. They submitted that the Bank should not be allowed to proceed against the Central Theatre before exhausting the remedy against the shares over which the decree had declared a charge.

2. The learned Subordinate Judge took the view that for executing the decree in this case the decree holder was not restricted to the charged properties alone. According to the learned Subordinate Judge, the decree-holder was at liberty to proceed against any of the other properties of the judgment debtors, unless it was shown that the execution petition was mala fide. On the facts, he found no evidence of mala fides on the part of the Bank. He, accordingly, entertained the execution petition and posted it for settlement of proclamation of sale.

3. The judgment-debtors have now come to this Court in appeal against the order of the learned Subordinate Judge. Mr. Vedantham, learned counsel appearing for the judgment-debtor reiterated before me the same contention as was advanced before the execution court.

4. Mr. Kasthuri Rangam learned counsel for the Bank, on the other hand, submitted that the levy of execution against the central Theatre was not bad, merely because the shares stood charged under the decree for payment of the debt and merely because those shares had not been proceeded against earlier for the realization of the decree.

5. The question which arises in the appeal is, whether the Bank is disentitled or disabled from proceeding against the properties of the judgment-debtors other than the shares charged under the decree. The answer to the question must be found, in my opinion, in the terms of

the decree. Clause 1 of the decree directs the judgment debtors to pay the Bank Rs. 1,50,766-89. Clasue 2 specifies the costs, and directs the judgment-debtors to pay the same. Clause 3 of the decree, which is relevant to the present purpose, is to the effect that "the shares mentioned in the plaint schedules I and II be a charge for the due payment of the amount to the plaintiff as mentioned in cls. 1 and 2 above." The decree would thus seem to be only a personal decree for money, and nonetheless so for its also declaring a charge over the shares. For the decree does not, in terms direct that the decree-holder should only proceed against the charged shares for the realization of the decree amount, or even that it should proceed against those shares in the first instance. Nor is there any prohibition or restriction which learned counsel for the appellants was able to point out to me under the law relating to execution. Order 21 rule 30 of the Code of Civil Procedure provides that every decree for the payment of money may be executed by the detention in the civil prison of the judgment-debtor or by the attachment and sale of his property or by both. The present execution petition has been filed by the respondent for attachment and sale of an item of immovable property which admittedly belongs to the judgment-debtors. Indeed, it is stated that this property had been attached before judgment during the pendency of the suit. It does not appear that any objection was taken by the appellants to that attachment on any of the grounds on which they now resist execution against the same property. It seems to me that there is nothing at all in order 21 of the Code of Civil Procedure which prohibits or restricts the right of the decree-holder to proceed against any properties of the judgment debtor in execution of the decree in this case, which, as I have earlier shown, is only a decree for money, both in form and in substance.

6. Learned counsel for the appellants relied on a decision of a learned single Judge of the Bom. High Court in Ramabai Balkrishna v. Janardan Eknath (AIR 1943 Bom 158) as enunciating a different principle. In that case, decree for maintenance in favour of a Hindu widow was sought to be executed against some property of the judgment-debtor other than the property which was charged under the decree. Objection was taken to this execution by the judgment-debtor on the score that the decree-holder ought to have exhausted her remedies as against the properties specifically charged for the decree amount and till that was done she could not proceed against the other properties of the judgment-debtor. The learned Judge sustained the judgment-debtor's objection, holding that the charged properties should be proceeded against first before the decree-holder sought execution against the judgment-debtor personally or against his other properties.

7. Mr. Kasthuri Rangan learned counsel for the Bank, submits that Rambai Balakrishna v. Janardan Eknath (AIR 1943 Bom 158) does not lay down the correct principle. He relied on an earlier Bombay case reported as Gurappa v. Amarangji, AIR 1941 Bom 90 decided by a Full Bench of the Bombay High Court. In that case, the Full Bench had to deal with the execution of a consent decree for payment of Rs. 9,000. The amount was made payable under the decree in instalments. The decree also created a charge over certain joint-stock company shares and security for payment of the money. The decree provided that "if the defendant fails to pay the moneys in time, the same should be recovered by sale of the said shares." The judgment-debtor committed default in payment of the amount. Thereupon, the decree holder proceeded against the shares, sold them and realised Rs. 4,350/- Thereafter, he took out an execution petition to recover the balance of the decree debt by attachment and sale of an item of immovable property belonging to the judgment-debtor. This execution petition was resisted by the judgment-debtor on the ground that once the decree-holder had proceeded against the property, which was made a charge under the decree, the decree itself stood exhausted and the decree-holder could not proceed against the other properties of the judgment-debtor. It was urged that under the terms of the decree the entire judgment debt was to be realised only from the properties charged under the decree for the payment of the debt. This contention, however, was negatived by the Full Bench. Beaumount C. J., who was a member of the Full Bench, explained the position thus:

"In taking a charge it seems to me that what the creditor is looking to is his protection against the rights of intervening creditors, who may attach the

property of the judgment-debtor, whilst the plaintiff's hands are tied by the time given for payment of instalments. That seems to me to be the object of a charge; not to regulate the order in which the defendant's property is liable to be attached."

Proceeding to construe the terms of the decree in that case, the learned Chief Justice observed that it was prima facie a personal decree. He further held that the analogy of a decree for sale in a mortgage action could not be applied to the decree before them. Adverting to the contention that by taking a charge upon a specified property the creditor had abandoned his right to proceed against the other properties of the judgment-debtor, the learned Chief Justice observed that "such an abandonment should not be presumed in the absence of language making clear the intention to abandon. On the other hand, to hold that the creditor can only attach other property after obtaining a fresh order for payment is to ignore the fact that the decree already contains an order for payment."

8. The learned single Judge who decided Ramabai Balakrishna v. Janardan Eknath, AIR 1943 Bom 158 had expressed the view that the Full Bench in Gurappa v. Amarangji (AIR 1941 Bom 90) had before them only a limited question to decide namely, whether a charge decree exhausted itself once the charged property had been sold and realized. But this is not, with respect, a correct reading of the Full Bench decision. The passages I have earlier extracted from the judgment of Beaumont C. J., would show that the Full Bench had also examined the wider question whether the holder of a charge decree is entitled to proceed against the properties other than those which are specifically charged under the decree.

9. The reasoning and the ultimate conclusion of the Full Bench of the Bombay High Court, which I have summarised above, are apposite to the present case. If anything this seems to me to be an a fortiori case. The decree obtained by the Bank in this case merely declares a charge over the shares; it does not even say that the charged property is to be proceeded against for the realization of the debt.

10. Learned counsel for the Bank brought to my notice yet another decision concerning the execution of charge decrees. He cited Shyamashankar v. Nathuram, AIR 1934 Nag 140 a judgment of Vivian Bose, A.J.C., as he then was. In that case, the suit was for recovery of money. The defendants accepted a personal decree against themselves. They further submitted to a declaration in the decree that a portion of their immovable properties should be charged for payment of the decretal amount. Bose A. J. C., held that the decree, on the aforesaid terms, was nothing but a personal decree. He further held that although the decree also created a charge it cannot be regarded as a mortgage decree under Order 34 of the Code of Civil Procedure. The learned Judge observed that the Code gives the decree-holder the right to decide whether he should execute his decree in one way or another. He added that if the court considers that the decree-holder should not exercise his right to levy execution in the manner he desires, then the court must give reasons for so holding. The last observation from the judgment of Vivian Bose A. J. C. is particularly relevant to this case, to meet one of the contentions raised by the learned counsel for the judgment debtors. He urged that the decree-holder had not given any reasons as to why he had not proceeded against the charged shares, but was seeking to levy execution against the Central Theatre which was not charged under the decree. As observed by Vivian Bose A. J. C., however, it is not necessary for the decree-holder to state any reason as to why he picks and chooses any particular property of the judgment debtor as the object of his execution proceeding. So long as there is no restriction or prohibition under the law for executing the personal decree for money, the decree-holder is at perfect liberty to seek the aid of the executing court for proceeding against any property of the judgment-debtor.

11. A few other decisions were also cited in argument at the bar. It is enough to notice two of them from this court. One is Rangaswami v. Jankiammal, AIR 1953 Mad 876 decided by Mack, J. An earlier Bench decision of this court in Srinivasa Ayyar v. Lakshmi Ammal, AIR 1933 Mad 33 (1) was also cited. These two decisions, however, when examined, are found to have been especially concerned with problems raised by execution of maintenance decrees obtained by Hindu widows. In the earlier decision of Srinivasa Ayyar v. Lakshmi

Ammal (AIR 1933 Mad 33 (1)) Venkatasubba Rao., J., remarked that "considerations that apply to decrees obtained by widows for maintenance are different from those that apply to mortgage decrees." This decision was followed by Mack, J., in Rengaswami v. Janakiammal, (AIR 1953 Mad 876). Mack, J., observed as under (at p. 876):—

"It is settled law that a widow cannot be confined to property charged with her maintenance and that she need not exhaust it all before she can proceed against other property belonging to her husband's joint family."

12. I am inclined to regard the charge-decrees obtained by Hindu widows as a class by themselves. Questions arising in execution of such decrees, perforce, raise aspects of the personal law relating to maintenance of Hindu widows. Desisions bearing on the execution of such decrees cannot, therefore, be regarded as laying down any principle of general application to other charge decrees.

13. The learned Subordinate Judge understood the law to be that where the holder of a charge decree proceeds in execution against the judgment-debtor's uncharged properties, the judgment debtors can successfully resist the execution only by establishing that the decree-holder's proceeding is mala fide. I do not think this is a correct view of the law. In cases where execution of charge-decrees obtained by Hindu widows have figured, it is true that courts have sometimes laid down this limitation. (Vide AIR 1953 Mad 876). It is not however necessary to examine in this case the theoretical validity of such a rule even in the case of execution of charge decrees obtained by Hindu widows. It is sufficient to state that the decree in the present case does not belong to that class. I know of no statutory provision or rule of law which compels executing courts to examine the bona fides or mala fides of a decree-holder just for determining questions arising in execution. At all events, in a case where, such as the present, the decree is simply a personal decree for money, it seems to me that the decree-holder is free to proceed against any property of the judgment-debtor, without constraint of any kind. It is not necessary that he should first proceed against the charged property or else establish his bona fides for proceeding against the other properties of the judgment-debtor.

14. As I have more than once pointed out, the decree in this case barely declares a charge over the shares. It may be a nice question to debate whether the charge so declared could be enforced under the decree straightway by the decree-holder applying for a sale of the shares, or whether on the analogy or Order 34, Rule 14 of the Code of Civil Procedure, the decree-holder would be driven to the necessity of filing a separate suit for enforcement of the charge by sale of the shares for realization of the amount decreed in this suit. Much would depend on the way the terms of the decree are construed. One view may be that the terms of a declaratory decree of this kind serve no purpose other than to ensure the position of the decree-holder as a secured creditor vis-a-vis the other creditors of the judgment-debtors. The other view may be to regard the decree as being analogous to a mortgage decree enabling the decree-holder to ask for a sale of the charged shares even without a precedent attachment. Whichever view might be entertained on the effect of the declaratory decree in respect of the shares, does not, however, touch the question in the present case, which relates to execution as against different properties of the judgment-debtors. On the latter question, as I have earlier shown, there can be little doubt, both on principle and on the authorities, that the decree in the present case must fall to be regarded as a personal decree for payment of money, that it is executable as such as against any of the properties of the judgment-debtors, and that such execution can be levied without first proceeding against the shares over which the decree-holder declares a charge.

15. For the reasons stated above, I agree with the learned Subordinate Judge's decision upholding the maintainability of the execution petitions. The civil miscellaneous appeal is dismissed; but, in the circumstances, without costs.

Appeal dismissed.

AIR 1978 MADRAS 242
SPECIAL BENCH

RAMAPRASADA RAO, NATARAJAN AND BALASUBRAHMANYAN, JJ.

The Chief Controlling Revenue Authority, Board of Revenue, Madras, Petitioner v. V. Daniel, Respondent.

Referred Case No. 2 of 1976, D/- 5-12-1977.

Stamp Act (2 of 1899), Ss. 2 (10), 57, 58, Schedule I, Art. 55 — Release deed or conveyance — Determination of — (Deed — Construction).

In order to interpret a document which is neither ambiguous nor incomplete, the recitals in the said document ought to be generally the safe and sole guide for such interpretation. Any reliance aliunde on instruments other than the instrument under consideration might lead to queries which are beyond the scope of an answer to the question posed by the Revenue in a reference made to Civil Courts under S. 58 of the Stamp Act. An instrument whereby a benamidar sustains and declares the interest of the real owner and puts such intention in writing and styles it as a release deed, could only be interpreted and understood as release deed, pure and simple and cannot be a conveyance as it is popularly understood. (Paras 6, 7)

For the purpose of establishing a church and incidentally to acquire properties, both moveable and immoveable for the benefit of the said Church, moneys belonging to a religious institution called the Society of Trustees, which at that time was not registered and which was not formed as a Society registered under the Societies Registration Act or under any other law for the time being in force were entrusted to certain individuals. One of the trustees executed an instrument releasing his interest in the said property in favour of the Society which was afterwards registered and which provided the source of consideration for the purpose of the property which is the subject-matter of the instrument and which at all material times was intended for the benefit of that Society.

Held that it was a release deed and not a conveyance. AIR 1977 Mad 10 (FB) and AIR 1975 Mad 161 (FB), Rel. on. (Paras 6, 10)

Anno: AIR Manual (3rd Edn.) Stamp Act, S. 2 (10), N. 1; S. 57, N. 1 and Schedule 1, Art. 55, N. 1.

Cases Referred: Chronological Paras

AIR 1977 Mad 10: (1976) 2 Mad LJ 279 (FB) 6

AIR 1975 Mad 161: 88 Mad LW 27 (FB) 8

Venkataswami, Addl. G. P., for Petitioner; P. Ramaswami, for Respondent.

RAMAPRASADA RAO, J.:— The question referred to us by the Chief Controlling Revenue Authority, Board of Revenue, Madras 5, is as follows—

"Whether in the circumstances and facts of the case the document dated 30-6-1963 (document No. P-37/73 of District Registrar's Office, Nagarcoil) executed by V. Daniel in favour of the Society of Trustees of Indigenous Churches in India represented by Brother Bakth Singh Chabra styled as a 'release deed' should be termed as a 'conveyance' as defined under S. 2 (10) of the Act attracting stamp duty under Art. 23 of Schedule I of the Stamp Act."

2. By way of prefatory remarks, we make it clear that if the instrument in question which we are asked to interpret is to be understood as a conveyance, then it is not properly stamped, but if it is a release deed as it is styled and understood by the parties, then it has been so properly stamped.

3. For the purpose of establishing a church and incidentally to acquire properties, both moveable and immoveable for the benefit of the said Church, moneys belonging to a religious institution called the Society of Trustees, which at that time was not registered and which was not formed as a society registered under the Societies Registration Act or under any other law for the time being in force were entrusted to certain individuals who included one Daniel who is the executant of the instrument in question. Under this instrument, Daniel is releasing his interest in the said property in favour of the Society which was later registered and which provided the source of consideration for the purchase of the property which is the subject-matter of the instrument and which at all material times was intended for the benefit of that Society. It is common ground that the Society of Trustees which was not registered at or about the time when the property which was released under the instrument was acquired was later registered

as 'the Society of Trustees of Indigenous Churches in India' and this Society is represented by its principal trustee Brother Bakht Singh Chabra who also functioned as one of the promoters, if such an expression could be adopted, for the purchase of property for the specific benefit of the Society to be then formed which in turn should hold the Church for whose benefit persons like Mr. Daniel and Brother Bakht Singh opted together as an inchoate congregation to secure such properties. The recitals as such in the instrument make it clear that it was the releasee, namely, the Society of Trustees of Indigenous Churches in India which supplied the releasor with the necessary consideration from the subscriptions secured by the quondam Society for the purpose of buying the properties in issue from time to time. Two properties are the subject-matter of the instrument, one which was the subject-matter of a gift deed dated 24-7-1967 by one Jayachandra in favour of Christian Assembly, Nagarcoil, represented amongst others by Mr. Daniel and Brother Bakht Singh. The second instrument is a sale deed executed by one Prabhakaran Pillai in favour of the same body of trustees functioning as Christian Assembly. In and by the recitals, it was made clear that by the two documents as above, the properties were acquired by the Christian Assembly or by the promoters for the benefit of tre Society to be formed in order to ultimately benefit the Church which the Society had to hold. The instrument also recites that the Society which is the releasee was always understood as the accredited beneficial owner of the properties and that the Society requested Mr. Daniel who was representing the said inchoate Society to relinquish his interest and title, if any, over the properties; and the deed of release which is under consideration by us was the resultant of that mutual understanding as between the parties.

4. The Revenue doubted that by reason of the recitals therein and on a reference to the earlier documents which were the subject-matter of the treatment in the release deed under consideration whether the instrument in question could be treated as a bare release deed or a conveyance by Mr. Daniel in favour of the Society which was latterly registered in a manner known to law.

5. Mr. Venkataswami, the learned Additional Government Pleader, would rely upon the earlier deeds under which the documents were secured. He particularly makes a reference to the gift deed dated 24-6-1967 and the sale deed dated 5-9-1968, and would urge that there has been a vesting of title in a body known as Christian Assembly represented by four persons including Mr. Daniel and Brother Bakth Singh, that such title in that body could be divested only by a conveyance of that property by that body in whom the title vests and that, therefore, the present instrument cannot be accepted and interpreted as a bare release deed.

6. It is by now well-established that in order to interpret a document which is neither ambiguous nor incomplete, the recitals in the said document ought to be generally the safe and sole guide for such interpretation. Any reliance aliunde on instruments other than the instrument under consideration might lead to queries which are beyond the scope of an answer to the question posed by the Revenue in a reference made to civil courts under S. 58 of the Stamp Act. In a case like this where there are recitals which are clinching and even telling, in the sense, that there are assertions in it to the effect that the consideration for the purpose of the property was made by the Society which is the releasee under the instrument and that the gift was made earlier because of a voluntary effort on the part of the donor under that gift to the inchoate Assembly which had no legal status by then and which was functioning under the name and style of Christian Assembly, then it would be hazardous to indulge in an empty exercise, so as to invoke instruments other than the instrument in question for the purposes of interpretation. That this is one of the accepted methods of interpretation has been held by our court in a Full Bench decision in Board of Revenue v. Dr. Manjunatha Rai, 1976-2 Mad LJ 279: (AIR 1977 Mad 10). There, the learned Judges would categorically lay down the following proposition at p. 285 (of Mad LJ): (At p. 15 of AIR Mad)—

"It is true that what name the parties choose to give to an instrument cannot be decisive, or even indicative of the true nature of the instrument for purposes of stamp duty. But this rule does not mean that the Revenue is empowered to go behind the recitals and terms of the document before it and hold that

the object of the transaction was something different from what the document discloses and therefore the document should be deemed to be that which it is not. We do not think that the revenue authorities can ignore the terms of the document which is before them for adjudication and base their decision on the terms of some other collateral instrument....."

In the light of this and our own view expressed above, we are unable to agree with the learned Additional Government Pleader that the earlier instruments which were the basis for the acquisition of the properties dealt with under the instrument and the recitals therein could also be looked into for the purpose of understanding the true nature and content of the document dated 30-6-1973 executed by Mr. Daniel in favour of the Society of Trustees of Indigenous Churches of India.

7. Even viewing from one other angle which also deals with another well accepted canon of law, namely, that an instrument whereby a benamidar sustains and declares the interest of the real owner and puts such intention in writing and styles it as a release deed, it could only be interpreted and understood as release deed, pure and simple and cannot be a conveyance as it is popularly understood.

8. Here again, a Full Bench of our Court in Chief Controlling Revenue Authority v. Hamid Sultan, 88 Mad LW 27 : (AIR 1975 Mad 161), lays stress upon the well-known proposition and observes that if in a given case it is proved that a transaction is a benami transaction and it satisfied the well-known tests which revolve round such transaction, it is a document whereby the benamidar concedes and accedes to the title of the real owner and it could attract duty only as a release deed and not as a conveyance.

9. In this case, we are not called upon to decide as suggested impliedly by the learned Government Pleader about rival claims. In fact, in answering the question posed by the Revenue under the Stamp Act, the civil court ought not to hazard such investigations.

10. Taking the recitals as a whole and accepting them as the sole guide for interpretation, we are of the view that the instrument has been correctly stamped as a release deed and it need not be stamped as a conveyance as defined in S. 2 (10) of the Stamp Act. The question is answered accordingly against the Revenue.

Reference answered against Revenue.

AIR 1978 MADRAS 244

BALASUBRAHMANYAN, J.

Mariyam Bivi and others, Appellants v. Natharsa Rowther Trust, Respondent.

Second Appeals Nos. 2460 of 1975 and 1464 of 1976, D/- 26-10-1977.*

(A) Registration Act (16 of 1908), Section 60 (2) — Onus of proof — Allegation that registration by executor's agent was done after executor's death, hence was invalid — Party so alleging has to prove it.

S. 60 (2) enacts only a rebuttable presumption as to the facts relating to the validity of registration, but the effect of the provision, all the same, is to place the burden of proof squarely and unmistakably on the party who denies registration or its validity. (Para 6)

Anno: AIR Manual (3rd Edn.) Registration Act, S. 60 (2), N. 5.

(B) Trusts Act (2 of 1882), S. 63 — Beneficiary's right under — Exchange of trust property by trustee in breach of trust — Exchange beneficial to beneficiary — Beneficiary's right not destroyed.

The trustee alienated some properties of the trust as if they were his own. The succeeding trustee sued the alienee for a declaration and possession, contending that the alienations were void. It was contended by the alienee that the particular alienation was a deed of exchange in which the alienee had parted with a larger extent of property and also some cash.

Held that the idea seems to be that if a trust benefits by a breach of trust committed by a trustee, then a court must accept the benefit and reject the breach. This is too dangerous a doctrine of pragmatism to be countenanced in the law of trusts. To say that a trust may benefit by a breach of trust may be utilitarian, but a breach of trust is a breach of trust for all that. It would be subversive of the fundamental basis on which this jurisprudence rests for a court to turn the Nelson eye to a

*(Against decree of Sub-J., Tanjore, in A. S. Nos. 244 and 246 of 1974.)

breach of trust, if with the other eye it can find that the trust is not the worse off in consequence. On the contrary, the proper way the law deals with a breach of trust is to regard it as an evil in itself. (Para 9)

Anno: AIR Manual (3rd Edn.) Trusts Act, S. 63, N. 2.

JUDGMENT:— These two second appeals raise a common question as to the validity of registration of a trust deed executed by one Natharsa Rowther on 26-6-1920. The question arises this way. The founder's son, Abdul Khader, succeeding as trustee, alienated the properties of the Trust as though they were his own, not disclosing that they were inalienable trust properties. After Abdul Khader's death, the grandson of the founder became trustee. Acting on behalf of the trust, he sued the alienees for a declaration and possession, contending that the alienations were void having been made in breach of trust. The alienees resisted the suits. One of the defences raised by them was that the trust itself was invalid since the deed of trust had not been validly registered. This contention, as well as others, were rejected by both the courts below and the suits were decreed in favour of the Trust as prayed for. The alienees have now come in further appeal before this court.

2. Mr. R. N. Kothandaraman, arguing for one of the alienees, the appellants in S. A. 2460 of 1975, has repeated the contention that the registration of the original trust deed was invalid. His argument centred round a narrow point. He conceded that the document was duly executed by Natharsa Rowther on 26-6-1920. He conceded that it was duly presented for registration on the same day, 26-6-1920, by the executant's agent. He conceded that the agent had been duly authorised to do so under a valid power of attorney dated 25-6-1920 executed by Natharsa Rowther. Granting all these, Mr. Kothandaraman, nevertheless contended that the registration was invalid, for, according to him, Natharsa Rowther was not alive on the date of registration, which was 7-8-1920. Learned counsel said that Natharsa Rowther died within 15 days of the execution of the trust deed on his way to Mecca and during his sea voyage, and that the presentation of the document by the agent for registration and the subsequent registration were all done subsequent to the executant's death. It was accordingly urged that the registration was invalid.

3. I cannot accept the learned counsel's contention as to the death of Natharsa Rowther, in the face of the finding of both the courts below that the old man died only after he returned to Bombay after successfully completing his pilgrimage. Both courts accepted the oral evidence to this effect adduced by as many as four witnesses.

4. Mr. Kothandaraman pointed out that no certificate of death was filed by the Trust to prove that the deceased had died in Bombay after his return from Mecca. But there is no law which says that death cannot be satisfactorily proved in a court of law by oral evidence alone.

5. Mr. Kothandaraman then said that even the oral evidence adduced on behalf of the plaintiff Trust did not give the exact date of death. According to him, it was upto the trust to establish that at the time of presentation of the document the executant was very much alive and it was only later that he had died. He urged that the onus of establishing that the registration was valid in the sense that it had been done during the lifetime of the executant was on the plaintiff trust. He punctuated his argument by referring to Ss. 101 and 102 of the Evidence Act.

6. I must, however, reject the above arguments. I do so, not in derogation of the rules of evidence quoted by learned counsel, but in affirmation of a special rule of evidence, appropriate in this case, found in S. 60 (2) of the Indian Registration Act, 1908. Under this provision, where registration is granted by any registering authority to any instrument, such a certificate shall be admissible for the purpose of proving that the document had been duly registered in the manner provided by the Act and that the facts set out by the registering authority in the endorsements made by him in the instrument had all occurred as therein mentioned. This provision, no doubt, enacts only a rebuttable presumption as to the facts relating to the validity of registration, but the effect of the provision, all the same, is to place the burden of proof squarely and unmistakably on the party who denies registration or its validity. In the present case, the appellant's definite plea in the written statement was that Natharsa Rowther died within 15 days of the execution of the document. This was not made out at the trial by way of evidence, I have, therefore, no hesitation in rejecting the con-

tention that the registration of the trust deed was obtained by Natharsa Rowther's agent after his death.

7. Mr. Kothandaraman then hazarded an argument that the suit was barred by limitation. This argument, in my view, cannot be mouthed at all in this case, considering that the whole basis of the suit was to recover the trust properties which had been alienated by a former trustee in breach of trust. No question of limitation at all can arise in such a suit.

8. Lastly it was contended that the appellant ought to have been paid compensation for a structure raised by him in the suit property. This contention has been adequately dealt with by both the courts below and rejected as unsound. They relied on a catena of decisions which hold that an alienee of property conveyed by a trustee in breach of trust would not be entiteld to compensation for any improvements made by him on the property. The legal position is too well settled for citation of case law. This contention must accordingly be rejected.

9. In the other second appeal i.e., S. A. 1464 of 1976 filed by another alienee of trust properties, an additional argument was urged. I was minded to regard this plea as having been addressed more for the consumption of the present Trustee of the plaintiff-trust than for serious examination by this court. Learned counsel pointed out that the particular transfer under which his client had obtained 7 cents of trust property from the previous trustee was a deed of exchange in which his client had parted with a larger extent, namely, 11 cents, not to speak of some cash consideration also in favour of the Trust. The suggestion is that this alienation by way of exchange was in no way detrimental to the Trust, but must have actually benefited it. I must reject this argument as wholly untenable. There is no evidence that a larger extent of property brought an added benefit to the Trust. Besides, I must reject the very approach behind this argument. The idea seems to be that if a trust benefits by a breach of trust committed by a trustee, then a court must accept the benefit and reject the breach. This, in my opinion, is too dangerous a doctrine of pragmatism to be countenanced in the law of trusts. To say that a trust may benefit by a breach of trust may be utilitarian, but a breach of trust is a breach of trust for all that. It would be subversive of the fundamental basis on which this jurisprudence rests for a court to turn the Nelson eye to a breach of trust, if with the other eye it can find that the trust is not the worse off in consequence. On the contrary, the proper way the law deals with a breach of trust is to regard it as an evil in itself. I do not propose to depart from this rule in this case.

10. Both the second appeals are accordingly dismissed with costs.

Appeals dismissed.

AIR 1978 MADRAS 246

N. S. RAMASWAMI, J.

Marimuthu Muthiriar, Appellant v. Ayyathurai, Respondent.

Second Appeal No. 1098 of 1976, D/- 9-9-1977.*

Civil P. C. (5 of 1908), O. 34, R. 7 — Suit for redemption — Whether Court can grant final decree for redemption without granting preliminary decree.

In the present case, the plaintiff-mortgagor deposited the mortgage amount even on the date of filing of the suit. The fact that the said amount was being deposited as the amount due to the mortgagee was also mentioned in the plaint. The defendant did not care to appear and contest the suit. Under such circumstances, the trial court was not wrong in passing a final decree for redemption without first passing a preliminary decree. (Para 5)

The provisions contained in O. 34, Rr. 7. 8 and 9 contemplating the passing of preliminary decree first and final decree at a later stage are for the purpose of giving an opportunity to the mortgagor to deposit the mortgage amount due to the mortgagee. But in a case where there was no dispute regarding the amount due to the mortgagee and the mortgagor had in fact deposited the mortgage amount even at the time of filing of the suit, the court is not without jurisdiction to straightway pass a final decree for redemption. AIR 1922 All 479 and AIR 1926 Mad 644, Rel. on. (Paras 7, 8)

Anno: AIR Comm. C.P.C. (8th Edn.), O. 34, R. 7, N. 3.

*(Against decree of Sub-J., Tiruchirapalli, in A. S. No. 348 of 1975.)

Cases Referred: Chronological Paras
AIR 1926 Mad 644 9
AIR 1922 All 479 1

JUDGMENT:— In this second appeal by the defendant the question raised is whether the trial court was in order in passing a final decree for redemption without first passing a preliminary decree. The plaintiff executed an usufructuary mortgage as per the original of Ex. A-1, dated 28-8-1971, in favour of the defendant for sum of Rs. 2,000. The plaintiff deposited the sum of Rs. 2,000 in court while filing the suit for redemption. The defendant did not appear to contest the suit. The trial court straightway passed a final decree for redemption following the decision in Roshan Lal v. Bhuri Singh, AIR 1922 All 479. It also fixed the mesne profits at Rs. 61 per month, on payment of the necessary court-fee.

2. The defendant filed an appeal which was heard by the learned Subordinate Judge, Tiruchirapalli. He went into the question whether the court can grant a final decree for redemption without granting a preliminary decree and held on the basis of the above said Allahabad decision that it can be done. Therefore, the decree granted by the trial court was confirmed except regarding the question of mesne profits. The first appellate court said that the quantum of mesne profits is to be determined by separate enquiry under O. 20, R. 12 C.P.C.

3. The defendant has filed the second appeal contending that the courts below are not right in holding that in this case the passing of a preliminary decree can be dispensed with.

4. Order 34, Rule 7 (1) C.P.C. undoubtedly contemplates the passing, in the first instance, of a preliminary decree in a suit for redemption. The Code says that in such a preliminary decree, the court is to order that an account is to be taken of what was due to the defendant (mortgagee) at the date of such decree for (1) principal and interest on the mortgage; (2) the costs of suit, if any, awarded to him and (3) other costs, charges and expenses properly incurred by him upto that date in respect of his mortgage security together with interest thereon. That is under cl. (a) of R. 7 (1).

5. But there is cl. (b) of the said sub-rule which says that the Court can declare the amount due on that date, without giving a direction in the preliminary decree for ascertaining the amount as contemplated under cl. (a). In the present case, the plaintiff-mortgagor has deposited the mortgage amount of Rs. 2,000 even on the date of filing of the suit. The fact that the said amount is being deposited as the amount due to the mortgagee is also mentioned in the plaint. The defendant did not care to appear and contest the suit. Under such circumstances, the question is whether the trial court was wrong in straightway passing a final decree for redemption as it did.

6. As already seen two alternatives are open in a suit for redemption. One is, the court can give a direction in the preliminary decree for the ascertainment of the mortgage amount. The other is to determine the amount itself without giving a direction as aforesaid. In this case, undoubtedly the trial court should be deemed to have declared the amount due to the mortgagee as contemplated under R. 7 (1) (b) of O. 34 C.P.C.

7. It is contended on behalf of the defendant appellant, that he might not have had any objection for the passing of a preliminary decree for redemption and therefore he allowed the matter to proceed ex parte and had the correct procedure as contemplated in the C.P.C., been followed, the plaintiff would have been obliged to file an application for a final decree in which the defendant would have received a notice and that after such notice, he would have had an opportunity to contend before the court that amounts more than the sum of Rupees 2,000 were due to him. This is hardly acceptable. If R. 7 (1) stops with saying that the preliminary decree should direct ascertainment of the amount as mentioned in cl. (a) of that rule, the contention may have some force. But as already seen, there is an alternative clause, namely, cl. (b) of Rule 7(1) which contemplates the court declaring the amount due even at that stage without giving any direction for the ascertainment of the amount due to the mortgagee on a later date. That means the defendant should have appeared in court and contested the matter if his case is that he was entitled to more than the sum of Rs. 2,000 deposited by the plaintiff. He, having not done so, it would not be open to him now to say that had the court passed only preliminary decree and gave notice on a final

decree application, he would have had the opportunity to put forth his case.

8. The provisions contained in Rr. 7, 8 and 9 of O. 34 C.P.C. contemplating the passing of preliminary decree first and final decree at a later stage are for the purpose of giving an opporunity to the mortgagor to deposit the mortgage amount due to the mortgagee. But in a case where there was no dispute regarding the amount due to the mortgagee and the mortgagor has in fact deposited the mortgage amount even at the time of filing of the suit, it is not as if the court has no jurisdiction to straightway pass a decree for redemption without passing a preliminary decree and waiting for an application for a final decree to be filed.

9. In the Allahabad case referred above, it has been held that where there is a valid mortgage and a deposit is made in the court by the mortgagor to redeem it, the court is not bound to first pass a preliminary decree and then a final decree which means the prolongation of the proceedings, if no injustice will be done to either party by the passing of the final decree at once. Learned counsel for the defendant tried to distinguish this decision. But there is no real distinction on facts between that case and this one. Manicka Chetti v. Kuppuswami Asari, AIR 1926 Mad 644, is a case where a decree was passed for redemption on compromise between the parties. It has been pointed out that it is not absolutely necessary that in every mortgage suit there should be a preliminary decree before a final decree is passed.

10. I have already indicated the facts and circumstances of this case to show that there is nothing wrong in the trial court straightway passing a decree for redemption. The direction given by the first appellate court regarding the ascertainment of mesne profits by separate enquiry is correct. The second appeal fails and is accordingly dismissed with costs.

Appeal dismissed.

AIR 1978 MADRAS 248

RAMAPRASADA RAO AND SURYAMURTHY, JJ.

Md. Sultan Moideen and others, Appellants v. Official Trustee, Madras and another, Respondents.

L. P. A. No. 12 and O. S. A. No. 3 of 1976, D/- 21-6-1977.

(A) Madras Buildings (Lease and Rent Control) Act (18 of 1960) S. 2 (8) (as amended by Act 23 of 1973) — 'Tenant' — Only heirs and legal representatives living with or associated with deceased tenant can continue as statutory tenants. (Para 4)

(B) T. P. Act (4 of 1882), S. 8 — Deed — Interpretation.

Courts ought not to be guided merely by the nomenclature and the description given to a particular document by the parties. If, on a general reading of the document concerned, a different legal or jural relationship could be carved out in the peculiar facts and circumstances of a given case, then the mere description given to a document by the parties may not have the weightage it would normally demand.

In the present case, the right to collect the rents from the property was given to the transferee under a deed by the lessor. The transferee undertook certain obligations. The purport of the deed was to enable the transferee to act as the agent of the lessor with an interest coupled with such an agency to appropriate towards his services the excess collections to himself and pay agreed sum called rent to the lessor. The transferee was not in occupation of a portion of the premises. In the circumstances, the document cannot be called a lease deed. (Para 5)

Anno: AIR Manual (3rd Edn.) T. P. Act, S. 8, N. 3A.

Cases Referred:	Chronological Paras
(1973) Appeal No. 518 of 1973 (Mad)	4
AIR 1960 Mad 321	4
AIR 1941 FC 5	4

RAMAPRASADA RAO, J.:— These two appeals are somewhat connected. L. P. A. No. 12 of 1976 is directed against the judgment of N. S. Ramaswami J. in App. No. 19 of 1972 and O. S. A. 3 of 1976 is against an order of Mohan J. in Appln. No. 3234 of 1975 in O. P. 158 of 1920. We shall first deal with the L. P. A. No. 12 of 1976.

2. M. A. Mohamed Burhanuddin Sahib entered into an arrangement with the Official Trustee, Madras, under Exs. A-1 and A-2 dated 12-5-1961 and 4-1-1963, which were styled as lease deeds, in and by which Mohamed Burhanuddin Sahib (hereinafter referred to as the original tenant) obtained a right to collect the rents from a market called Connemera Market in Pudupet, Madras. There are a number of stalls in the said market which is used as a daily market. Apparently for administrative convenience, the Official Trustee enabled Mr. Sahib to collect the rents from the various stalls in the market and pay him a monthly rent of Rs. 970 and the tenant was obliged to perform various other obligations which he undertook under the lease deed. For the purposes of this appeal, it is unnecessary to state in detail the terms and conditions under which the arrangement was entered into between the Official Trustee and late Mr. Sahib. The lessee, as Mr. Sahib was called, was to meet all the commitments as regards electricity, cause minor repairs and pay the water supply charges as also the charges to the Corporation of Madras for running the market in accordance with the rules of the Corporation of Madras, and the lessor, i.e., the Official Trustee, was to pay the property tax on the premises and continue the arrangement as above for a period of five years from 1-3-1961, with option to Sahib to renew the so-called lease for a further period of three years on the same terms and conditions enumerated in what is known as the lease deed. Under Ex. A-4, the Official Trustee determined the lease with effect from 31-3-1969 and called upon Sahib, who was the first defendant in the main suit instituted by the Official Trustee, to surrender possession. The first defendant failed to do so. Hence the suit for possession was filed by the Official Trustee impleading the said Mohammed Bahrunuddin Sahib as the first defendant and the second defendant who is said to have purchased a share in the property in ancillary proceedings. The Official Trustee impleaded the above second defendant only by way of abundant caution and never sought relief against him. The first defendant's contentions were threefold. Firstly, his contention was that the Madras Buildings (Lease and Rent Control) Act, XVIII of 1960 (hereinafter referred to as the Act) was applicable to the building and therefore, a bare suit for eviction in a civil court and for consequential possession does not lie. He questioned the jurisdiction of the Civil Court to entertain the suit for possession. Secondly, he would say that the notice of determination of the tenancy was not in order and therefore, the suit has to fail. He also contended that the Official Trustee did not represent all the interests of the shareholders and that, therefore, the suit as such and as framed is not maintainable. The suit was originally tried in the City Civil Court and it resulted in a decree in favour of the Official Trustee. The first defendant filed an appeal to this court, but he died pending appeal on 11-5-1972. Thereupon, the present appellants including the second defendant were brought on record as the deceased first defendant's legal representatives. N. S. Ramaswami J. once again considered the objections of the appellants and would not agree with them. In particular, he would not countenance the contention that in view of the amendment of S. 2 (8) of Act XVIII of 1960 by Act XXIII of 1973, the present proceeding for possession against them is incompetent as they have secured a statutory right to continue in the premises under the provisions of Act XVIII of 1960 and that, therefore, the suit for possession in a civil court ignoring the provisions of the special enactment, viz., Act XVIII of 1960, is not in order. He would also not agree with the learned counsel for the appellants that the mere fact that the Official Trustee accepted the rents from the appellants after the death of the first defendant would by itself establish that a fresh tenancy is created and therefore, the suit as framed cannot be proceeded with. The last contention that the Official Trustee represented only some of the estate did not gain favour with the learned Judge. On the question whether the notice of determination of tenancy was valid and proper, he would observe that the validity of the notice as per the original of Ex. A-4 had not been questioned in any other respect except that the same had not been issued by a person who represented the entire estate. The learned Judge discountenanced this contention observing that the Official Trustee was not representing the entire estate, but only the other beneficiaries barring the second defendant who has also become a legal representative of the first defendant after his death. Ultimately, he dismissed the appeal. Hence the

L. P. Appeal. The same contentions are pursued before us by the learned counsel for the appellants.

3. The Madras Buildings (Lease and Rent Control) Act being a beneficial legislation, is intended to serve certain definite objectives of the Legislature. Under the old Act, XVIII of 1960, the tenant has been defined as meaning a person by whom or on whose account rent is payable for a building and includes the surviving spouse or any son or daughter or the legal representative of a deceased tenant who had been living with the tenant in the building as a member of the tenant's family upto the death of the tenant and a person continuing in possession after the termination of the tenancy in his favour etc. Hence, under the old Act, there was no express reference to a non-residential building, but on a fair reading of the said definition, the benefits of statutory tenancy provided for in this sub-clause could be availed of by the heirs and legal representatives of a deceased tenant provided they were also living with the deceased in the building as members of the tenant's family upto the death of the tenant. This requirement to get the statutory entitlement reflects the purpose of the Legislature. We are of the view that even under the old definition the Legislature made it clear that unless the heir or the legal representatives, who project a claim to be continued as statutory tenant, establishes as a fact, that he or they was or were living with the deceased tenant, viz, his or their predecessor-in-interest, he or they cannot obtain the statutory benefits under the provisions of Act XVIII of 1960. When the definition was amended as per Act XXIII of 1973, the following clause was substituted in the place of the erstwhile cl. (8) of S. 2 of the Act which reads as follows:—

"Clause (8): 'Tenant' means any person by whom or on whose account rent is payable for a building and includes the surviving spouse, or any son, or daughter, or the legal representatives of a deceased tenant who — (i) in the case of a residential building, had been living, with the tenant in the building as a member of the tenant's family upto the death of the tenant, and (ii) in the case of a non-residential building, had been in continuous association with the tenant for the purpose of carrying on the business of the tenant upto the death of the tenant and continues to carry on such business thereafter, and a person continuing in possession after the termination of the tenancy in his favour etc. etc.."

4. Due to such an amendment, the legislature, according to us, again declared its intention by clarifying the position and by laying an emphasis upon such association of the heirs and legal representatives with the deceased tenant. On an examination of the two limbs of the definition of 'tenant' in S. 2(8) as amended in 1973, one gains the impression that in order to secure continuity in the tenancy the heirs should prove, as a fact, that they were in the case of a residential building, residing with the deceased tenant as members of his family till his death and equally prove in the case of a non-residential building, that they were in continuous association with the tenant for the purpose of carrying on the business of the tenant up to the death of the tenant and continue to carry on such business thereafter. It is therefore fairly clear that such a commercial association with the deceased tenant in the business or non-residential activity which was carried on by the deceased tenant in the premises is an essential sine qua non to claim the benefits under S. 2 (8) (ii) of the Act. It appears to us that even after the amendment of the definition of 'tenant' in S. 2 (8), the Legislature maintained its legislative intent to ensure that only heirs and legal representatives who were living with or associated with the deceased tenant in the case of residential or non-residential buildings, as the case may be can claim the benefits of continuing as statutory tenants. This primordial requirement has to be complied with and if there is no proof of nexus in the matter of living or in the matter of the continued association in the quondam mercantile activity of the deceased tenant, then the heirs or legal representatives, in each of those cases, would not be entitled to the benefits of Act XVIII of 1960. If, therefore, the halo of the above legislative intent pervaded the entire fabric of the particular legislation and if what had been achieved by the amendment is to declare and clarify such a pre-existing intent, then the question whether the amendment which is clarificatory in nature is retrospective in operation does not arise at all. Strong reliance was placed upon a decision of a Division Bench of this Court in Appeal No. 516

of 1973 (Mad) — M/s. Killick Nixon Ltd. Bombay v. V. R. Narayana Rao — to which Ramanujam and V. Ramaswami JJ. were parties. That was also a case for recovery of possession. The question which came up for consideration before the Bench was whether the decision rendered by the trial court became null and void in view of the amending Act 23 of 1973. Directly the question did not arise as to what is the effect of the amending provision in S. 2 (8) of the Act. The learned Judges, however, noticed the fundamental principle that a legal proceeding has to be dealt with in accordance with the law prevailing on the date of its disposal. In a case like this, where S. 2 (8) of the Act is, as we said, merely clarificatory and declaratory of the pre-existing intent of the Legislature, this court is bound to apply the law as on the date when the suit or the appeal was disposed of. In this sense, therefore, N. S. Ramaswami J. was right. Two decisions have been referred to by the learned Judges of the Division Bench referred to above. One is that of the Federal Court in Lachmeswar Prasad v. Keshwar Lal, AIR 1941 FC 5 and the other of our own court in Lakshmiammal v. Narayanasami Naicker, AIR 1950 Mad 321 : 1950-1 Mad LJ 63. In those cases, the proposition is well settled that the rights of parties have to be determined as on the date of the disposal of the appeal by this court, and that therefore, this court has to take into account the statutory provisions as amended, in deciding the rights of parties before it as on the date of disposal. It follows, therefore, that the appellants who were admittedly not associated with the deceased tenant, nor were in continuous association with the tenant for the purpose of carrying on the business of the tenant upto his death. nor did continue to carry on any such business thereafter. would not be entitled to the special privileges as statutory tenants under Act XVIII of 1960.

5. The next question is whether Exs. A-1 and A-2 are really leases at all. Though this question was not mooted in its true perspective, yet it has become necessary for us to adjudicate upon the real nature of the transaction entered into between the Official Trustee and the late Sahib, the predecessor-in-interest of the appellants. Learned counsel for the appellant vehemently contends that the exhibits created a jural relationship of landlord and tenant within the meaning of the Act. It is common ground that at no time Sahib occupied the non-residential premises and did any business there. He never carried on any business which the appellants can proclaim to have continued. Courts ought not to be guided merely by the nomenclature and the description given to a particular document by the parties. If, on a general reading of the document concerned, a different legal or jural relationship could be carved out in the peculiar facts and circumstances of a given case, then the mere description given to a document by the parties may not have the weightage it would normally demand. In this case, the document is described as a lease. A lease implies a transfer of interest in immoveable property for the purpose of enjoying it. Here, the transferee, viz, the predecessor-in-interest of the appellants, did never enjoy the property at all, nor did he carry on any business in it. In effect the right to collect the rents from the market was farmed out to the transferee who is called the lessee, and he was apparently making a profit out of it. The transferee or lessee undertook certain obligations in the so-called lease but that would not make any difference. The purport of Exs. A-1 and A-2 appears to us to be to enable the transferee called the lessee to act as the agent of the Official Trustee with an interest coupled with such an agency to appropriate towards his services the excess collections to himself and pay an agreed sum called rent to the Official Trustee. If the transferee was in occupation of a portion of the premises it might be contended by the legal representatives that in so far as that portion of the non-residential building occupied by the deceased tenant is concerned, they could claim the statutory right by reason of succession. But they should satisfy the primary requirements laid down in S. 2 (8) of the Act. They are unable to do so in this case. In our view therefore, Exts. A-1 and A-2 cannot rightly be accepted as lease deeds, but they are instruments which vested a right in Sahib to collect rents from the Cannemera Market. But he had an interest in the said collections. Thus, the very foundation of the contention of the learned counsel for the appellants fails and the suit for possession, in such circumstances, filed by the Official Trustee was in order. The Act, in our view could not apply, nor could it be invoked by either party, as Exts. A-1 and A-2 do not forge the legal relationship of landlord and tenant as be-

tween the Official Trustee and the deceased Sahib.

6. We also agree with the learned Judge that merely because the Official Trustee accepted the so-called rents from the appellants after the demise of the original transferee, it would not mean that a fresh tenancy has been created. It depends upon the proof of the intention of the parties. In fact, the Official Trustee, when he filed O. S. 5584 of 1974, for recovery of the various amounts which the appellants failed to pay by then characterised the said sums as damages for use and occupation of the building. The claim would not be named as such if the relationship was that of a landlord and tenant. This contention also fails.

7. Regarding the notice of determination of tenancy, we are in entire agreement with N. S. Ramaswami J. and his observations regarding the same and it is unnecessary for us to consider this contention any more.

8. As regards the last contention that the Official Trustee represented only a small proportion of the sharers, this is not open for challenge by the other sharers, for the Official Trustee asks for possession and if there are any sharers interested in sharing the rents and profits of the market, it is open to them to work out their rights as against the Official Trustee.

9. For the reasons that there was no jural relationship of landlord and tenant as between the Offical Trustee and the late Sahib and also because the notice of determination of tenancy was in order, and as S. 2 (8) of Act. XVIII of 1960 is declaratory of a pre-existing legislative intent, we are unable to agree with the learned counsel for the appellants that the judgment of N. S. Ramaswami J. needs interference. The appeal fails and is dismissed.

10. Now, coming to O. S. App No. 3 of 1976, Mohan J. passed the following order:—

"I see no reason to set aside my order because all that the applicant says is that he is in constructive possession. The earlier order of mine was to give effect to the judgment of N. S. Ramaswami J. rendered in App. No. 19 of 1972. In this view, I see no merit in these applications. Hence they will stand dismissed. Counsel's fee Rs. 150 in all the three applications."

The learned Judge referred to the judgment in App. No. 19 of 1972 and confirmed that the Official Trustee was entitled to take possession of the market. What was, however, urged before him was that a regular execution petition ought to have been taken by the Official Trustee to obtain possession and that the Official Trustee ought not to have approached the Original Side Judge for directions in the matter of collecting the rents from the actual occupants of the stalls in the market. Such a direction was made by Mohan J. having regard to the judgment of N. S. Ramaswami J. in App. 19 of 1972, which we have confirmed in L. P. A. No. 12 of 1976. Having found that such administrative directions were given by Mohan J., the applicants who were the appellants in K. P. A. No. 12 of 1976, filed Appn. No. 3234 of 1975 seeking to set aside the order made by Mohan J. earlier enabling the Official Trustee to constructively take delivery of the property which would enable him to collect the rents from the stallholders direct. The learned Judge, again, referred to the judgment of N. S. Ramaswami J. and reiterated that the Official Trustee had the requisite authority to seek for such constructive possession. We see no reason to interfere. O. S. Ap. No. 3 of 1976 also fails and it is dismissed. There will be no order as to costs in both the appeals.

Appeals dismissed.

AIR 1978 MADRAS 252

V. SETHURAMAN J.

Khiaram Khushiram and others, Petitioning Creditors v. Kamadhenu Drinks, and others, Debtors-Respondents.

Petition Nos. 41 and 46 of 1976, D/- 15-6-1977.

(A) Presidency Towns Insolvency Act (3 of 1909), S. 9 (d) (ii) — Act of insolvency under (ii) — Essentials to be proved.

From the language of S. 9 (d) (ii) itself it is clear that the act of insolvency is contemplated only where a person departs from his dwelling house or usual place of business or otherwise absents himself with intent to defeat or delay his creditors. Absenting oneself is no act of insolvency unless it be with intent to defeat or delay creditors. Whe-

ther that intention exists is a question of fact. If a trader shuts up his shop during business hours without leaving instructions where he is to be found if creditors call, or without making arrangements for carrying on his business, he must be presumed to have left to avoid his creditors; but the absence may be satisfactorily accounted for and the presumption may be rebutted. No such presumption, however, arises where the debtor has left a representative behind or has left a direction that letters are to be addressed to him at a particular place. In the context of the appropriate instructions having been left for the purpose of communications reaching the debtor it cannot be said that he was making himself scarce with any intent to defeat or delay the creditors, AIR 1967 Mad 279 Relied on. (Paras 10, 11, 12)

Anno: AIR Manual (3rd Edn.), Presi. Towns Insolvency Act, S. 9 N. 4.

(B) Presidency Towns Insolvency Act (3 of 1909), S. 9 (g) — Act of insolvency under — Essence of.

The essence of an act of insolvency under S. 9 (g) is that the debtor must give sufficient indication to show that he had suspended payment of all the debts. No particular form of expression is necessary. What is necessary is that the words should unmistakably leave the impression in the mind of the creditor that the debtor has actually suspended or is about to suspend payment of all his debts. The words used by the debtors must be reasonably construed. A creditor cannot approach the court with a petition for insolvency by merely misunderstanding what was stated by the debtor, AIR 1928 Mad 903, AIR 1935 Mad 589 (2), AIR 1937 Mad 13, Rel. on. (Para 17)

Held on fact that it could not be said that any act of insolvency within S. 9 (g) had been committed by the debtors. There was no scope to draw the inference that the offer of sale of the property was itself proof positive of the hopeless condition in which the debtors were placed. Similarly merely because the Government wanted some security in accordance with certain regulations under the Excise Act, it did not follow that the debtors (respondents) were in involved circumstances so as to be unable to pay their debts. (Paras 26, 27, 28)

Anno; AIR Manual (3rd Edn.) Presi. Towns Insolvency Act, S. 9 N. 7.

(C) Presidency Towns Insolvency Act (3 of 1909), S. 10 — Insolvency petition — It is not necessary to examine a contention which is not even based on the pleadings. (Para 27)

Anno:— AIR Manual (3rd Edn.) Presi. Towns Insolvency Act. S. 10. N. 1.

Cases Referred	Chronological Paras
AIR 1967 Mad 279: (1966) 2 Mad LJ 548	11
AIR 1937 Mad 13; (1936) 71 Mad LJ 730	16
AIR 1935 Mad 589 (2)	15
AIR 1928 Mad 903	14

ORDER:— These two insolvency petitions have been filed by two sets of creditors for adjudicating the first respondent-firm and its alleged partners, respondents 2 to 9 as insolvents. The first respondent is known as Kamadhenu Drinks. The creditors in I. P. No. 41 of 1976 had advanced different amounts on hundies or promissory notes. The first respondent agreed to repay the amounts borrowed within a period of 90 days from the said date of the hundies. The said promissory notes or hundies were executed at No. 10, Kasturi Ranga Iyengar Road, Madras-18, by one V. P. Muthukumaraswamy Gounder who is admittedly a partner in the said firm. According to the petitioning creditors in I. P. No. 41 of 1976 the first of them went to No. 10, Kasturi Ranga Iyengar road, on 1st, 2nd and 4th March, 1976 and did not find the board of Kamadhenu Drinks previously found in the said premises. He was not able to contact anyone of the partners at the aforesaid premises and it is, therefore, stated in the petition that the debtors had departed from the usual place of business at No. 10 Kasutri Ranga Iyengar Road and had thus committed an act of insolvency within the meaning of S. 9 (d) (ii) of the Presidency Towns Insolvency Act. Notices were given to the debtors in March, 1976 and they were acknowledged by the debtors by their letter dated 20-3-1976, wherein it was stated that Kamadenu Drinks was at No. 26, Agraharam Street, Erode. It is therefore, alleged that the debtors had changed their place of business from No. 10, Kasturi Ranga Iyengar Road, Alwarpet, Madras-18. to No 26, Agraharam Street Erode, and had thereby committed an act of insolvency described in S. 9 (d) (ii) of the Presidency Towns Insolvency Act. It is further alleged in the petition that after the receipt of notices some of the debtors came over to Madras and stayed in Hotel Ashoka and called for a meeting of the

creditors in a room in the said Hotel on 7-4-1976 and also on 8-4-1976. On 7-4-1976 two of the creditors viz., Seth Biharilal Prakashlal and Seth Motiram Newendram attended the meeting and on that day it was represented by two of the debtors viz., S. V. Balasubramaniam and V. K. Swaminathan respondents 5 and 6 respectively, and that they would call for the other debtors also and have full discussions with the creditors on the next day. At the meeting on the next day, a number of other creditors were also present and at that meeting it is alleged that the debtors expressed their inability to pay the amounts due immediately and stated that everything was in a state of confusion due to the sudden death of a partner V. M. Kailasa Gounder, that the accounts had not been kept properly and that it was not possible to discharge the huge liability incurred, as no partner was coming forward to give his share of debts and to co-operate in the discharge of the debts. It is alleged also that they stated that they could not make payment and they would not be in a position to pay the amount in the near future and that thus they suspended the payment. It is further alleged that the debtors told them that they could do whatever they wanted to do. It is stated in the petition that the debtors had suspended payment and thus committed an act of insolvency described in Section 9 (g) of the Act. The prayer is, therefore, that the debtors should be adjudged as insolvents and that consequential orders should be passed.

2. A common counter-affidavit has been filed by respondents 1 and 3. They have denied the allegations that they had committed any act of insolvency contemplated either by Section 9 (d) (ii) or by S. 9 (g) of the Act. According to them, there were several discussions and ultimately a settlement was reached by which Multani Bankers, to which class the petitioning creditors belonged, would be paid certain amounts by sale of No. 10, Kasturi Ranga Iyengar Road, for which purpose a special power of attorney was executed in favour of Sri R. Krishnaswami, Advocate. It is also stated that they paid a sum of Rs. 2,00,000/- and the petitioning creditors were estopped from prosecuting this petition and that their only remedy was to take suitable steps to enforce the arrangement dated 10-5-1976 as a result of which the power of attorney mentioned above had been given and the property bearing Door No. 10, Kasturi Ranga Iyengar Road was to be sold. It is stated in the counter affidavit that assets of the first respondent firm exceeded 1.5 crores of rupees and that the assets were more than sufficient to discharge all the liabilities of the firm and that with a view to evade payment of court-fee, the petitioning creditors had chosen to fill the petitions for insolvency for adjudicating the respondents as insolvents as a short cut for recovery, which was not permissible under the law.

3. The second respondent and the fourth respondent have filed counter affidavits which run more or less on the same lines as of the first and the third respondents. In the counter affidavit filed by the fifth respondent it is stated that he was no longer a partner in the firm of Kamadhenu Drinks and that the acts of insolvency said to have been committed would not in any manner justify his adjudication. Respondent No. 6 and respondent No. 8 (for himself and on behalf of respondents 7 and 9) have filed counter affidavits denying the allegations of their having committed any act of insolvency.

4. A reply affidavit has been filed in which the statements contained in the counter affidavits have been controverted and it has been reiterated that the debtors said at the said meeting held on 8-4-1976 that the creditors could do whatever they wanted to do.

5. In the course of the trial of the petitions on the side of the petitioning credtitors the first petitioning creditor has given evidence as P.W. 1. P.W. 2 by name Arjun was not a creditor of the first respondent-firm and was only representing his mother, who had advanced some monies, guaranteed by the respondents to a mill called 'Janardhana Mills Limited' in which the said Kailasa Gounder and others were interested. His evidence is relevant only for the purpose of finding out what happened on the 8th April 1976, as he claimed to have been present at the said meeting. One Beharilal has given evidence as P. W. 3, He is a creditor of the firm; but he is not one of the petitioning creditors. One Chandraban Ramchand has given evidence as P.W. 4. He is a finance broker and according to him the finances were arranged through him and he was present at the meetings held on 7-4-1976 and 8-4-1976. On the side of the respondents, evidence has been given by res-

pondents 2, 3, 5, 6, 7 and 8. The only respondents who did not give evidence were respondents 4 and 9.

6. I. P. No. 46 of 1976 was filed by four other creditors who have similarly advanced amounts to the first respondent-firm. They have also alleged that the acts of insolvency contemplated by S. 9 (d) (ii) and S. 9 (g) of the Presidency Towns Insolvency Act had been committed by the respondents. In the counter-affidavits filed in the said petition also, the respondents have taken the identical stand as in I. P. No. 41 of 1976. Apparently because the facts are identical, the petitioning creditors in I. P. No. 46 of 1976 did not let in separate evidence.

7. The evidence recorded in I. P. No. 41 of 1976 was by consent of parties, taken as common to both the petitions.

8. In the context of these facts, the points that require consideration in the petitions are:—

1. Whether the respondents have committed acts of insolvency under S. 9 (d) (ii) and S. 9 (g) of the Presidency Towns Insolvency Act?

2. Whether the fifth respondent is not liable on the ground that he had retired from the first respondent firm.? and

3. Whether the acts of insolvency complained of are the joint acts so that all of them were liable to be adjudged as insolvents?

9. There was one Kailasa Gounder, who was interested as a partner of Kamadhenu Drinks and also of several other limited companies like Janardhana Mills Limited, M. L. R. Drinks Limited, Amudam Enterprise Limited. etc. The partners of the first respondent-firm belonged either to his family or to his brother's family or to the families of his relations. In fact, except the 9th respondent P. Chenniappan, the rest of the respondents fall into three categories. The second, third and fourth respondents are the nephews of Kailasa Gounder, the sixth respondent is the son of Kailasa Gounder, fifth, seventh and eighth respondents are brothers who are relations of Kailasa Gounder. The firm of Kamadhenu Drinks had an office at 261, Agraharam Street, Erode, and a factory in a village near Erode. Some of the partners or their relations had purchased a property bearing No. 10, Kasturi Ranga Iyengar Road, and it is not in dispute that the second respondent was residing in the said premises wherefrom he was also borrowing monies for the first respondent-firm showing that place as the address of the said firm. On the death of Kailasa Gounder on 19-2-1976 the second respondent left Madras for the purpose of attending the funeral ceremonies of his uncle. There is some difference in the version regarding the date of his return to Madras. In I. PL No. 41 of 1976, it is stated in para 20 that some of the creditors named therein went to the business premises at No. 10, Kasturi Ranga Iyengar Road and were informed by V. P. Muthukumaraswamy the second respondent, that the debtors were indebted to the extent of more than Rs. 1½ crores and their total assets came to about Rs. 90 lakhs only. It is stated that the second respondent told that they were in difficulties and they could not pay any amount unless the matter relating to Kailasa Gounder was settled. Thus, from that petition it is clear that the second respondent was in Madras on 26-2-1976. However, on behalf of the respondents it is stated in the counter affidavit as well as in the evidence that the second respondent, after he left Madras for attending the funeral ceremonies of Kailasa Gounder, did not return to Madras till sometime late in March. It appears that on or about 30th of March, 1976, there was a meeting of the Board of Directors of one of the companies in which some of the respondents were interested and that on 31-3-1976 the second respondent was taken into the custody under the provisions of the Maintenance of Internal Security Act and taken to Coimbatore on the 1st of April 1976. If the allegations in the petition are to be accepted with regard to the version, then the second respondent was available at premises No. 10, Kasturi Ranga Iyengar Road on 26-2-1976. It is not alleged that any act of insolvency was committed on 26-2-1976 at the time of the meeting of some of the creditors with him. However, the allegations in the petition is that the first of the petitioning creditors visited the premises No. 10, Kasturi Ranga Iyengar Road, on the 1st, 2nd and 4th of March, 1976. and did not find the board and could not contact any of the respondents there. Though it is in evidence that some of the other respondents, whenever they came to Madras, stayed in the said premises, there is nothing to show that they were ordinarily residing at the said premises. From the fact that the first res-

pondent-firm is carrying on business in Erode for several years and is having an office at Erode it could be seen that the Madras Office was, if at all, only a branch, and from this branch the only transactions that were evidently transacted were borrowing by the second respondent on behalf of the firm apparently on a large scale. The said Kailasa Gounder, was a man of considerable resources and a well-known industrialist and businessman of Erode. On his death, which was sudden, problems arose and differences also erupted among the groups. It is clear that there was differences of opinion between his son and his nephews, respondents, 2, 3 and 4. From the petition it is also clear that a committee of five persons consisting of Subbaroya Gounder, Muthuvellappa Gounder, Muthuswami, Sengottuvellappan and Lakshminarayana Gounder had taken interest in the settlement of the liabilities of Kailasa Gounder and had called for a list of persons to whom Kailasa Gounder owed any amount. It is, thus evident that on the death of Kailasa Gounder, there was some confusion in the family and business affairs of the firms in which Kailasa Gounder was interested. I do not think it possible to discredit the evidence given by the second respondent himself in which he stated that he remained in Erode for sometime after his uncle's demise for the purpose of attending the funeral etc., From the evidence of the sixth respondent himself as R. W. 1, it is found that the second respondent attended funeral and was also visiting Kailasa Gounder's house off and on for sometime. R. W. 1 has also stated that the second respondent had his own house in Erode and also had an establishment in a village nearby, From the evidence of these two persons viz., Respondents 1 and 2, I am satisfied that the second respondent had moved out of Madras for the purpose of attending the funeral of his uncle and also for the purpose of attending to the affairs which arose consequent on the demise of Kailasa Gounder. It is not disputed that the 2nd respondent was not available at premises No. 10, Kasturi Ranga Iyengar Road on the 1st, 2nd and 4th of March, 1976. However, the reason for his absence is clear viz., to attend the funeral of his uncle and to the affairs which arose consequent on the demise of his uncle. On the death of Kailasa Gounder the second respondent was the senior most among the two families. Even during the time of Kailasa Gounder it is in evidence that Kailasa Gounder and the second respondent were mainly looking after the affairs of the first respondent firm. It is in these circumstances not inconceivable that the second respondent went to Erode and stayed on for the purpose of arranging all the affairs. It is not also, as if the second respondent shut up his shop and made himself scarce with a view to evade his creditors. The notices that were despatched to 10. Kasturi Ranga Iyengar Road, on the 5th March, 1976, had actually been received at the Erode address. This itself goes to show that arrangements had been made for the purpose of seeing that communications could be had with him and the firm. It appears from the evidence that No. 10 Kasturi Ranga Iyengar Road was not completely closed and that a person by name Singaram was available to tell the parties as to where the respondents were. I am not, therefore, satisfied on the facts herein that the respondents have committed any act of insolvency as provided in S. 9 (d) (ii) of the Presidency Towns Insolvency Act.

10. The said provision runs as follows:—

"A debtor commits an act of insolvency in each of the following cases, namely:—

(d) If, with intent to defeat or delay his creditors;—

(i) he departs or remains out of the States.

(ii) he departs from his dwelling house or usual place of business or otherwise absents himself,

(iii) he secludes himself so as to deprive his creditors of the means of communicating with him."

From the language of the provision itself it is clear that the act of insolvency is contemplated only where a person departs from his dwelling house or usual place of business or otherwise absents himself with intent to defeat or delay his creditors. At page 64 of Mulla's Law of Insolvency in India, Third Edition, it is stated in para 103 as follows:—

"All the acts mentioned in this clause 9 (d) (ii) are in themselves innocent, and to make them acts of insolvency, it is necessary to prove that the act was done with intent to defeat or delay creditors."

In para 105 it is stated as follows:—

"Absenting oneself is no act of insolvency unless it be with intent to defeat or delay creditors. Whether that inten-

tion exists is a question of fact.....If a trader shuts up his shop during business hours..... without leaving instructions where he is to be found if creditors call, or without making arrangements for carrying on his business, he must be presumed to have left to avoid his creditors; but the absence may be satisfactorily accounted for and the presumption may be rebutted. No such presumption, however, arises where the debtor has left a representative behind or has left a direction that letters are to be addressed to him at a particular place."

In the present case, therefore, it is necessary to see whether the second respondent, who alone was the resident in the said premises at No. 10, Kasturi Ranga Iyengar Road, had left the place with intent to defeat or delay creditors. There can be no presumption on the facts herein that his departure from the place was with intent to defeat or delay the creditors because he has left a representative behind. The letters addressed to him had also been redirected to the address at Erode as there is also a valid explanation as to why he was not present in Madras at the relevant time. It is common knowledge that ceremonies in connection with the demise of a Hindu take nearly a fortnight, and therefore, there is nothing surprising if he was away from Madras during the period of a fortnight commencing from 19-2-1976 when Kailasa Gounder died. In the context of the explanation, it is reasonable to draw the inference that the absence of the second respondent from the said premises was not with a view to defeat or delay creditors. In the context of the appropriate instructions having been left for the purpose of communications reaching him, I am not at all satisfied that he was making himself scarce with any intent to defeat or delay the creditors. The first respondent being a firm could only act through a human agency and in the present case it is only the second respondent who, according to the petitioners, was representing the firm at Madras. Therefore, whatever applies to him would equally apply to the first respondent. There is nothing to show that the branch was closed with a view to defeat or delay creditors. Further there could have been no difficulty about contacting it at the Erode address. The other respondents who came to Madras casually stayed in the said premises. They cannot be charged with having departed from the place in which they did not reside. All of them have their own residences in Erode and other places and, therefore, they cannot be charged with having absented themselves from the said premises with intent to defeat or delay the creditors.

11. A similar situation arose for consideration by a Bench of this court in M. Ratchaganadan v. Kishindas Shamada Sunder, (1966) 2 Mad LJ 548 : (AIR 1967 Mad 279). In that case, there was a cashewnut business in Panrutti. It had also an address in Madras. The money had been borrowed from the Madras address. The notice addressed to the said place in Madras was returned. It was, therefore, alleged that the debtor had committed an act of insolvency by departing from his place of business in Madras with intent to defeat or delay the creditors. It was pointed out at p. 550 (of Mad LJ) : (at p. 280 of AIR) of the judgment as follows:—

"We need not stress that insolvency is a status to which no person should be reduced, unless an act of insolvency is fully established to the satisfaction of the court. A creditor, in particular, ought not to be permitted to utilise this mode of obtaining an adjudication as insolvent, as a kind of pressure, in order to realise a debt more economically or by swifter means".

In that case it was held, differing from the trial court, that the adjudication of the debtor was wrong, as the temporary absence of the debtor from Madras was not with a view to defeat or delay his creditors. The same conclusion should follow in the present case.

12. In paragraph 245 of Volume 3, Halsbury's Laws of England, Fourth Edition dealing with Bankruptcy and Insolvency, the following passage occurs:—

"The onus of proving that the debtor remained out of England with the intent to defeat or delay creditors rests on the petitioning creditor, and though proof must necessarily be a matter of inference from the circumstances of each case, it is wrong to hold that it can only be discharged by showing that the existence of the intent is the only possible explanation of the debtor's conduct; the standard of proof required demands at least that the court should be satisfied that in all the circumstances of the case the presence of intent to defeat and delay creditors is so much the most probable explanation of the debtor's conduct as to make it in effect the only probable one."

In the present case having regard to the peculiar facts, it cannot be said that the absence of the second respondent from the Madras premises was only with a view to defeat or delay the creditors or most probably with a view to defeat and delay the creditors. The more probable explanation is that he was away because of the unfortunate demise of his uncle. I, therefore, hold that the petitioning creditors have not made out any act of insolvency as contemplated by S. 9 (d) (ii) of the Act in either of these two petitions.

13. I have now to consider the question as to whether the act of insolvency contemplated by S. 9 (g) of the Act has been made out here. Section 9 (g) runs as follows:—

"A debtor commits an act of insolvency in each of the following cases, namely:

(g) If he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts."

What constitutes an act of insolvency under this provision may now be considered before going into the evidence, as the evidence has to be examined in the light of the necessary requirements of the law. In para 118 of Mulla on the Law of Insolvency in India, third Edition at page 94 it is stated as follows:—

"What the section requires is notice of suspension of payment. Therefore, mere suspension of payment will not suffice.....

It is important to note that suspension of payment is something different from and over and above inability to pay. A statement made by a debtor to a creditor that he is unable to pay his debts does not of itself and without reference to context or circumstances amount to a notice that he has suspended or is about to suspend payment of his debts so as to constitute an act of insolvency within the meaning of this section. Such a statement may in one set of circumstances be merely a statement that he cannot pay, but in another set of circumstances to which one is entitled to look for the purpose of interpreting words that are not words of art, it may clearly mean to any ordinary human being listening to it, that he is stating that he has not the intention of paying his debts when they become due. The result is that in each case all the circumstances must be looked at; and we have to find, beyond a simple declaration of inability to pay, some evidence of an intention on the part of the debtor to suspend payment of his debts — that is to say, to abstain from paying his debts as they fall due, at least for a time."

At page 95, para 120, it is stated as follows:—

"The test whether or not a notice amounts to an act of insolvency under this clause, lies in the effect which the notice would produce on the mind of a creditor receiving it as to the intention of the debtor with regard to his creditors. If the language of the notice can only lead the creditors to infer that if an offer of composition made by the debtor is not accepted, suspension is the only alternative, it amounts to a notice that the debtor is about to suspend payment of his debts. A mere statement of debtors that they are unable to pay their debts, however, insolvent they may be is not a notice within the meaning of the Act, that they are suspending or about to suspend payment."

14. In Ramaswami Chettiar v. Muthialuswami Chettiar (AIR 1928 Mad 903) the question as to whether the debtor had suspended payment arose on the following facts: The debtors in that case were carrying on business and were in involved circumstances. There was a pressure for payment of the debts. On one such occasion when the creditors made a demand for payment, the debtors offered their properties consisting of two houses and a garden, omitting the house in which they were living in discharge of the debts. No settlement was reached on that day. Subsequently a few days later there was a discussion between the debtors and creditors as to how the debts were to be discharged. It was stated on that occasion that the title deeds for the sale of the properties had been given to one of the creditors. On these facts, this court held as follows:—

"In the case before us though all the creditors might not have been present there is no doubt that what was discussed at the meeting was the payment of all the creditors and the impression that was left on their minds was that the appellants were unable to pay debts and would suspend payment or debts unless this offer of discharge of all the debts by the sale of the properties is accepted."

On the facts it was held that there was an act of insolvency.

15. In Gangu Veera Brahman v. Gangu Jaganadhacharyulu (AIR 1935 Mad 589 (2)) the debtors sold their property and offered to make a rateable distribution among their unsecured creditors, after satisfying the mortgage debt, of the balance of the sale proceeds. The amount so available for distribution was three annas nine pies in the rupee for each creditor. There was thus intimation to the creditors that the debtors did not intend to pay anything unless the creditors agreed to accept in full settlement the small amount which they offered. It was held on these facts after discussing certain decisions as follows:—

"Now applying these criteria to the present case we feel no doubt that the intimation given by the debtors to the petitioner amounted to a notice that they had suspended or were about to suspend payment of their debts. The debtors were in insolvent circumstances. The sale of their property was the last resource available to them for meeting their creditors' claim and the sale proceeds were far from sufficient to pay those claims in full. We think it clear that when the debtors informed the petitioner that they could pay no more than three anans nine pies in the rupee to their creditors they in effect gave notice that they were about to suspend payment of their debts. That was an act of insolvency."

16. In Siva Reddi v. Official Receiver, Bellary, (1936) 71 Mad LJ 730 : (AIR 1937 Mad 13) there was a partition among three members of a joint family. One of the brothers was in sole and exclusive charge. When he was approached for repayment of the debts by the petitioning creditors he stated: 'I cannot pay your debts; you can do what you like'. This was construed to be an act of insolvency within the meaning of Sec. 6 of the Provincial Insolvency Act corresponding to S. 9 of the Presidency Towns Insolvency Act.

17. The essence of an act of insolvency under this head is as shown by these decisions, that the debtor must give sufficient indication to show that he had suspended payment of all the debts. No particular form of expression is necessary. What is necessary is that the words should unmistakably leave the impression in the mind of the creditor that the debtor has actually suspended or is about to suspend payment of all his debts. The words used by the debtors must be reasonably construed. A creditor cannot approach the court with a petition for insolvency by merely misunderstanding what was stated by the debtor.

18. In the present case, as already seen, there were two meetings held on 7-4-1976 and 8-4-76. The alleged act of insolvency viz., of suspension of payment was said to have taken place only on 8-4-1976. On 7-4-1976 S. V. Balasubramaniam, the fifth respondent and V. K. Swaminathan the sixth respondent were present. The evidence recorded goes to show that the fifth respondent telephoned P.W.1 from Ashoka Hotel asking him to meet him at the said Hotel for solving the problem of discharging the debts. P.W. 1 went with Mothiram and Biharilal (P.W. 3). Only the fifth respondent and the sixth respondent were there. P.W. 1 in his evidence stated: "They were telling that they wanted to settle with the creditors". At another place P.W. 1 said that they wanted one year's time stating they were unable to pay. At another place he stated: "They said they cannot pay; they have suspended payment and asked to wait". In the course of the cross-examination the witness stated: "They stated that they can settle. I said I do not represent all the creditors and must call all of them". In the cross-examination the following questions were put to him by Mr. Sivaramakrishniah appearing for respondents 5 to 9.

"Q. At this meeting they stated that they would like to settle and you wanted a regular meeting?

A. We will discuss further how to settle it at a regular meeting."

P.W. 3 in the course of his deposition regarding the meeting on 7-4-1976 stated as follows:—

Q. What did they say?

A. They said tomorrow we will fix a meeting at the same place. You call the other debtors also and we will call our guarantors and we will see tomorrow."

Further he said as follows:—

Q. What happened as a result of the meeting?

A. Nothing happened as a result of the meeting with these two persons except saying 'meet tomorrow'. He said all other guarantors and persons are coming from Erode tomorrow we will meet."

P.W. 4 also stated in the course of his deposition:—

"We discussed with the two partners. They told us that they would be calling

the other partners also the next day and that we might have a fuller discussion then. We again met on 8th April 1976, at Ashoka Hotel (in the room above the reception). I do not remember the number of the room".

19. Thus, taking the evidence let in on behalf of the petitioning creditors alone, it is clear that the meeting on the 7th was only a preliminary meeting with the two or three creditors by the two debtors and that a further meeting was to be held on 8-4-76. Therefore, as far as the meeting on 7-4-1977 is concerned, there was no question of notice of suspension of payment coming within the scope of S. 9 (g) of the Act.

20. I now have to discuss about the meeting of the 8th April, 1976, in which, according to the petitioning creditors, there was a notice of suspension of payment. P.W. 1 stated that the debtors on that day were three in number viz., the fifth respondent, the sixth respondent and the third respondent. There were a few other persons present at the said meeting. One was Mr. Rajaram, a former Minister of this State. The other persons present included V. R. Balasubramaniam P. Sengottian, Director of Janardhana Mills Limited, G. Sriranga Gounder, father-in-law of the second respondent, K. N. Kandaswamy and Vardamanan, Chairman of Lakshmi Vilas Bank. A number of creditors were present on that day. The total number, who were present either on behalf of the creditors or on behalf of the debtors, was between 35 and 40. In the course of the deposition, P.W. 1, stated that the debtors were not able to pay any amount, that they said that they must be given time for one year and that they suspended the payment for one year. In the course of his deposition he further stated that each party put forward the ways and means to settle the creditors of the first respondent. P.W. 2, in his deposition stated as follows:—

"The debtors represented to us that one of their partners Kailasa Gounder had expired and other partners internally are not co-operating with each other and therefore in these circumstances it is not possible to make us any payment. So we hereby suspend the payment at least for a period of one year and we will not be able to pay. If you agree to this, well, otherwise go and do whatever you like."

P.W. 4, in the course of his deposition has stated the following regarding what happened on 8th:—

"We are about 35 to 40 persons, both creditors as well as debtors and their relations. Other than the debtors, there were a couple of persons. One was Mr. Vardamanan, Chairman of Lakshmi Vilas Bank and the other was the Chairman of the Karur Vysya Bank. They had also lent monies to them to a great extent. On that day, we discussed about the repayment plan, and the same expression was made by the debtors stating that assets could not be liquidated, particularly because Kailasam died, and everything was in a mess and the partners were not co-operating and coming forward to pay the monies."

Though the examination of the witness had gone on a wide range, the above represented the crucial passages regarding the allegations of suspension of payment. The question is what is the impression that could have been left in the minds of the debtors at such a meeting.

21. At this stage I may deal with one argument which was advanced on behalf of respondents 1 and 3 by Mr. Dolia, learned counsel who appeared for them. The submission of Mr. Dolia was that the meeting was confined to a few of the creditors and that any statement made in such a meeting could not be equated to a suspension of payment which, in order to fall within the scope of S. 9 (g) of the Act, should be with reference to all the creditors. The learned counsel appearing for the other respondents did not take up this stand. I am not satisfied that this submission of Mr. Dolia is correct. It was not as if the meeting was confined to the Multani Bankers alone. There were large amounts due to the Karur Vysya Bank and the Lakshmi Vilas Bank. Their representatives were also present. I do not, therefore, consider that at the said meeting any declaration that was made was given only in relation to Multani Bankers who were singled out for any separate treatment. At any rate, this aspect had not been adverted to even in the counter-affidavit filed on behalf of respondents 1 and 3 and I do not think that this plea merits any further discussion for rejection.

22. Yet another contention on behalf of the other respondents was that the said meeting was merely for the purpose of working out a plan for liquidating the debts or for settlement of the liability

and that no expression was used which could convey the impression to any of the creditors that the debtors were about to suspend payment. One crucial aspect which deserves to be noticed now is that apart from examining the four witnesses, who are either creditors of the first respondent firm or of some other entities in which Kailasa Gounder and others were interested, the petitioning creditors have not examined any of the other persons present at that meeting. For instance, if either of the two representatives of the Karur Vysya Bank or Lakshmi Vilas Bank had been summoned and examined, they would have furnished the most independent evidence on the point as to whether there was any suspension of payment on the said day. In the absence of any such independent testimony, I have to consider the correctness or otherwise of the plea of the petitioning creditors regarding the commission of act of insolvency only in the light of the evidence let in by either side. It is more or less a case of oath against oath.

23. At this stage, I may set out as to how this act of insolvency has been described in the petition itself. In paragraph 23 of I. P. No. 41 of 1976 it is stated as follows:—

"On 8-4-1976 a schedule meeting was held at Room No. 408, Hotel Ashoka. The meeting was held between 3 and 5 p.m. The third debtor, 5th debtor, 6th debtor and one V. R. Balasubramaniam, on behalf of the second debtor herein and P. Sengottian, Director and surety for Janardhana Mills Ltd., and G. Sriranga Gounder, father-in-law of the second debtor and the father of the third debtor and one K. N. Kandaswamy, brother-in-law of the second debtor were present and represented the debtors herein. On behalf of the creditors including the petitioning creditors herein, the following persons were present:—

1. Prabudas Gurumukhsing; 2. Bhajandas Ramchand; 3. Atmaram Sadhuram; 4. Motiram Newandram; 5. Biharilal Prakashlal; 6. Hassasingh Lalsingh; 7. Arjundas Gokuldas, partner Dharamdas Gokuldas and 8. Seth Khiaram Khushiram, the first petitioning creditor herein. One secured creditor Lakshmi Vilas Bank represented by their Chairman Sri Vardamanan was also present. The debtors expressed their inability to pay the amount immediately and stated everything is in a state of dismal due to sudden death of the partner V. M. Kailasa Gounder and they further represented that the accounts were not kept properly and they said that it is not possible for them to discharge the huge liability incurred as no partner is coming forward to give their share of debts and to co-operate to discharge the debts. They said, therefore, "they could not make the payment and they will not be in a position to pay the amount in the near future for nearly one year and thus suspended the payment". They further said that "The creditors can do whatever they want to do." Thus the debtors have suspended the payment and have committed Act of Insolvency squarely within S. 9 (g) of the Presidency Town Insolvency Act."

In para 8 of the petition (I. P. No. 46 of 1976) the following passage occurs:—

"Again the meeting was adjourned to 8-4-76 and in that meeting several creditors were present of which the partner of the first petitioning creditor also participated. The names of the persons representing the creditors are given as under:—

1. Prabhudas Gurumuksingh; 2 Bhajandas Ramchand; 3. Atmaram Sadhuram; 4. Motiram Newandram; 5. Biharilal Prakashlal; 6. Hassasingh Lalsingh represented by Mohan Singh; 7. Arjundas Gokuldas; 8. Seth Khiaram Khushiram.

On the side of the debtors 5th and 6th debtors and one V. R. Balasubramanian representing on behalf of the second debtor, P. Senkottaiyan, Director of Janardhana Mills Ltd., G. Sreeranga Gounder, father-in-law of the second debtor and the father of the third debtor, K. N. Kandaswami, brother-in-law of the second debtor represented all the debtors and in addition the Chairman of the Lakshmi Vilas Bank, Sri Vardhamanan was also present in that meeting. The debtors expressed their inability to make payment to the creditors owing to the non-co-operation of the partners and also gave notice of suspension of payment of all their debts. The effect of the said meeting is that they have clearly expressed their intention in suspending the payment to all their creditors of their debts. This action on the part of the debtors would amount to the act of insolvency under S. 9 (g) of the Presidency Towns Insolvency Act."

Para 8 of I. P. No. 46 of 1976 is somewhat an improved version of para 23 of I. P. No. 41 of 1976. In neither petition it was stated that the debtors actually

used the expression 'Suspension of payment'. But the witnesses for the petitioners have spoken to such expressions being used as is shown by the extracts given above. I am satisfied that the version in the depositions as if they used the expression of suspension of payment is not correct. If that was the expression used, that would have found a place in the petitions.

24. It is necessary to remember the course of events on and from 19-2-1976. Mr. Kailasa Gounder died on that day. Immediately on his death there were certain claims made against the said Kailasa Gounder personally and for this purpose a committee of five persons had called for the particulars of the amount due to any persons who claimed to have made any deposit with Kailasa Gounder. On 31-3-1976, V. P. Muthukumaraswamy who, it is clear from the evidence, was attending to the affairs of the business of the first respondent along with Kailasa Gounder had been arrested and detained and had been taken to Coimbatore. The other persons had left the affairs either in the hands of Kailasa Gounder or in the hands of the second respondent. The fifth respondent was employed in Sakthi Sugars. His brothers were not in business. One of the creditors of Janardhana Mills had filed a suit and obtained an order of attachment of the moveables of the fifth respondent.

25. In order to get the attachment set aside, the fifth respondent came over to Madras on the 7th April 1976 accompanied by the sixth respondent to whom the fifth respondent had telephoned before he left for Madras. On the 7th, it is only these two persons who were present at the meeting. On the 8th the third respondent joined them. Notices had been received from several of the Multani creditors. As far as the first respondent-firm is concerned, the amount due to the Multanis came to about Rupees 12,00,000. If the liabilities of Janardhana Mills Ltd. are also taken into account, the total liability to the Multani Bankers would have been about to Rs. 22,00,000. A reply notice had already been given on behalf of the second respondent. In that reply notice, which is marked as Ex. P-5 and which is dated 20th March, 1976 it is stated that consequent on the sudden death of Kailasa Gounder who was managing the firm, products were not moving fast, that recent developments had also contributed to a slump in the trade and that the firm was making arrangements to pay its just dues. It was therefore, requested that those who had issued notices should not take any hasty step which may tend to mar the cordial relationship that had been existing between the creditors and the first respondent-firm to their mutual advantage. From the reply itself it is clear that the firm was making arrangements to pay its just dues when the parties came to Madras on 7-4-1976; they could thus have come with a view to find out how best to settle all the liabilities that were due by the first respondent-firm. From the fact that subsequently there were several meetings even after the filing of the insolvency petitions, it is clear that the respondents, who participated in the meeting on 8-4-1976, were only trying to see how best the affairs relating to the debts due by the first respondent-firm could be settled. It is rather curious to find that in para 20 of the petition in I. P. No. 41 of 1976 the second respondent is said to have told the creditors, who met him, that the assets were worth only Rs. 90 lakhs and the liabilities were Rs. 1½ crores while in I. P. No. 46 of 1976 in para 8 it is stated that the liabilities came to nearly two lakhs of rupees as against their assets of Rs. 90,00,000 as estimated by them. Though the persons who are said to have made the declaration as set out in para 8 of the petition in I. P. No. 41 of 1976 are different from the person who was said to have given out the value of the assets and liabilities in I. P. No. 41 of 1976, still the difference in the version itself goes to show that both the versions could not be true at the same time. There is no independent evidence to confirm these versions. Further the respondents in their evidence have stated that their assets exceed their liability and that they are not in a position to pay immediately only because the assets are in the shape of immovable properties and machineries etc., which lack liquidity. Even in the evidence of P.W. 1 it was only stated that only four creditors said that the assets were worth Rs. 90,00,000 and the liability Rs. 1½ crores and that the debtors did not say so. In the face of these statements, I am not at all satisfied that in the present case the debtors were summoning the creditors for the purpose of announcement to them that they were in such a hopeless condition, that they would have

to settle with the creditors at a rateable amount or that if they did not wait for a period of one year or so, they could take whatever steps they liked. Singnificantly enough this meeting has been summoned by the debtors themselves. Though there were some pending proceedings in which action had been taken for attaching the moveables belonging to one of the respondents, still the evidence does not establish the existence of such a scramble or pressure that they had to summon the creditors and sue for peace by asking them to wait for some period or for telling them that they could do whatever they liked if they did not wait. I am unable to draw an inference on the facts herein that the respondents were declaring that they were suspending payments or words to that effect so as to come within the scope of S. 9 (g) of the Act. The whole discussion of the 8th April, 1976 in my opinion, was only with a view to find out how best to evolve a scheme for the settlement of all the liabilities. What happened on 8-4-1976 was only a discussion for the purpose of discharging the debts in a satisfactory manner, and not a declaration that there was any suspension of payment. In fact, the conduct of the debtors subsequently goes to confirm that they were making efforts to pay the liability. They paid Rs. 2,00,000 and also gave a power of attorney in favour of Mr. R. Krishnaswami, Advocate in order to enable him to sell No. 10, Kasturi Ranga Iyengar Road. It is true that the sale could not go through because one of the persons, who resided there, would not vacate the premises. At the time when the power of attorney was given, the parties could not have anticipated this difficulty and it is not even suggested that the power of attorney was only with a view to bide time and was not a bona fide attempt at selling the property bearing Door No. 10, Kasturi Ranga Iyengar Road, and repaying the creditors.

26. Mr. R. Krishnaswamy in a very vehement argument submitted that the fact that the debtors were driven to the necessity of having to sell a property, which did not belong exclusively to them itself went to show that they had not enough resources to repay all the debts. From the evidence of the respondents it appears that they have large immoveable properties in Erode and nearby places. It also appears that they have installed a valuable machinery for the purpose of the distillery which was owned by Kamadhenu Drinks, the first respondent. Though there may be some difference of opinion regarding the estimate of valuation of the properties, still it is not as if the respondents were in such a hopeless condition that they had to suspend payment. The contemplated sale of the Madras property was probably motivated by the fact that is is easier of realisation being a property in the City. I am unable to draw the inference that the offer of sale of the Madras property was itself proof positive of the hopeless condition in which the debtors were placed. Mr. Krishnaswami drew also my attention to Ex. R-34. That is a communication dated 7-4-1976 from the Commissioner of Land Revenue, Prohibition and Excise. The first respondent had given a security i.e. land, buildings, distillery etc., and estimated their value at Rs. 27.15 lakhs. This had been offered as security for a sum of Rs. 10,00,000 for which the Government wanted a security. In the said communication it was pointed out by the Board of Revenue as follows:—

"The Board has already considered their request carefully and informed them its decision in its letters dated 17-3-1976 and 1-4-1976. The properties are heavily encumbered to the tune of Rs. 74 lakhs according to the petitioners. Interests on the said loans are accruing. The value of the lands are stated to have been estimated on the basis of a high rate. The valuation in respect of the buildings, distillery unit, etc., have evidently been given without taking into account the depreciation etc. The Hon'ble High Court has also observed that if the Board of Revenue considers that the property offered as security cannot be accepted on the ground that they are insufficient as security having regard to their value, the petitioners are at liberty to offer other properties as security within four weeks from the date of the interim order. The petitioners are therefore, advised to furnish suitable and acceptable security in accordance with the instructions already issued in this matter within the time stipulated."

The inference sought to be drawn by the learned counsel from this letter is that the Government itself had pointed out that the respondents were heavily involved in debts for over Rs. 74 lakhs on the properties and that therefore, the Government insisted on the respondents

to furnish further security. Merely because the Government wanted some security in accordance with certain regulations under the Excise Act. It does not follow that the respondents were in involved circumstances so as to be unable to pay their debts. It may be that the Government considered that the security offered by the respondents was not sufficient. But that does not mean that there was any independent valuation made by the Government of all the assets and liabilities belonging to the respondents in their entirety so as to show that they were in insolvent circumstances.

27. The learned counsel for the petitioners also submitted that the properties belonging to the first respondent had been transferred to a company called Coimbatore Alcohol and Chemicals Private Limited and that that itself showed that the first respondent did not have any property so that it had to be adjudged as an insolvent. With reference to this aspect, there is the evidence of the respondents which goes to show that the Tamil Nadu Industrial Investment Corporation and the Banks which had advanced monies to the respondents were insisting on the business of the first respondent being vested in a limited company. It is not clear as to how the interests of the institutions which lent the money are better safeguarded if the assets were vested in a Limited Company. However, it is unnecessary to go into this aspect for my present purpose. It is clear from the exhibits and the evidence that even during the life time of Kailasa Gounder there was such a request and time had been taken for the formation of a Limited Company. The Limited Company itself was formed on 16-3-1976. It commenced business soon thereafter. A partnership deed taking it as a partner was executed on 1-4-1976 and subsequently on 10-4-1976 this partnership was dissolved when the said Coimbatore Alcohol and Chemicals Private Limited took over the assets. It is no doubt a cleverly designed scheme of transferring the properties of Kamadhenu Drinks in favour of Coimbatore Alcohol and Chemicals Private Limited without incurring the stamp duty and other tax liabilities. The fifth respondent made no bones about the intention behind the introduction of the Limited Company as a partner and the subsequent dissolution of the firm within a few days so as to vest the assets of the first respondent firm in the Limited Company. The motive behind the said arrangement was said to be to save stamp duty and the capital gains tax liability. If he firm had sold the assets directly to a limited company, then the sale would have attracted the Capital Gains Tax if the sale was for a price higher than the original costs. If the assets are taken over by a partner from the firm in which he is a partner on the dissolution of the firm, then there is no sale, as such, and it would only be a settlement inter se of the rights and liabilities of all the partners. The transaction was, therefore, put through on the basis that Coimbatore Alcohol and Chemical Private Limited was a partner on 1-4-1976 and that the firm was dissolved on 10-4-1976 when the assets were taken over by the said firm. I am not concerned with the motive behind the transaction or its effectiveness in avoiding the tax liabilities. I am now concerned to find out whether the vesting of the assets of the first respondent in Coimbatore Alcohol and Chemicals Private Limited was such as to show that the first respondent and others had committed an act of insolvency. The transaction of vesting itself was not challenged in the present proceedings as an act of insolvency. The learned counsel for the petitioning creditors relied on this transaction only to show that the assets of the firm had ceased to exist. This was not even pleaded. I do not, therefore, think it necessary to examine a contention which is not even based on the pleadings.

28. Thus, having given my anxious consideration to the submission made on behalf of the petitioning creditors I am not at all satisfied that any act of insolvency had been committed by the first respondent or by other respondents. The case under S. 9 (g) has not also been made out before me.

29. In this view, it is unnecessary to go into the question as to whether the fifth respondent had retired from the firm so as not to be liable to the petitioning creditors or others. This is a matter which can be gone into in any other appropriate proceedings. When there is no act of insolvency, the question as to whether it is a joint act of the partners or not does not arise. The result is that these petitions are dismissed with costs.

Petitions dismissed.

AIR 1978 MADRAS 265

RAMAPRASADA RAO AND SURYAMURTHY, JJ.

R. Sivagnanam, Appellant v. P. K. Sadananda Mudaliar, Respondent.

O. S. Appeal No. 28 of 1973, D/- 5-4-1977.

(A) Succession Act (39 of 1925), S. 276 — Practice and Procedure — Proof of will in common or solemn form left to court's discretion.

Where there is sufficient proof on record of the execution of the will and the same is corroborated by the evidence of the available attesting witness, the court may in its discretion grant probate, the mode of grant being called common form. When, however, the court feels inclined to have the will proved in solemn form, it may require the propounder to prove execution of the will or its genuineness in the presence of interested parties. (Para 6)

Anno: AIR Manual (3rd Edn.) Succession Act, S. 276 N. 3.

(B) Succession Act (39 of 1925), S. 263 — Scope and applicability — Clauses and Illustrations provide guidelines — Revocation of grant only on strict proof of presence of any of the stated circumstances.

The various clauses of S. 263 and the illustrations guide the court while exercising its discretion to revoke the grant of probate. Since the revocation sets aside an earlier valid judicial order there should be caution and strict proof of presence of any one of the circumstances stated in the provision should be insisted upon. (Paras 7 and 8)

Anno: AIR Manual (3rd Edn.) Succession Act. S. 263 N. 1.

(C) Succession Act (39 of 1925), S. 263 (a) and Illus. (ii) — 'Defective in substance', meaning stated — Failure to cite all interested parties is not invariably fatal to the validity of the proceedings.

Notwithstanding the fact that grant of probate is a judgment in rem and has got to be pronounced in the presence of all parties interested, the rule is not that peremptory and each case has to be decided on its own merit. Where, therefore, a party who entered caveat as an interested person later on withdrew and the court granted probate satisfied about the sufficiency of proof in common form of the execution and genuineness of the will, it was held that the grant could not be revoked after 12 years on the plea that all the parties interested were not cited nor on the ground that the grant was defective for the reason that the court had said that the grant was by consent of parties. The court, by saying that the grant was by consent of parties, in the circumstances only meant that the caveat having been withdrawn there was no objection to the grant of probate proof of the will in common form being available on record. Defect in substance means that the very basis on which the proceedings were started and proceeded was irregular and defective so that it affected the root of the matter. AIR 1955 SC 566, Foll. (Para 8)

Anno: AIR Manual (3rd Edn.), Succession Act, S. 263 N. 10.

(D) Succession Act (39 of 1925), S. 263, Explanation (c) — Proceedings to obtain the grant end with the grant — Untrue allegation by the applicant about his status while seeking condonation of delay in paying probate duty does not attract the Clause — Question of payment of duty arises after the grant and such ancillary matter relatable to grant is not a proceeding to obtain the grant. (Para 9)

Anno: AIR Manual (3rd Edn.), Succession Act, S. 263 N. 12.

(E) Succession Act (39 of 1925), Section 263, Explanation (e) — Delay in exhibiting the inventory excused by High Court — Ground of delay cannot be availed of to challenge the grant of probate. (Para 10)

Anno: AIR Manual (3rd Edn.), Succession Act, S. 263 N. 14.

Cases Referred: Chronological Paras

AIR 1955 SC 566 8

RAMAPRASADA RAO, J.:— This appeal is directed against the order of N. S. Ramaswami, J. in Application No. 329 of 1972 in T. O. S. No. 2 of 1957. The facts leading to the subject-matter may be succinctly stated thus:

2. One Thangavelu Mudaliar died leaving behind him a will duly executed by him in proper form. He died in Aug. 1956, leaving behind him his daughter Krishnaveni Ammal. Krishnaveni Ammal had two children — Sadanandam, a son, and Saraswathi Ammal a daughter. It is common ground that Sadanandam was named as the executor under the will and he sought for probate in the usual course and in the common form. Originally the proceedings came up before Ganapatia Pillai, J. who, after having

been satisfied that a grant could be made in the common form, was about to issue it, when he was interdicted by caveat proceedings. Krishnaveni Ammal filed a caveat as an interested person, and thereafter the proceedings were converted into a suit, T. O. S. No. 2 of 1957. On a verification of the record, we find that in the course of the proceedings two witnesses were examined. P.W. 1 was Sadanandam, the propounder of the will, and P.W. 2 was Swaminatha Achari, one of the attestors to the will, who also filed, along with the application for the issuance of the probate, the supporting affidavit so as to enable the propounder to obtain a probate after proof of the will in the common form. But, at that juncture, it appears that Krishnaveni Ammal withdrew her caveat. In those circumstances Ganapatia Pillai, J. observed — both sides agree that the probate asked for could be issued..... He imposed certain conditions for the issuance of the probate. His order is dated 22-1-1960. Nearly 12 years thereafter Saraswathi Ammal's son one Sivagnanam filed the present application for the revocation of the grant in favour of Sadanandam.

According to the applicant, who is the appellant before us, the grant of the probate was defective inasmuch as all the persons interested in the grant were not before the Court. Secondly, he would say that the grantee did not pay the probate duty in time and when he sought the indulgence of the Court for excusing the delay in making payment of such probate duty, he made a false allegation and that averment, which is admittedly false, by itself would enable him to obtain a reversal of the grant under S. 263(c) of the Indian Succession Act. Thirdly, the contention was that the inventory was not filed by the grantee of the probate as directed by the Court and this inaction on the part of Sadanandam is another matter which ought to be taken into consideration for the revocation of the grant and that this is possible under S. 263 (e) of the Indian Succession Act.

3. This application was resisted on the ground that there was no defect in the procedure and that the alleged false allegation was not at a time when the grant of probate was sought for and that the delay in filing of the inventory was excused by this Court by an order of Maharajan, J., and therefore, the three grounds on which revocation of the grant was sought by the applicant are unsustainable as not being available to him.

4. N. S. Ramaswami, J. rejected the application for the revocation of the grant holding that there was no defect in the procedure and that even if the grantee Sadanandam made a false allegation while seeking for an order for excusing the delay in the payment of the probate duty, it would not vitiate the grant as such an allegation was not made in the course of the proceedings resulting in such grant. And lastly, in view of the order of Maharajan, J., who excused the delay in filing the inventory by the executor, the third ground also was not open to the applicant. He dismissed the application. Hence the appeal.

5. The three grounds pressed before the learned Judge are repeated before us. Mr. Krishan, learned counsel for the appellant, would contend that there is a defect in the procedure since the order of Ganapatia Pillai, J., which is speaking, would say that the grant was by consent and as such a grant cannot be made by consent of parties, this itself is sufficient to vitiate the proceedings. Secondly he would say that the false allegation made at a time when seeking for an order to excuse the delay in the payment of the probate duty, is an allegation which should be deemed to have been made in the course of the proceedings relatable to the grant, and that therefore, the grant is vitiated and it ought to be revoked.

6. Probate being a document issued under the seal of Court and is demonstrative evidence of the executor's authority to act, is a solemn document. There are two modes by which probate can be granted. It could be proved in the common form or in the solemn form. When the Court is satisfied that sufficient proof is available on record of the execution of the will and when it is corroborated by the evidence of the available attesting witness, then it has the judicial discretion to grant such probate. But when its conscience provokes it to have the will proved in the solemn form which requires proof of execution of the will or its genuineness in the presence of interested parties, it should demand such proof from the propounder of the will. In the instant case, Sadanandam, son of Krishnaveni Ammal, as executor sought, for such a probate in the common form. N. S. Ramaswami, J. in his judgment specifically referred to the fact

that proof affidavits from the attestors of the will had been filed along with the petition for probate. There was therefore, enough material before the Court to issue a fiat and thus order probate of the will. But due to the intervention of Krishnaveni Ammal, who entered a caveat, the proceedings were registered as a suit — T. O. S. No. 2 of 1957. We have already referred to the fact that two witnesses were examined, which included the propounder of the will and an attesting witness. An attempt was made to summon the advocate who drafted the will. It was only at that stage that the caveator withdrew her objections for the grant. It is in the light of such events which transpired before him Ganapatia Pillai, J. said that there was no objection for the grant. We have already referred to the alternative mode by which a probate could be granted. The learned Judge apparently was satisfied by the affidavits of proof filed by the attestors and the discretion exercised by him judiciously to grant probate in the common form cannot lightly be disturbed at this stage. No doubt the normal process initiated for the issuance of a probate in the common form was snapped by the intervention of the caveator who. afterwards, withdrew her objections. But this would not, in our view, render the grant in any way defective. The grant should be deemed, in the instant case, to have been made after the Court applied its mind to the hypothesis on record and the present hopelessly belated attempt on the part of the appellant to set at naught such a grant twelve years after it was made, is obviously a futile one and Courts, whose assistance is sought to revoke such a grant, ought to view the circumstances with strict caution.

7. The principles governing the revocation of the grant are specifically enumerated in S. 263 of the Indian Sucession Act, which reads as follows:—

"263. The grant of probate or letters of administration may be revoked or annulled for just cause.

Explanation: Just cause shall be deemed to exist where:—

(a) the proceedings to obtain the grant were defective in substance; or

(b) The grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case; or

(c) the grant was obtained by means of an untrue allegation of fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently; or

(d) the grant has become useless and inoperative through circumstances; or

(e) the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect."

The grant of a probate may be revoked for a just cause. "Just cause" is explained in the body of the section itself. The various clauses which explain the expression "just cause" provide guidelines for the Court, whose assistance is sought for revocation of an improper grant under the Act. As revocation of a grant implies the effacement of the earlier valid judicial order of a Court, not only there should be caution in acceding to such a request but strict proof of the existence of one or other of the circumstances enumerated in the explanation to S. 263 of the Indian Succession Act is necessary before the Court could accede to such request.

8. Revocation should be for a just cause. The illustrations to the Section also provide some material to Court as to when it could exercise its discretion to reverse a grant. Illustration (ii) to S. 263 probably is the only material illustration which has an impact on the facts and circumstances of this case. Illustration (ii) runs as follows:—

"The grant was made without citing parties who ought to have been cited."

Then it would be a just cause which would enable the Court to revoke the grant. No doubt it is fundamental that a judgment of a Court of Probate being a judgment in rem, should be pronounced in the presence of all parties interested, however slight such interest may be. But this is not axiomatic. Each case has to be decided on its own merit. Absence of just cause cannot be presumed on an a priori consideration. In the case before us, Krishnaveni Ammal entered her caveat as an interested person, but withdrew it unconditionally during the process of the enquiry. N. S. Ramaswami, J. was right when he said that there was enough material on record to grant a probate of the will in the com-

mon form. If, therefore, in a given situation when the Court found that the interested person has withdrawn the caveat, then it should reasonably follow that he had requisite judicial discretion to grant the probate provided the common form proof is made available by the propounder. There were no prima facie grounds for withholding such a grant under such circumstances. The only technical objection before us is that Ganapatia Pillai. J. observed that the probate was being granted by consent. Obviously this expression was used in a very wide sense by the learned Judge. Certainly we can assume that the learned Judge did never mean that the probate of the will can be granted by consent of parties. What obviously he meant was that at the particular time when the caveator withdrew from the proceedings, there was no objection for the grant otherwise, for there was material before him to issue the grant after having been satisfied that the normal method of proof of the will was available on record. We have already seen that two witnesses were also examined one the propounder and the other the attesting witness. In the circumstances, therefore, we are inclined to think that when Ganapatia Pillai, J. said that by consent the grant was being made, it only means that he was granting the probate because there could be no possible objection to the grant of probate of a will which has been proved in the common form. It should not, however, also be forgotten that when the caveator did not pursue the objection, by necessary implication the person interested did not question the genuineness or truth of the will. The present application for revocation on the ground that the proceedings for obtaining the grant was defective in substance has no merit, because in the circumstances of the case the Court should be deemed to have been satisfied about the common form proof of the will. Neither before N. S. Ramaswami, J. nor before us any attempt was made attacking the genuineness or truth of the will. It is in these circumstances we are unable to conclude that there was a defect in the procedure, as contended by the learned counsel for the appellant, within the meaning of cl. (a) of the Explanation to S. 263 which would in any manner vitiate the grant.

The Supreme Court had occasion to consider the meaning of the expression "defective in substance" appearing in Explanation (a) to Section 263 of the Indian Succession Act. In Anil Behari Ghosh v. Smt. Latika Bala Dassi, AIR 1955 SC 566 the Supreme Court said that defective in substance means that the defect was of such a character as to substantially affect the regularity and correctness of the previous proceedings. Therefore, to assert that in a proceeding which involves the grant of a probate or letters of administration, a defect in substance appears, the person challenging such a grant should be in a position to establish beyond reasonable doubt that the very foundation of the proceedings and the basis on which the proceedings started and proceeded, were irregular and defective. It is such a defect which goes to the root of the matter that is contemplated in Explanation (a) to S. 263. The use of the expression by Ganapatia Pillai, J. that probate is granted by consent, which, as we stated earlier, was very broadly used by the learned Judge, cannot be taken undue advantage of by the counsel to make out a case of substantital defect in the proceedings. It was only the language used by the Court that was sought to be pressed into service. We do not find any irregularity which would shake the foundation of the proceedings resulting in the grant of the probate by the learned Judge. We are, therefore unable to accept the first contention.

9. The second contention of the learned counsel for the appellant is that a false allegation was made at a time when the grantee sought for a favour from the Court to excuse the delay in the payment of the probate duty. It is no doubt true as it transpired in this case, that in the affidavit in support of the application for excusing the delay in the payment of the probate duty, the grantee Sadanandan made a false allegation regarding his status. This is taken advantage of and placing reliance on explanation (c) of S. 263, Mr. Krishnan urges that the grant has to be revoked on the ground that it was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant. There is a fallacy in this contention. The proceedings to obtain the grant terminates with the grant. The other ancillary matters relatable to the grant cannot be said to be proceedings to obtain the grant. After obtaining the grant the question of payment of probate duty comes in. In the instant case it was not paid in time. The grantee sought for

excusing the delay in the payment of such fee. In the affidavit filed by him in support of such a request he made an allegation, which is untrue, and which related to his status. It cannot be said that such an allegation, even if untrue, relates to a fact essential in point of law to justify the grant. This is an event which is posterior to the grant. The person who made the untrue allegation has already obtained the grant. What is contemplated in Explanation (c) is that the grant itself should have been obtained by means of an untrue allegation of an essential fact. Therefore, we are of the view that the allegation in the affidavit in question cannot be said to be one which would come within the mischief of Explanation (c) of S. 263, for, it is not one which was made for obtaining the grant but obviously it was one made after obtaining the grant. S. 263 (c) has no application at all and we do not agree with the second contention.

10. As regards the third contention, we have already observed that Maharajan, J. excused the delay in filing the inventory. Explanation (e) is pressed into service. Explanation (e) relates to a case where the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory, etc. When a learned Judge of this Court excuses such a delay in the exhibition of such an inventory which should follow up the grant, then it obviously means that the delay was neither wilful nor without reasonable cause. In any event, this objection is not open to the appellant after the delay in filing the inventory has been excused by an order of this court.

11. All the three contentions raised fail. The appeal is dismissed. No costs.

Appeal dismissed.

AIR 1978 MADRAS 269

ISMAIL J.

H. L. Nantha, Petitioner v. T. C. Ramalingam Pillai, Respondent.

C. R. P. No. 2041 of 1977, D/- 24-2-1978*

Civil P. C. (5 of 1908) O. 21, R. 29 (As amended in 1976) — Effect of amendment — Court can stay execution of not only its own decree but also of decree passed by another court transferred to it for execution. (Para 2)

Anno: AIR Comm. CPC (8th Edn.) O. 21, R. 29 N. 1.

Miss M. B. Dominque, for Petitioner; V. Ratnam, for Respondent.

ORDER:— This is a petition to revise the order of the learned District Munsif, Tenkasi, dated 21-7-1977 in E. A. No. 128 of 1976 in O. S. No. 20 of 1974. Admittedly certain suits instituted by the petitioner against the respondent on the file of the Court of the District Munsif, Tenkasi are pending. Equally admittedly the respondent had obtained a decree against the petitioner in O. S. No. 20 of 1974 on the file of the Sub Court of Tirunelveli. It is not again disputed that the decree in O. S. No. 20 of 1974 on the file of the Sub Court, Tirunelveli, had been transferred for execution to the court of the District Munsif, Tenkasi. The consequence is that before the District Munsif, Tenkasi, are pending the suits filed by the petitioners against the respondent herein and the execution proceedings in O. S. No. 20 of 1974. It is against the background of these facts, the petitioner filed E. A. No. 128 of 1976 under O. 21 R. 29 C. P. C. for stay of execution proceedings in O. S. No. 20 of 1974. The learned District Munsif by the impugned order dismissed the application, Hence the civil revision petition.

2. The sole ground on which the learned District Munsif dismissed the execution application filed by the revision petitioner is that the decree in O. S. No. 20 of 1974 on the file of the Sub Court of Tirunelveli was not passed by the District Munsif and therefore he had no competency to stay the execution proceedings of that decree. In coming to this conclusion, obviously the learned District Munsif has overlooked the amendment made in O. 21 Rule 29 C. P. Code, by Central Act 104 of 1976. After the amendment, Order 21 Rule 29 reads as follows:—

"Where a suit is pending in any court against the holder of a decree of such court or of a decree which is being executed by such court on the part of the person against whom the decree was passed, the court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided;

Provided that if the decree is one for payment of money, the court shall, if it

*(Against order of Dist. Munsif Tenkasi in E. A. No. 128 of 1976 in O. S. No. 20 of 1974).

grants stay without requiring security, record its reasons for so doing."

As a result of the amendment, the court acquires competency to stay not only the decree which it passed, but also the decree which had been transferred to it for execution, though passed by another court. The learned District Munsif failed to take note of this important change made in the relevant provision of the Civil Procedure Code. Hence the civil revision petition is allowed, the order passed by the learned District Munsif is set aside and the learned District Munsif is directed to dispose of E A No. 128 of 1976 on merits on the basis that he has the jurisdiction to stay the execution of the decree in O. S. No. 20 of 1974, because that decree had been transferred to his court for execution. There will be no order as to costs in this petition.

Petition allowed.

AIR 1978 MADRAS 270

RAMAPRASADA RAO AND SATHAR SAYEED, JJ.

M/s. Southern Steelmet and Alloys Ltd., Appellant v. B. M. Steel, Madras, Respondent.

O. S. A. No. 1 of 1978, D/- 1-2-1978*

Civil P. C. (5 of 1908) (as amended by Act No. 104 of 1976), O. 21 R. 58 — Attachment of property — Claims or objections — Adjudication — Enquiry — Nature and scope of — Order in Application No. 3578/77 in C. S. No. 354/77 D/- 23-12-1977 (Mad), Reversed.

The adjudication referred to under O. 21 R. 58 C. P. C. (as amended in 1976) is not summary and as it is the intention of Legislature under the amended Civil P. C. that it should be a decision as if rendered in a regular suit resulting in an appealable decree the fuller examination of the rights of parties has to be held after giving them adequate opportunity to place all relevant materials before the Court so that the court could ultimately decide and adjudicate on all questions including questions relating to title or interest in the property attached. Order dated 23-12-1977 in Appl. No. 3578 of 1977 in C. S. No. 354 of 1977 (Mad) Reversed. (Para 4)

*(Against order of V. Ramaswami J. in Appln. No. 3578 of 1977 in C. S. No. 354 of 1977 etc., D/- 23-12-1977.)

EV/EV/B811/78/KHA/DVT

Anno : AIR Comm : C. P. C. (8th Edn), O. 21, R. 58, Note 22-C.

K. Parasaran for B. Soundarapandian, for Appellant; M. R. Narayanaswami, for Respondent.

RAMAPRASADA RAO J.:— Two applications, Appln. No. 3578 of 1977 by B. M. Steel Pvt. Ltd., and Appn. No. 3595 of 1977 by Maharashtra Bank for similar reliefs were filed on the Original Side of this court under Or. 21 rule 58 C. P. Code, stating that both the applicants as above were the owners of the steel and M. S. rounds or were interested in them and which were at No. 32 Suryanarayana Chetti St, Madras 13, and which according to the company, were their goods and which according to the Bank were goods in and over which they had an enforceable legal right. The appellant as plaintiff instituted a suit CS No. 354 of 1977 on the file of the Original Side of this court against a partnership firm known as B. M. Steel impleading the partners therein as defendants 2 to 6. Contemporaneous with the filing of the suit, an application for attachment before judgment was filed by the plaintiff-appellant. Notice in that application was served on the partnership firm B. M. Steel. When ultimately the application for attachment before judgment came up for final disposal B. M. Steel was prepared to give an undertaking not to alienate the goods belonging to it. In consonance with the undertaking which they wanted to give, they filed on affidavit, but later it was discovered, according to the plaintiff, that a large stock of over 52 tons of steel belonging to B. M. Steel which was available at No. 32 Suryanarayana Chetti St, was not included in the affidavit of undertaking. It was also averred that there is every possibility of B. M. Steel transferring such goods in the aforesaid godown to another company which was an incorporated one and which is the applicant in Appn. No. 3578 of 1977 and that if B. M. Steel effected a transfer of such goods to the incorporated company, they would be put to irreparable loss. They sought therefore a physical attachment of those goods instead of accepting the affidavit of undertaking filed by B. M. Steel. Accordingly, an attachment was effected on 14-11-1977 of goods, inter alia, found at No. 32 Suryanarayana Chetti St,. The incorported company as claimant filed Appn. No. 3578 of 1977 and sought for raising of the attachment claiming the goods as their own and setting up a title in themselves indepen-

dent of that of B. M. Steel. This was opposed by the plaintiff in the main suit. When the claim petition as it is popularly called filed under Or. 21 Rule 58 C. P. Code came up for hearing, the learned Judge, enquired into the matter summarily and on the affidavits and probably on representations made before him at the time of the hearing. He mainly adverted to the fact that the supplies were made after the date of the incorporation of the private limited company, that such supplies therefore not having been made to the corporate body pursuant to any understanding or contract, they were not liable to pay for the goods and that, therefore, the attachment of their goods for a debt due by B. M. Steel is illegal. The contention of the plaintiff throughout was that the incorporated company is alter ego of B. M. Steel that the memorandum of association of the incorporated company provides for the taking over of the business of B. M. Steel, which obviously includes its assets, that almost all the partners of B. M. Steel are the directors of the incorporated company and that therefore the claim that the goods at No. 32 Suryanarayana Chetti St, are the goods of B. M. Steel is not sustainable. The learned Judge after referring to the contentions of the parties raised the attachment. As against this, the present appeal has been filed.

2. Mr. K. Parasaran, the learned counsel for the appellant, referred to us the change of law after the amendment of the Civil Procedure Code by Central Act 104 of 1976. There has been a drastic change in the literature, the mode of approach and the method by which a decision should be arrived at and which should be adopted by a civil court when an application under Or. 21, Rule 58 comes up for adjudication. Whilst under the earlier law, such an investigation of claim and objection to attachment of attached property was summary in nature, the present law provides as it were a significant departure in the matter of disposal and adjudication of such claims. Order 21 Rule 58, as it stands today reads as follows:—

"58. Adjudication of claims to, or objections to attachment of, property — (1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained;

Provided that no such claim or objection shall be entertained—

(a) where, before the claim is preferred or objection is made, the property attached has already been sold or

(b) where the court considers that the claim or objection was designedly or unnecessarily delayed.

(2) All questions (including questions relating to right, title or interest in the property attached) arising between the parties to a proceeding or their representatives under this rule and relevant to the adjudication of the claim or objection, shall be determined by the court dealing with the claim or objection and not by a separate suit.

(3) Upon the determination of the questions referred to in sub-rule (2) the court shall, in accordance with such determination—

(a) allow the claim or objection and release the property from attachment either wholly or to such extent as it thinks fit; or

(b) disallow the claim or objection; or

(c) continue the attachment subject to any mortgage, charge or other interest in favour of any person; or

(d) pass such order as in the circumstances of the case it deems fit.

(4) Where any claim or objection has been adjudicated upon under this rule, the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(5) Where a claim or an objection is preferred and the Court under the proviso to sub-rule (1), refuses to entertain it, the party against whom such order is made may institute a suit to establish the right which he claims to the property in dispute; but, subject to the result of such suit if any an order so refusing to entertain the claim or objection shall be conclusive."

3. The order contemplates a full enquiry into all questions including questions relating to right, title or interest in the property attached which arise between the parties to the proceeding and mandates that the court enquiring such a claim petition shall determine such questions. There is also an embargo on the institution of a separate suit for the determination of such above questions. Sub-clause (4) of O. 21, Rule 58 throws abundant light upon the nature and

character of the decision ultimately to be arrived at by the civil court on such adjudication under Or. 21 Rule 58. It says that after the claim or objection has been adjudicated upon, the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree. Though perforce an order is contemplated to be passed under Or. 21 Rule 58 C. P. C. that order has the legal effect of a decree. Such an order is a substitute for a decision resulting in a decree in an ordinary litigation. A decree as is understood both legally and commonly results in the adjudication of rights, privileges, and duties of a party to a legal proceeding. Such being the intendment of the amended rule under Or. 21 Rule 58 C. P. C. in our view the enquiry contemplated under Or. 21 R. 58 C. P. C. is no longer of a summary nature, but should be full, realistic and after giving adequate opportunity to the parties concerned to prove their respective claims, rights, title and interest in the property attached. We are, therefore, of the view and rightly Mr. M. R. Narayanswami appearing for the incorporated company agrees with us that there has not been such a full adjudication of the rights of parties by the learned Judge when he passed the order appealed against.

4. We are not traversing the merits urged by the parties before the trial court and even before us. Though contentions mostly factual were raised by the parties, they stood there as bare contentions without being substantiated by corroborative evidence and acceptable material. We have already expressed the view that the adjudication referred to under Or. 21 rule 58 C. P. Code not being summary and as it is the intention of the Legislature under the amended Civil Procedure Code that it should be a decision as if rendered in a regular suit resulting in an appealable decree, we are of the view that a fuller examination of the rights of parties has to be held in the instant case after giving them adequate opportunity to place all relevant materials before the trial court, so that it could ultimately decide and adjudicate on all questions including questions relating to right, title or interest in the property attached which eigher directly or indirectly arise between the parties to the proceedings. This not having been done, we are constrained to set aside the order of the learned Judge and remit the subject matter to the Original Side of this court for a fuller and detailed examination as contemplated under the amended provision and for an ultimate decision after adjudication of the rights of parties. To the above extent, the appeal is allowed. There will be no order as to costs.

Appeal allowed.

AIR 1978 MADRAS 272

NAINAR SUNDARAM J.

Pappu Ammal, Petitioner v. M/s. Lab Chemicals and another, Respondents.

C. R. P. Nos. 439 and 440 of 1975, D/- 27-1-1978.

(A) Tamil Nadu Buildings (Lease and Rent Control) Act (18 of 1960), S. 14 (1) (b) — Bona fides — Interpretation.

In its wisdom, the Legislature was not content to lay down that the landlord can recover possession from the tenant on the simple ground that he required the premises for the immediate purpose of demolishing it and putting up a new building on the site. The expression 'bona fide' has been consciously incorporated so as to enjoin a duty upon the Courts to consider as to whether the requirement of the landlord has got the support of his bona fides. Without this element being present and without the consideration of this element, it will not be easy for the landlord to apply for eviction under this provision, viz., Sec. 14 (1) (b) of the Act. (Para 2)

In cases where the claim of the landlord is not per se dishonest and has not been found to be oblique or for any designed purpose to evict the tenant, then it follows that he is entitled to an order of eviction in the ordinary course, subject, however, to the tribunal constituted under the Act being satisfied that the other relevant conditions required and prescribed under the Act are complied with. Case law discussed. (Para 5)

The landlady wanted the building inftially for her own use and occupation. The petitions filed to that effect under Sec. 10 (3) (a) (iii) were followed by petitions under S. 14 (1) (b). The averments in the petitions under S. 14 (1) (b) did refer to the earlier petitions and the averments indicated that the demolition and reconstruction of the building was for her own requirements.

Held that it could not be said that the two claims are contradictory to one an-

other. It would be erroneous to take this as a factor indicating the lack of bona fides on the part of the landlady. The fact that she obtained sanction for demolition and reconstruction subsequently could not be put against the landlady. (Para 14)

The anxiety on the part of the landlords to get reasonable rent due to change of times and costs of living and equally so the tenacity of the tenants to stick on to the old rents would not always be a relevant factor to adjudge the question of bona fides one or the other way. Each case would have to be decided on its own facts. (Para 14)

On an overall consideration, the High Court found in revision that the courts below had made a wrong approach to the question of bona fides in derogation of the well laid down principles in the judicial precedents of the High Court on this question. (Para 14)

(B) T. N. Buildings (Lease and Rent Control) Act (18 of 1960), Ss. 25, 14 (1) (b) —High Court has power in revision to re-assess and review question of bona fides under S. 14 (1) (b).

Section 25 is wide enough in giving power to the High Court for the purpose of satisfying itself as to the legality, regularity, or propriety of the order of or proceeding before the courts below, (1973) 2 Mad LJ 380, Rel. on. (Para 13)

Cases Referred: Chronological Paras

AIR 1976 Mad. 65: (1976) 1 Mad LJ 89 7
(1976) 2 Mad LJ 211 8
(1976) 1 Mad LJ 267 11
(1974) CRP No. 2524 of 1973, D/- 1-10-1974 (Mad) 8
(1973) 2 Mad LJ 380 13
AIR 1971 SC 942: (1970) 1 SCWR 406 9,
(1971) 2 Mad LJ 383 12, 14
(1969) 1 Mad LJ 587 5, 8
(1967) 1 Mad LJ 110 4
(1965) 2 Mad LJ 12 3
(1964) 77 Mad LW 194 3

G. V. Baluswami and Asif Ali, for Petitioner; S. V. Kumaraswami, A. L. Natarajan and M. A. Srinivasan, for Respondents.

ORDER:— In these revisions, the landlady is the petitioner. The matters arise out of rent control petitions filed by the landlady under S. 14 (1) (b) of the Tamil Nadu Buildings (Lease and Rent Control) Act (hereinafter referred to as the Act). H. R. C. No. 2270 of 1971 was filed by the landlady against Messrs. Lab Chemicals, the respondent in C. R. P. No. 439 of 1975. H. R. C. No. 2271 of 1971 was filed by the landlady against P. S. Palani Chetti respondent in C. R. P. No. 440 of 1975. Both were entertained by the Eighth Judge, Court of Small Causes (Rent Controller), Madras. According to the petitioner she required the premises in the occupation of the respective tenants for the immediate purpose of demolishing the same and such demolition is to be made for the purpose of erecting a new building on the site of the building sought to be demolished. The case of the petitioner as could be gathered from the petitions filed before the Rent Controller, was that her husband was doing business in Ceylon; for some years there have been threats against the Indian merchants in that country to leave; her husband was able to prolong his stay there till recently when he had to migrate to India once for all in May 1971; her husband, after coming to India, has made all preparations to start a business of his own at Madras for the benefit of the family, but for want of a business place for carrying on the business exclusively, the family is handicapped; the petition building is the only non-residential building belonging to them in Madras, that she has also filed separate petitions for eviction of the tenants under S. 10 (3) (a) (iii) of the Act; the shops in the occupation of the tenants are old and narrow and require to be reconstructed. The landlady gave the requisite undertaking to commence the work of demolition of the building, not later than one month and to complete the same before the expiry of the three months from the date possession is recovered. The respondents-tenants filed their counters. The main contentions, as could be gathered from their counters, are that the landlady has been demanding enhanced rent; she has no means to demolish and reconstruct the building; the building is not old and does not require any demolition; that the landlady has filed another petition for their eviction on the ground of requirement of the building for business purposes and she is not motivated by bona fides in filing the petitions for eviction. The Rent Controller who heard the petitions came to the conclusion that the landlady is not motivated by bona fides and in that view, dismissed her petitions on 30-7-1973. Aggrieved thereby the landlady filed H. R. A. No. 534 of 1973 against H. R. C. No. 2270 of 1971 and H. R. A. No. 535 of 1973 against H. R. C. No. 2271 of 1971. They were heard and

disposed of by the Appellate Authority (Third Judge, Court of Small Causes, Madras) by a common judgment dated 7-10-1974. Appellate Authority concurred with the Rent Controller that the landlady lacked bona fides and dismissed the appeals, preferred by the landlady. The present revisions are directed against the order of the Appellate authority.

2. The main question that comes up for consideration in both these revisions is as to whether the courts below applied the correct principles with reference to the assessment of bona fides unler S. 14(1) (b) of the Act. The question of bona fides has passed through many facets of consideration by judicial precedents. It will be pertinent to refer to some of them so as to deduce the correct principle that should be applied in consideration of this question, viz. 'bona fides' of the landlord for seeking eviction under S. 14 (1) (b) of the Act. In its wisdom, the Legislature was not content to lay down that the landlord can recover possession from the tenant on the simple ground that he required the premises for the immediate purpose of demolishing it and putting a new building on the site. The expression 'bona fide' has been consciously incorporated so as to enjoin a duty upon the Courts to consider as to whether the requirement of the landlord has got the support of his bona fides. Without this element being present and without the consideration of this element, it will not be easy for the landlord to apply for eviction under this provision, viz., S. 14 (1) (b) of the Act.

3. In Mehsin Bhai v. Hale and Co., Madras, (1964) 77 Mad LW 194, Ananthanarayanan J. while considering the question of 'bona fide' observed —

"Some regard must certainly be made to the fact that the Act is intended for the protection of tenants, from unjust eviction though the rights of landlords acting bona fide are equally safeguarded and that it will be an abuse of process of court if any provision of the Act is merely used as a pretext by the landlord, to obtain the eviction of a tenant, which he could not do otherwise".

In Sha Manakchand v. Sankarji Moolchand 1965-2 Mad LJ 12, Anantanarayanan O. C. J. considered the question of 'bona fides' and observed —

"The question of the bona fide requirement of a landlord of a building for immediate demolition and reconstruction under S. 14(1) (b) of the Madras Buildings Lease and Rent Control Act is sometimes difficult to adjudge and it is impossible to lay down any hard and fast rule. Bona fides will be a matter for decision in each case on its own facts and cannot rest upon a mere averment on claim by landlord. It is not the intention of the Legislature that in every case bona fides should be presumed unless the tenant establishes mala fides".

4. In David v. Daniel, (1967) 1 Mad LJ 110, a Division Bench of this Court consisting of Chandra Reddy C. J. and Natesan J. had occasion to consider the question of bona fides under S. 14(1) (b) of the Act. In that decision, the law has been stated as follows —

"The only requirement of S. 14 (1) (b) is that honest desire of the landlord to demolish the building and such demolition is to be made for the purpose of erecting a new building on the site of the building sought to be demolished. There is nothing in the language of this clause to warrant the view that the building should be old and decrepit. The expression bona fide occurring in that clause cannot sustain the opinion that it is only when a building is old and in a dilapidated condition that it could be demolished for the purpose of putting up a new construction so as to attract clause (b) of S. 14 (1). The import of the section is that the desire or the intention to demolish and rebuild should be honestly entertained by the landlord. It should not be a device to evict the tenant.....The fact that the landlords have not decided as to what use they should put part of the building after its reconstruction is not decisive on the question of bona fide."

5. In Selvaraj v. Narasimha Rao, (1969) 1 Mad LJ 587, a Division Bench of this court, consisting of Veeraswami C. J. and Ramaprasada Rao J. has laid down the test with regard to the bona fide under S. 14 (1) (b) of the Act. The learned Judges observed —

"The quality and content of the expression 'bona fide' appearing in the various sections of the Act and for purposes therein enumerated have to be weighed and construed in different lines under different circumstances having regard to the context in which the expression appears. Section 16 of the Act affords a statutory right to the tenant to reclaim possession of a building secured by the landlord under S. 14(1) (b), if he does not substantially demolish the building and attempt at reconstruction as proposed. This controlling provision provides

as it were a key to the interpretation of the expression bona fide appearing in S. 14 (1) (b) of the Act. It appears to us that in cases where the claim of the landlord is not per se dishonest and has not been found to be oblique or for any designed purpose to evict the tenant, then it follows that he is entitled to an order of eviction in the ordinary course, subject, however, to the tribunals constituted under the Act being satisfied that the other relevant conditions required and prescribed under the Act are complied with".

6. The ratio enunciated by their Lordships in the above decision seems to have concluded the controversy with reference to the construction of the expression 'bona fides' occurring in S. 14 (1) (b) of the Act. No other decision of this court, holding a contrary view, has been brought to my notice and I find the said ratio has been uniformly followed by the subsequent judicial precedents of this court.

7. In Smt. C. B. Purshothamdass v. P. Mittalal, 1976-1 Mad LJ 89: (AIR 1976 Mal 65), Ramaprasada Rao J. has reiterated the above ratio in the following terms (at p. 65 of AIR):

"There is inbuilt in S. 14(1) (b) of the Madras Buildings (Lease and Rent Control) Act a safeguard under which the tenant could take shelter so as to thwart any pretences on the part of the landlord in the matter of the demolition of the building for purposes of reconstruction. The lever is that the tenant can seek for restitution if the landlord who has to peremptorily give an undertaking as provided for in S. 14 (2) fails to demolish the same within the prescribed time. Whatever reason might prompt an individual to destroy his own property that cannot be the subject matter of investigation by a Court of Law. It is in this sense that the halo of bona fides which play a very prominent part in so far as petitions under the other sections of the Act are concerned, sinks, to more or less an insignificant level. In view of the fact that the landlord comes forward openly and publicly to demolish and destroy his property, that would not be case which is automatically illustrative of the bona fides of the landlord. In such circumstances, there cannot be any acid test to measure the bona fides of the landlord in the matter of such eviction".

8. In Shanthakumari v. Narasimga Mudaliar, (1976) 2 Mad LJ 211. Suryamurthy J. observed that bona fides is a question of degree; bona fides has to be assessed with reference to the circumstances and facts of each particular case and in the context and framework of the situation prevailing at that time. In Sampathu v. Ethiraja Chettiar, C.R.P. No. 2524 of 1973, D/- 1-10-1974 (Mad), Ramaprasada Rao J. had occasion to refer to the dictum of the Division Bench of this court in Selvaraj v. Narasimha Rao 1969-1 Mad LJ 587 and the learned Judge observed—

"It is high time that the Subordinate Judge and the Rent Controller of his District, namely, North Arcot District, apprise themselves of the decision in Selvaraj v. Narasimha Rao, 1969-1 Mad LJ 587, and apply it correctly at least in future. The section itself provides for relief to the tenant, who can remain in the property, if the demolition is not made within the prescribed time. This is a statutory benefit conferred on the tenant in the case of any laches on the part of the landlord. Thus viewed, the courts below ought not to have entered into an adjudication on the issue whether the claim of the landlord in such circumstances was bona fide or not".

9. While dealing with a similar provision under the Mysore Rent Control Act, 1961 (Mysore Act 22 of 1961) the Supreme Court, in Panchmal Narayan Shenoy v. Basthi Venkatesha Shenoy 1970-1 SC WR 406 : (AIR 1971 SC 942), had occasion to consider the question of bona fides. The relevant provision of the Mysore Act, as extracted in the decision reads as follows: (at p. 944 of AIR):

"21 (1) Notwithstanding anything to the contrary contained in any other law or contract, no order or decree for the recovery of possession of any premises shall be made by any court or other authority in favour of the landlord against the tenant;

Provided that the court may on an application made to it, make an order for the recovery of possession of a premises on one or more of the following grounds, only, namely—.

(j) that the premises are reasonably and bona fide required by the landlord for the immediate purpose of demolishing them and such demolition is to be made for the purpose of erecting a new building in place of the premises sought to be demolished".

10. The Supreme Court observed as follows—

"What is necessary under that clause is that the landlord must satisfy the

court that he reasonably and bona fide requires the premises for the immediate purpose of demolishing it and the demolition is for the purpose of erecting a new building in the place of the old one. No doubt, as to whether the landlord's requirement is reasonable and bona fide has to be judged by the surrounding circumstances, which will include his means for reconstruction of the building, and other steps taken by him in that regard. In considering the reasonable and bona fide requirement of the landlord under this clause, the desire of the landlord to put the property to a more profitable use after demolition and reconstruction is also a factor that may be taken into account in favour of the landlord. In our opinion, it is not necessary that the landlord should go further and establish under this clause that the condition of the building is such that it requires immediate demolition.....So the requirement under clause (j) is that of the landlord and cannot have any reference to the building".

11. In Ramachandra Rao v. Krishnaswami Iyengar, 1976-1 Mad LJ 267 Varadarajan J. had occasion to deal with a case where the landlord put forth the specific plea that the building is in very bad state of repairs and required to be immediately pulled down and this case has not been substantiated, but has been found to be otherwise, In that the building has been found to be in a sound condition although it is about 50 years old. In those circumstances, the learned Judge was obliged to negative the bona fides of the landlord.

12. In Ramanatha Iyer v. Bathul Bai, 1971-2-Mad LJ 383 Ramanujam J., while considering a case arising out of an application under S. 14 (1) (b) of the Act, repelled the contention that whenever an application for demolition and reconstruction is made, a prior sanction of the Municipality should have been obtained. The learned Judge observed that the Act nowhere provides that a petition for demolition and reconstruction should be made only after getting the required sanction from the Municipality. In that decision, the learned Judge also discountenanced the proposition that in a notice preceding the action for eviction, the purpose for eviction is sought must be set out.

13. In the light of the above principles, it becomes necessary to consider as to whether the courts below have correctly applied the ratio on the question of bona fides under S. 14 (1) (b) of the Act. Learned counsel appearing for the respondent would suggest that this court, exercising revisional jurisdiction under S. 25 of the Act shall not re-assess and review this question. S. 25 of the Act is wide enough in giving power to this court for the purpose of satisfying itself as to the legality, regularity, or propriety of the order of or proceeding before the courts below. This has been recognised by Gokulakrishnan J. in Arumugham v. National Palayakot Co., 1973-2 Mad LJ 380. When the Courts below misconstrued the principles to be applied or acted in ignorance of the principles deducible from the judicial precedents of this court with regard to the question involved, it will be certainly within the ambit of the powers of this court to correct and annul such improper, irregular and illegal orders.

14. Coming to the question involved in the present cases, the landlady wanted the building initially for her own use and occupation. The petitions filed to that effect under S. 10 (3) (a) (iii) of the Act have been followed by petitions under S. 14 (1) (b) of the Act. The averments in the petitions under S. 14 (1) (b) of the Act do refer to the earlier petitions and the averments indicated that the demolition and reconstruction of the building is for her own requirements. It cannot be said that the two claims are contradictory to one another. The courts below have erroneously taken this as a factor indicating the lack of bona fides on the part of the landlady. The fact that she obtained sanction for demolition and reconstruction subsequently is also put against the landlady. The ratio enunciated by Ramanujam J. in Ramanatha Iyer v. Bathul Bai, 1971-2 Mad LJ 383 discountenances such a consideration to test the bona fides. The courts below found that the landlady has got the means to carry out the work of demolition and reconstruction and her affluence is also taken against her. Another factor which has been taken into consideration by the courts below in negativing the bona fides of the landlady is that in 1962 there was a move by the landlady to get enhanced rent. This may not be a relevant factor to consider the question of bona fides in view of the fact that the present petitions came to be filed practically a decade later. The anxiety on the part of the landlords to get reasonable rent due to change of times and costs of living and equally so the tenacity of the tenants to

stick on to the old rents, will not always be a relevant factor to adjudge the question of bona fides one or the other way. Each case will have to be decided on its own facts. In the present case, the time lag practically waters down this theory, even if that could be tenable under other circumstances, I find that there is no finding rendered by the courts below that the building is in a sound condition so that this factor may be taken into consideration to negative the bona fides of the landlady. On an overall consideration, I find that the courts below have made a wrong approach to the question of bona fides in derogation of the well laid down principles in the judicial precedents of this court on this question.

15. I find that the orders of the courts below are vitiated and they are improper, irregular and incorrect and accordingly they are set aside and the petitions for eviction filed by the landlady are allowed. These revisions are allowed. There will be no order as to costs in both these revisions.

16. Taking into consideration the facts and circumstances of the case and also the fact that the building concerned is not a residential one, I feel sufficient time should be given to the tenants-respondents in the present revisions to vacate the building in their occupation. Mr. O. V. Baluswami, learned counsel for the petitioner in these revisions, is agreeable for the grant of 11 months time. Hence the respondent in each of these revision petitions is granted eleven months time to vacate.

Application allowed.

AIR 1978 MADRAS 277

P. GOVINDAN NAIR, C. J. AND V. RAMASWAMI, J.

P. V. Mohammed Ghouse, Appellant v. State of Tamil Nadu and another, Respondents.

Writ App. No. 592 of 1977, D/- 5-1-1978.*

Land Acquisition Act (1 of 1894), Ss. 17, 5-A — Declaration dispensing with enquiry under S. 5-A on the ground of urgency — Validity — W. P. No. 3281 of 1977 D/- 24-10-1977 (Mad), Reversed.

*(Against order of Mohan J. in W. P. No. 3281 of 1977, D/- 24-10-1977).

CV/EV/B314/78/AS/SSG

Under S. 17 power is given to the appropriate Government to direct that the provisions of S. 5-A shall not apply in cases where sub-sec. (1) of Section 17 is attracted. However, the power under Section 17 (1) cannot be applied when there is no urgency. It is also necessary to apply the mind to the question whether in a given case the power under S. 17 (4) can appropriately and reasonably be applied for, whenever the power under S. 17 (4) is exercised, the right given under S. 5-A to the owner of the land to make representation against the proposed acquisition is taken away. The procedure adopted must indicate whether there was any such extreme or dire need for dispensing with the right of the owner of the land and in proceeding with the declaration containing dispensation of the enquiry under S. 5-A. (Para 4)

In the present case, the notification under S. 4 (1), the direction and declaration made under S. 6 have all been published simualtaneously. This is scant respect to the statutory provisions and rule of law embodied under S. 17 (4). The procedure adopted therefore belies the story of an extreme urgency as the foundation for the action for dispensing with the enquiry under S. 5-A and indicates that there has been no application of mind to S. 17 at all, before wielding heavy weapon given to the authority under S. 17 (4). Such an action borders on arbitrariness if not on perversity and the court sitting under Art. 226 of the Constitution can set aside the proceedings by appropriate directions or orders. W. P. No. 3281 of 1977, D/- 24-10-1977 (Mad) Reversed. (Para 6)

Anno: AIR Manual (3rd Edn.) Land Acquisition Act S. 17 N. 3.

Cases Referred: Chronological Paras

1975 Ker LT 537 5

G. Gopalaswami and R. Sukantharaj, for Appellant; C. Chinnaswami for Govt. Pleader, for Respondents.

P. GOVINDAN NAIR C. J.:— This appeal is against the order in W. P. No. 3281 of 1977 dismissing the writ petition in limine. The prayer in the writ petition is to call for the records of the respondents in their proceedings in Roc. in G. O. Ms No. 989 P. W. General dated 28-6-1977 of the second respondent and quash the same as illegal and direct the respondents to conduct proceedings under S. 5-A of the Land Acquisition Act (Act I of 1894) by issue of a writ of certiorari or manda-

mus or any other appropriate writ direction or order as this Hon'ble Court may deem fit and proper in the interests of justice."

The notification referred to is seen at page 7 of the typed set of papers. In the third para it states:—

"Whereas it has become necessary to acquire the immediate possession of the land specified in the schedule below, the Government of Tamil Nadu hereby directs that the land be acquired under the provisions of sub-sec. (2) of S. 17 of the said Act."

The notification under S. 4 (1) is dated 22-3-1977. The declaration which also contains the dispensation of the enquiry, which we have just now read, is dated 28-6-1977. The notification under S. 4 (1) and declaration under S. 6 were published in the Gazette on 20-7-1977.

2. Counsel on behalf of the appellant contended before us that the facts as indicated by the dates of the notification and the declaration and the publication thereof clearly belies any urgency or emergency which would justify the application of S. 17 (2) of the Act. Sec. 17 (2) of the Land Acquisition Act 1894 (Act I of 1894) has been amended by the State Legislature by Madras Act XXI of 1948. The following sub-sec. (2) has been substituted in the first para of sub-sec. (2). The amended section reads as follows:—

"(2) In the following cases, that is to say — (a) whenever, owing to any sudden change in the channel of any navigable river or other unforeseen emergency, it becomes necessary for any Railway administration to acquire the immediate possession of any land for the maintenance of their traffic or for the purpose of making thereon a riverside or ghat section, or of providing a convenient connection with or access to any such station.

(b) Whenever in the opinion of the Collector it becomes necessary to acquire the immediate possession of any land — (i) for the purpose of any library or educational institution, or (ii) for the construction, extension or improvement, of

(A) any building or other structure in any village for the common use of the inhabitants of such village, or (B) any godown for any society registered or deemed to be registered under the Madras Co-operative Societies Act 1932, or (C) any dwelling house for the poor, or (D) any irrigation work, irrigation or drainage channel or any well, or (E) any road, the Collector may, immediately after the publication of the notice mentioned in sub-sec. (1) and with the previous sanction of the appropriate Government, enter upon and take possession of such land, which shall thereupon vest absolutely in the Government free from all encumbrances."

3. The question that had often arisen in what circumstances the power under Sec. 17 (4) can be applied legitimately had come up for consideration in a number of decisions. Sub-sec. (4) states that "in the case of any land to which, in the opinion of the appropriate Government, the provisions of sub-sec. (1) or sub-sec. (2) are applicable, the appropriate Government may direct that the provisions of Sec. 5-A shall not apply, and, if it does so direct, a declaration may be made under Section 6 in respect of the land at any time after the publication of the notification under Sec. 4 sub-sec. (1)."

4. Though the working of the section gives a power to the appropriate Government to direct that the provisions of S. 5-A shall not apply in cases where sub-sec. (1) of Sec. 17 is attracted, it has to be borne in mind that that power can be exercised 'only in cases of urgency.' The words in quotation are the words with which sub-sec. (1) of Sec. 17 commences. The power under sub-sec. (1) of Sec. 17 cannot, therefore, be applied when there is no urgency. Secondly, it is necessary to apply the mind to the question whether in a given case the power under S. 17 (4) can appropriately be applied and reasonably be applied, for whenever the power under sub-sec. (4) of Sec. 17 is applied, the right given under Sec. 5-A of Act I of 1894 to the owner of the land to make representation against the proposed acquisition, is taken away. That such a right is a very valuable right has also been laid down in a number of judicial decisions. It is unnecessary to refer to them, for, the principles is very well established.

The application of the mind, therefore, must be to the various aspects as to whether it is just and proper that such a right should be taken away and further whether it is necessary to take away that right in order that the urgency may be satisfied. It is reasonably possible to give a right to the owner of the land to state his case and to consider the same and then to decide whether the land should be acquired and thereafter the declaration under Sec. 6 made, then in such circumstances there will be no justification whatever in

pressing into service the extraordinary powers under sub-sec. (4) of Sec. 17. As we understand the provisions of Sec. 17 the power is given for rare use in circumstances where, without the use of that power, the purpose of public need cannot be met. The procedure adopted would indicate whether there was any such extreme or dire need for dispensing with the right of the owner of the land and in proceeding with the declaration containing dispensation of the enquiry under Section 5-A.

5. The matter has been dealt with elaborately in a judgment of Kerala High Court in the decision reported in Damodara Menon v. P. A. (L. A.) to Dy. Collector, 1975 Ker LT 537. After a review of the relevant authorities the principle has been laid down that if the procedure adopted belies the story of an extreme urgency as the foundation for the action for dispensing with the enquiry, then the procedure would not be justified under the statute and the court sitting under Art. 226 of the Constitution can set aside the proceedings by appropriate directions or orders.

6. We have already adverted to the date of the notification under Sec. 4 (1) and the date of publication of that notification. We shall repeat that the notification is dated 22-3-1977, whereas it was published only on 20-7-1977. Sub-sec. (4) of Sec. 17, which we have referred to in detail, clearly states that the appropriate Government may direct that the provisions of Sec. 5-A shall not apply and, if it does so direct, a declaration may be made under Sec. 6 in respect of the land at any time after the publication of the notification under Sec. 4, sub-sec. (1).

In this case, the notification under Sec. 4 (1) the direction and the declaration have all been simultaneously published on 20-7-1977. This is scant respect to the statutory provisions and the rule of law as embodied therein. Apart from the consideration there is another fundamental aspect. Sec. 17 (2) does not contemplate the application of Sec. 17 (4) for purposes of the acquisition as stated in the notification under Sec. 4 (1) in this case. This merely indicates that there has been no application of the mind to Sec. 17 at all, before wielding the heavy weapon given to the authority under Sec. 17 (4). Such an action borders on arbitrariness if not on perversity. In such circumstances, we are constrained to interfere by issue of necessary directions. We consider that interests of justice demand that the notification dated 28-6-1977, which is at page 7 of the typed set of papers must be quashed in toto, that is, as far as the declaration portion is concerned and so also the dispensing with the enquiry under Sec. 5-A is concerned. We do so.

7. We are informed by the learned counsel on behalf of the State that possession had already been taken pursuant to these proceedings on 31-8-1977. In view of the quashing of the declaration, it is necessary that possession must be handed over to the appellant, we direct that this should be done immediately.

8. Before parting with this case, we would like to record that counsel for the appellant stated that he has no objection to 75 cents of land being taken from the portion of the land lying away from the road and that he has no objection to the whole of that 75 cents being taken and he only wants his interest being safeguarded. The portion lying adjacent to the road it is said is necessary for the purpose of opening a cinema theatre which he proposes to do so. It is not disputed that only 75 cents is required for the purpose for which public acquisition was resorted to. In the light of these statements made by counsel on behalf of the appellant. It seems to us to be possible to have the enquiry concluded without any delay, because the land is available to the Government and only its location need be determined.

9. We direct that notice be given of the enquiry and the appellant given an opportunity to state his case and his claim that the acquisition be confined to the back portion, that is, the portion lying away from the road be considered. The authority conducting the enquiry should apply his mind to this question and pass proper orders before proceeding further with the acquisition proposed.

10. The writ appeal is disposed of on the above terms. We direct the parties to bear their respective costs.

Order accordingly.

AIR 1978 MADRAS 280

RAMANUJAM, J.

K. A. Natarajan, Petitioner v. M. Naina Mohamed and another, Respondents.

C. R. P. No. 2553 of 1976, D/- 3-10-1977.*

(A) Motor Vehicles Act (4 of 1939), Ss. 64, 68F (1-D) — Appellate power of Tribunal — Appeal against grant of permit preferred before notification of draft scheme under S. 68-C — Maintainability.

The appellate power of the Tribunal against the grant of permit made earlier to the notification of a draft scheme is not in the least affected by the provisions of the scheme. There is always a clear-cut distinction between the power of the Tribunal to entertain and dispose of an appeal and the relief which the Tribunal can give. The mere fact that some restrictions are placed on the Tribunal in respect of the relief to be granted, that will not amount to the repeal of the appellate power to entertain and dispose of the appeal. It may be, in view of a particular provision in the statute it is not possible for the Tribunal to give a particular relief, but that will not mean that the Tribunal cannot entertain the appeal and dispose of the same. Even assuming that the Tribunal is not empowered to grant a permit in respect of a route covered by a draft scheme, that will not mean that the appeal filed earlier cannot be maintained. (Para 6)

Anno: AIR Comm. M. V. Act (1st Edn.) S. 64 N. 3, S. 68-F N. 7.

(B) Motor Vehicles Act (4 of 1939), Ss. 64, 68-F (1-D) — Appellate power of Tribunal — Appeal against grant of permit filed before publication of draft scheme under S. 68-C — Power to dispose of appeal on merits.

The Tribunal, while considering the appeal on merits only deals with the order of the Regional Transport authority rejecting the claims of others and choosing a particular person. Therefore, if the Tribunal agrees with the view of the R. T. Authority it confirms his order and if it does not agree it sets aside that order and substitutes its own decision therefor. Thus the Tribunal merely deals with the correctness or otherwise of the order of the R. T. authority in making the selection for the grant of permit. Therefore whatever be the effect of the order passed by the Tribunal, the same cannot be said to amount to a fresh grant of the permit. In this view, therefore, where the appeal against grant of permit has been filed before publication of draft scheme under S. 68-C, the Tribunal should be taken to have the power to dispose of the appeal on merits. Any other contrary view will lead to anomalies, and the same cannot be justified with reference to the object sought to be achieved by the introduction of a scheme for nationalisation. (Paras 8, 9)

Section 68-F (2) also indicates that Section 68-F (1-D) will not apply to permits granted earlier and which were the subject matter of appeals before the Tribunal. In deciding the appeal the Tribunal has to take note of the draft scheme. But that will not mean that the publication of the draft scheme will make ineffective an appeal filed against the earlier grant of a permit and thus making the grant immune from attack. AIR 1977 SC 1564 Applied. (Paras 10, 13)

Anno: AIR Comm. M. V. Act (1st Edn.) S. 64, N. 3; S. 68-F N. 7.

Cases Referred: Chronological	Paras
AIR 1977 SC 1564	14
AIR 1975 SC 1867	1
AIR 1974 SC 1876	12

K. K. Venugopal for S. B. Anthonisami and M. Krishnappan, for Petitioner; M. N. Rangachari, for Respondent No. 1.

ORDER:— In respect of a new route from Paramakudi to Madurai covering a distance of 49 miles, applications were called for under S. 57 (2) of the Motor Vehicles Act, hereinafter referred to as the Act and there were 35 applicants for the said route. After consideration of the various applications, the R. T. A. granted the permit to the first respondent herein, on 23-11-1966. An appeal to the State Transport Appellate Tribunal having failed, the matter was taken to this court by way of a writ petition. The writ petition was allowed and the grant in favour of the first respondent was set aside. However, in writ appeal the order of the State Transport Appellate tribunal was restored. Subsequently, the matter was taken to the Supreme Court in C. A. No. 98 of 1975 and the Supreme Court has remitted the matter for fresh consideration by the Tribunal, by order dated 23-7-1975.* By that time there was a draft scheme notified under S. 68-C of the Act on 4-6-1976,

*(Against order of State Transport-Appellate Tribunal Madras in A. P. No. 2060 of 1966 etc.).

*Reported in AIR 1975 SC 1867.

for the identical route and the permit issued in favour of the first respondent had also been renewed on 14-7-1976 for a period of three years.

2. When the appeal was taken up for fresh hearing by the State Transport Appellate Tribunal on 13-9-1976, in pursuance of the remit order passed by the Supreme Court, the first respondent contended that the appeal before the Tribunal is not maintainable for the reason that a draft scheme had been notifed under S. 68-C, that in between the date of publication of the draft scheme and the date of the approval of the scheme there is no scope for considering the grant of a permit or renewal thereof, that there being a statutory bar under S. 68-F (1D) of the Act, the Tribunal cannot go into the question as to whether the appellant could be granted a permit for the route which is covered by a draft scheme and that, therefore, the appeal itself is not maintainable. The Tribunal upheld the said objection as to the maintainability of the appeal after publication of the draft notification holding that inasmuch as the draft scheme had been framed for the identical route, any order in favour of the appellant will definitely run counter to the statutory bar contained in S. 68-F (1D) of the Act that therefore, the Tribunal, will be incompetent to pass any order in favour of the appellant and as such the appeal cannot be entertained. The said decision of the Tribunal has been challenged in this revision by the petitioner herein appellant before the Tribunal.

3. The contention of the petitioner is that the Tribunal is in error in holding that the appeal is not maintainable in view of the draft scheme, that the effect of an order in favour of the appellant may not amount to grant of a fresh patta which alone is prohibited by S. 68-F (1D), that allowing of the appeal by the Tribunal will only amount to substitution of its order in the place of the order of the Regional Transport authority, that the Tribunal, by allowing the appeal is not making any fresh grant of permit, that any order passed by the Tribunal allowing the appeal will only date back to the order of the Regional Transport authority and that having regard to the object of S. 68-F (1D) which is to see that no new vehicle is introduced on the route, the consideration of the appeal by the Tribunal is not prohibited by the issue of a draft scheme. It is also contended by the learned counsel for the petitioner that if the draft scheme is not approved under S. 68-D, the dismissal of the appeal, as not maintainable would have deprived the appellant of a valid right of competing for a permit, as there is no provision for restoration of the appeal in the event of the scheme not being approved.

4. Section 64 states that any person aggrieved by the refusal of the State or a R. T. A. to grant a permit may, within the prescribed time and in the prescribed manner, appeal to the State Transport appellate Authority who shall, after giving such person and the R. T. A. an opportunity of being heard give a decision thereon which shall be final. In this case, it is not in dispute that the appeal before the Tribunal was properly filed and validly entertained. The question is whether this statutory right of appeal which has already been exercised is in any way affected by the issue of a draft scheme under S. 68-C or any of the provisions in Chapter IV-A. Section 68-B says that the provisions of that Chapter IV-A and the rules and the orders made thereunder shall have effect notwithstanding anything inconsistent therewith contained in Chapter IV of the Act or in any other law for the time being in force. Section 64 occurs in Chapter IV and therefore as S. 68-B gives an overriding effect for the provisions in Chapter IV-A it has to be seen whether there is anything in Chapter IV-A which will take away the right of appeal given to an aggrieved party under S. 64.

5. Section 68-C provides for the preparation and publication of a draft scheme in respect of any area or route or portion thereof. Section 68-D provides for the approval of the draft scheme after hearing objections from those referred to in sub-sec. (1). Section 68-F (I) provides for the issue of permits to the State Transport undertaking in pursuance of an approved scheme. Section 68-F (1-A) says that when a draft scheme is published under S. 68-C, the State Transport undertaking may apply for a temporary permit in respect of the route notified if there is need for increasing the transport facilities on that route. Section 68-F (1-C) states that if no application for a temporary permit is made by the State Transport undertaking under sub-sec. (1-A) a temporary permit may be granted to any person in respect of the notified route but the permit so granted shall cease to be effective on the issue of a permit to the

State Transport Undertaking in respect of that route in pursuance of the approved scheme. Then we come to S. 68-F (1-D) which is as follows—

"Save as otherwise provided in sub-section (1-A) or sub-sec. (1-C), no permit shall be granted or renewed during the period intervening between the date of publication, under S. 68-C of any scheme and the date of publication of the approved or modified scheme, in favour of any person for any class of road transport service in relation to an area or route or portion thereof covered by such scheme:

Provided that where the period of operation of a permit in relation to any area, route or portion thereof specified in a scheme published under S. 68-C, expires after such publication, such permit may be renewed for a limited period, but the permit so renewed shall cease to be effective on the publication of the scheme under sub-sec. (3) of S. 68-D."

The question for consideration is whether the provision extracted above stands in the way of the Tribunal disposing the appeal against a grant of permit preferred by an aggrieved party long before the date of the notification of the draft scheme under S. 68-C. The view taken by the Tribunal is that if it were to allow the appeal and direct the grant of permit to the appellants before it, it will be practically granting a permit to the appellant which will be contrary to Section 68 (1-D) and that, therefore, no appeal could be maintained after the notification of a draft scheme even in respect of a grant made earlier. The learned counsel for the petitioner questions the correctness of the view taken by the Tribunal on the ground that the statutory right of appeal available to an aggrieved party aginst the grant of a permit has not been taken away either expressly or by implication on the issue of a draft scheme, that the grant having been made long earlier to the publication of the draft scheme, the only question before the Tribunal was as to who should have the permit and that the question before the Tribunal was not whether a permit should be granted or not on the route notified in the draft scheme.

6. Section 68-F (1-D) does not expressly take away the appellate power of the Tribunal. Nor is it possible to hold that the appellate power of the Tribunal is impliedly repealed or withdrawn by the provisions in S. 68-F (1-D). The question is whether S. 68-F (1-D) which does not expressly or impliedly affect the appellate power of the Tribunal is capable of affecting the power of the Tribunal as soon as a draft scheme is published under S. 68-C. On a due consideration of the matter, I am clearly of the view that the appellate power of the Tribunal against the grant of permit made earlier to the notification of a draft scheme is not in the least affected by the provisions of the scheme. There is always a clear-cut distinction between the power of the Tribunal to entertain and dispose of an appeal and the relief which the Tribunal can give. The mere fact that some restrictions are placed on the Tribunal in respect of the relief to be granted, that will not amount to the repeal of the appellate power to entertain and dispose of the appeal. It may be, in view of a particular provision in the statute it is not possible for the Tribunal to give a particular relief, but that will not mean that the Tribunal cannot entertain the appeal and dispose of the same. Even assuming that the Tribunal is not empowered to grant a permit in respect of a route covered by a draft scheme, that will not mean that the appeal filed earlier cannot be maintained. Therefore, the reasoning of the Tribunal that the appeal is not maintainable after the draft scheme is notified in respect of the route cannot at all be sustained.

7. The next question is whether it is possible for the Tribunal to allow the appeal if it comes to the conclusion that the grant made in favour of the first respondent by the R. T. A. could not be sustained. It is the contention of the petitioner that the grant having been made already by the R. T. A. long before the draft scheme was notified, the Tribunal can modify the order of the R. T. A. granting the permit to the appellant in the place of the first respondent and that such an order will not amount to grant of a permit which alone is prohibited under S. 68-F (1-D). It is said that the object of S. 68-F (1-D) being not to allow any new vehicle to ply on the notified route, any order affirming or varying the grant made earlier by the R. T. A. will not be hit by the said section. It is also urged by the learned counsel for the petitioner that public interest being the prime consideration in the grant of stage carriage permits, the grant should be made to a suitable person who will serve public interest better, that if any grant made before the draft scheme was notified is not to be appealed against, public

interest will definitely suffer if the grantee from the R. T. A. is found to be unsuitable, that construing S. 68-F (1-D) as a bar to the Tribunal considering the merits of the grant made by the R. T. A. will be against public interest and, therefore, such a construction should be avoided especially when the section does not in terms purport to take away the power of the Appellate Tribunal. On a due consideration of the matter, I am inclined to agree with this contention of the petitioner.

8. The normal procedure is for the R. T. A. to consider the various applications for the grant of permit and choose the most qualified among them having public interest in mind. Then follows the ministerial act of the grant of permit. The appeal before the Tribunal is against the order directing the grant of permit and not against the ministerial act of granting the permit. The Tribunal, while considering the appeal on merits only deals with the order of the Regional Transport Authority rejecting the claims of others and choosing a particular person. Therefore, if the Tribunal agrees with the view of the R. T. A. it confirms his order and if it does not agree it sets aside that order and substitutes its own decision therefor. Thus the Tribunal merely deals with the correctness or otherwise of the order of the R. T. A. in making the selection for the grant of permit. Therefore whatever be the effect of the order passed by the Tribunal, the same cannot be said to amount to a fresh grant of the permit. In the nature of things the Tribunal merely deals with the question as to who should be the grantee in respect of the permit granted already. As soon as the Tribunal passes its order, that order replaces the order of the R. T. A. Though the Tribunal passes the order in respect of a grant made earlier by the R. T. A. after the draft scheme has been published, the Tribunal's order should be deemed to have been passed for purpose of S. 68-F (1-D) before the draft scheme. In this view, therefore, the Tribunal should be taken to have the power to dispose of the appeal on merits.

9. Any other contrary view will lead to anomalies or inequities. While all the grants made by the Regional Transport Authority will normally be subjected to appeal before the Tribunal under S. 64, such of those grants made by the R. T. A. just prior to the draft notification will not be amenable to the appellate jurisdiction. This will create inequality and the same cannot be justified with reference to the object sought to be achieved by the introduction of a scheme for nationalisation which is initiated by the issue of a draft scheme. The object of the scheme of nationalisation is definitely not to see that a particular operator is benefited or to give immunity to the private operators who were granted permits just before the draft scheme from attack before the Appellate Tribunal. This is also another reason as to why S. 68-F (1-D) cannot be construed as affecting the power of the Appellate Tribunal to hear appeal as regards the grant made earlier to the draft scheme.

10. Section 68-F (2) also in a way indicates that S. 68-F (1-D) will not apply to permits granted earlier and which were the subject matter of appeals before the Tribunal, S. 68-F (2) enables the R. T. A. to (a) refuse to entertain any application for grant or renewal of any other permit or reject any such application which may be pending, (b) cancel any existing permit or (c) modify the terms of the existing permit. In this case, the permit which is the subject matter of appeal before the Tribunal will come within the expression 'existing permit.' While under sub-sec. (2) of S. 68-F the permit in question is an existing permit will not become a fresh grant of permit if the Tribunal modifies the order of the Regional Transport authority. In my view, therefore, the Tribunal has jurisdiction to deal with the appeal before it on merits.

11. Besides, there are other considerations to be taken into account in dealing with the appellate power of the Tribunal. As already stated, the Tribunal has, in this case, dismissed the appeal as not maintainable because of the existence of a draft scheme. It is common knowledge that the draft scheme which have been notified are of various kinds (1) covering the entire route, (2) covering a sector of the route and (3) dealing with particular services such as mofussil or town services. Some of the schemes also contemplate private operators plying their vehicles simultaneously with the vehicles of the State Transport Undertaking either on the whole route or in portions of the route. It cannot, therefore, be said that once a draft scheme is notified the grant of any permit on the route is a bar unless the provisions of the scheme are looked into for purpose of finding out the extent to which the operation of the service on the basis of the permit will

be affected. As already stated the Tribunal in this case has not considered the provisions of the scheme to see whether the operation of service under the permit could be validly carried on notwithstanding the provisions of the scheme. The Tribunal is not, therefore, justified in rejecting the appeal as not maintainable without considering the terms of the draft scheme.

12. The learned counsel for the first respondent refers to the decision of the Supreme Court in Ali Ahmed and Sons v. R. S. Narain, AIR 1974 SC 1876 as an authority for the proposition that after a draft scheme is published, the Tribunal cannot entertain an appeal even against the grant of permit granted earlier. I do not see how that decision can be taken to be an authority for the above proposition. In that case A held a stage carriage permit in respect of a route covering a distance of 82 miles. He applied for extension of that route which was allowed. An appeal against the order granting extension was dismissed, but the extension of the permit was quashed by the High Court. The matter was taken to the Supreme Court was pending, the Madhya Pradesh State Road Transport Corporation published a draft scheme in respect of the entire route including the extended portion. The Supreme Court dismissed the appeal as infructuous on the ground that even if the appeal were to be allowed the petitioner cannot get the extension of the permit, as the permit for the extended route had already expired by efflux of time even before the publication of the scheme. As per the facts of that case the permit for the extended route which was the subject matter of the appeal before the Supreme Court had expired by efflux of time before the publication of the draft scheme and, therefore, if the Supreme Court were to grant the extension it will mean a fresh grant for the extended route and therefore the petitioner could not be granted an extension of the permit after the publication of the draft scheme. In any event the above decision does not hold that the appeal before the Supreme Court was not maintainable as has been done by the Tribunal in this case. Therefore the dismissal of the appeal by the Tribunal as not maintainable cannot be sustained.

13. It is no doubt true that in deciding the appeal the Tribunal has to take the circumstances as they were at the time of the hearing of the appeal, and this means that the Tribunal has to take note of the draft scheme which has been notified in relation to the route. But that will not mean that the publication of the draft scheme will make ineffective an appeal filed against the earlier grant of a permit and thus making the grant immune from attack at the instance of the aggrieved person. As already stated, S. 68-F (1-D) is not concerned with as to who should have the benefit of the permit granted earlier to the publication of the draft scheme and its object is only to prohibit grant of renewal of permits on areas or routes covered by the the draft scheme and to make provision for grant of temporary permits to the State Transport undertaking or in its place to any other operator to meet the need of the travelling public for the period intervening between the date of publication of the scheme under S. 68-C and the date of publication of the approved or modified scheme under S. 68-D. Once a grant has been made earlier to the draft scheme and the route is being served by an operator on the basis of the said permit, the continued operation of that permit cannot be said to be affected by S. 68-F (1-D). The continued operation on the route may be either by the grantee of the Regional Transport authority or by the grantee of the Tribunal. By substituting another person in the place of the original grantee by the Regional Transport authority or by the Tribunal cannot be said to defeat the object of S. 68-F (1-D).

14. The learned counsel for the first respondent has also raised another contention as to why the appeal before the Tribunal cannot become ineffective by the publication of a draft scheme. Admittedly in this case the appeal has been filed long before the publication of the draft scheme. If the appeal has been disposed of on the day when it is filed, the Tribunal would have undoubted power to set aside the order of the R. T. A. and substitute its own order. The fact that the appeal has been pending before the Tribunal for some time till the publication of the draft scheme will not affect the power of the Tribunal to deal with the appeal on merits. It is well established that an act of Court cannot prejudice a party (Actus curiae neminem gravabit) where a case stands over on account of multiplicity of business in the court, the party ought not to be prejudiced by the delay in the disposal of the case by the court. As the delay is the act

of the Court neither party should suffer for that delay. In a recent decision of the Supreme Court in Cheran Transport Co. Ltd. v. Kanan Lorry Service, AIR 1977 SC 1564 the question arose as to whether an application for renewal of a permit which was pending on the date of the publication of the draft scheme could be entertained after that date and disposed of in accordance with the proviso to S. 68-F (1-D). The Supreme Court had expressed the view that where applications for renewal in conformity with the law have been filed and thus the legal machinery for the grant of renewal has been set in motion by the party claiming renewal, the publication of a draft scheme under S. 68-C before the actual grant of renewal will not intercept or extinguish the process of law set in motion already by the party, that in such cases the R. T. A. has to consider the application for renewal on merits, that if for reasons beyond the control of the applicant the renewal process gets delayed or prolonged, he cannot be penalised, and therefore, the renewal can be granted on such an application notwithstanding the existence of a draft scheme. The same principle will apply to the facts of this case as well where an appeal has already been filed and the legal process by way of an appeal has been set in motion.

15. As already stated, the Tribunal, while disposing of the appeal, has to take into account the publication of the draft scheme. It may be that the scheme provides for complete exclusion or partial exclusion of a private operator or prohibits only a particular kind of service, say, mofussil service or town service. The Tribunal cannot merely refer to the draft scheme and dismiss the appeal without going into the question as to how far the relief claimed by the appellant could be granted without infringing the provisions contained in the draft scheme. It may be, in respect of certain draft scheme, operation of service in pursuance of the permit under appeal, may not be prohibited. Therefore to what extent the draft scheme prohibits the operation of a service under a particular permit will have to be considered with reference to the provisions of the scheme. The Tribunal is not, therefore, justified in dismissing the appeal without duly considering the provisions of the scheme and finding out as to how far the scheme affects the operation of service under the permit in question. In this view, I allow the revision petition, set aside the order of the Tribunal and direct the Tribunal to rehear the appeal on merits with reference to the provisions of the draft scheme. There will be no order as to costs.

Petition allowed.

AIR 1978 MADRAS 285

FULL BENCH

VEERASWAMI, C. J., NATARAJAN AND SETHURAMAN, JJ. (FB)

AND

RAMAPRASADA RAO AND RATNAVEL PANDIAN JJ. (DB)

Kumaraswami Gounder and others, Appellants v. D. R. Nanjappa Gounder (dead) and others, Respondents.

Second Appeal No. 172 of 1968 and C. M. P. No. 9869 of 1977. (Opinion of Full Bench D/- 9-10-1974, Order of Division Bench D/- 21-7-1976 and Final Judgment D/- 28-10 1977).*

(A) Hindu Succession Act (30 of 1956), Section 8 — "Dying intestate" — Meaning — Applicability of S. 8.

Per Full Bench: The expression "a male Hindu dying intestate" only referred to the status of the person dying and it had no effect upon the time of death so that the expression would be apt to apply to a Hindu dying intestate before or after that Act. It is true that Sec. 14 would enable the limited estate to be enlarged only if the widow was possessed of such property. But once it is taken to be the law that succession in a case like this opens when the widow dies as it her husband also died on the very date, this presumption should not be boggled with and should be applied as a fact, so that Sec. 8 of the Act is attracted to the situation. Therefore, S. 8 will be applicable to a case where a husband died intestate before the Act came into force and his widow inherited his properties, but was not possessed of those properties and died subsequent to the commencement of the Act. AIR 1974 SC 665 Rel. on. (Paras 8, 7, 10)

Anno: AIR Manual (3rd Edn.), Hindu Succession Act, S. 8, N. 2.

(B) Civil P. C. (5 of 1908), O. 41, R. 33, S. 100 — Second appeal — Decision of lower court — Interference — When open — Concurrent finding of fact — Finding when cannot be said to be concurrent.

*(Order of Reference to Full Bench by Ramaprasada Rao and Ratnavel Pandian JJ. D/- 19-9-1973.)

GV/GV/C737/78/SSG

Per Division Bench: The fundamental principle in a second appeal is that only on question of law, the decision of the lower court has to be interfered. If the trial court and the appellate court concurrently find on a particular issue, but after legal adjudication, then such a concurrent finding of fact also is equally binding on the second appellate court. When the trial court as well as the appellate court, however, base their conclusion on a public register which is challenged on several grounds by the opponent and if in the light of such challenge, both the trial court and the appellate court could not delve into the recitals in that public register and give satisfactory reason as to why the public register should be accepted or rejected, then it cannot reasonably be said that there has been a legal adjudication on the main issue in controversy. If the trial court fails to advert to the public register and its various limbs and the recitals therein and sustain its judgment on a well-founded reasoning or if the appellate court mechanically accepts such a finding rendered by the trial court which did not make a detailed examination of a challenged public register, then, in either of the above two contingencies, it cannot be said that there was a concurrent finding of fact. In such a case the High Court cannot accept mechanically the theory that there is a concurrent finding of fact and therefore S. 100 C. P. C. is a bar for a further hearing of the second appeal on such a question. (Paras 11, 14)

Anno: AIR Comm. C. P. C., (8th Edn.), S. 100, N. 54, O. 41, R. 33, N. 16.

(C) Civil P. C. (5 of 1908), O. 6, R. 17 — Amendment by introducing new cause of action — Permissibility.

Per Division Bench: When the amendment sought for sets up a totally different cause of action which ex facie cannot stand on a line with the original pleading, courts cannot allow such application for amendment. A pleading could only be amended if it is to substantiate, elucidate and expand the pre-existing facts already contained in the original pleadings; but under the guise of an amendment a new cause and a case cannot be substituted and the courts cannot be asked to adjudicate the alternative case instead of the original case. Though it is expedient under certain circumstances to take into consideration the supervening facts in the course of a litigation which is long drawn, yet the march and lapse of such time alone cannot be the foundation to mechanically accept the request for amendment because due to such passage of time, several events have happened and several matters have intervened. It would be hazardous to accept such an application for amendment to a plaint on the only ground of passage of time and change of circumstances. This is more so when the application for amendment is an afterthought and, therefore, lacks bona fides. (Para 19)

Anno: AIR Comm. C. P. C. (8th Edn.), O. 6, R. 17, N. 12.

(D) Hindu Succession Act (30 of 1956), Sch. Class II — Heirs in various items, if take together.

Per Division Bench: The style of enumeration of the heirs in Class II in the schedule is different from that accepted in Class I. It gives the key for understanding and interpreting the same. It may be that the son's daughter's son, son's daughter's daughter, the brother and the sister of a Hindu, who died intestate may all be the heirs of the deceased Hindu having been so closeted and grouped as item II heirs in Class II of the schedule. But it cannot be said that all the heirs enumerated in the various items to Class II take together and they would be entitled to succeed to the estate of a Hindu who died intestate. On the only ground that the enumerated heirs in Class I all take together in equal shares, it cannot be said by the mechanical invocation of the doctrine of anological application that such enumerated heirs in the various items set out in Class II should also be treated as such and all of them pooled up together so as to vest on them an entitlement to share the estate of the deceased equally as Class II heirs. (Para 20)

Anno: AIR Manual (3rd Edn.) Hindu Succession Act, Sch. Class II, N. 1.

(E) Civil P. C. (5 of 1908), O. 41, Rr. 33, 4 — Second appeal arising out of title suit — Common grounds agitated before courts below was whether alienations by certain defendants were sustainable — Appeal by some alienees only — Ground common to all defendants — O. 41, Rr. 4 and 33 attracted — Appellate Court vary decree in favour of all — Fact that appeal is against a part of decree and some of defendants have not appealed is immaterial — Appeal treated as one filed for benefits of all alienees. (Per Division Bench). (Para 22)

Anno: AIR Comm. C. P. C., (8th Edn.), O. 41, R. 4, Notes 5, 6, O. 41, R. 33, N. 2.

(F) Civil P. C. (5 of 1908), S. 11 — Res judicata — In earlier suit will construed in favour of certain defendants — Will upheld in earlier suit as true and binding on plain-

tiffs — Subsequent suit by plaintiffs on inconsistent source of title — Held, decisions is earlier suit became final and is binding on plaintiffs in subsequent suit. (Per Division Bench). (Para 23)

Anno: AIR Comm. C. P. C., (8th Edn.), S. 11, N. 100.

Cases Referred: Chronological	Paras
AIR 1974 SC 665	1, 5, 6, 9, 10
AIR 1966 SC 1879	9
(1926) A. S. No. 147 of 1926 (Mad)	28
(1880) ILR 5 Cal 776 (PC)	7

R. Kesava Iyengar and N. Varadarajan, for Appellants; V. K. Thiruvenkatachari, for K. Parasaran and T. Vadivel, T. R. Rajagopalan, S. P. L. Palaniappan and S. Rajaram, for Respondents.

OPINION OF THE FULL BENCH

VEERASWAMI C. J. (9-10-1974):— This reference comes before us because of the conflict of opinion on the question whether S. 8 of the Hindu Succession Act 1956 is applicable to a case where a husband died intestate before the Act came into force and his widow inherited his properties, but was not possessed of those properties and died subsequent to the commencement of the Act. One of us was a party to the reference. Since then has come Daya Singh v. Dhankaur AIR 1974 SC 665 which, in almost similar circumstances and after dealing with the conflict of opinion of some of the High Courts, answered the question in the affirmative

2. Were the question res integra, it would have been open to debate and doubt as to whether S. 8 was intended to cover reversionary succession as in the instant case. The Act was, no doubt, intended to amend and codify the law regarding intestate succession. The intention of the Act was to cover, as far as possible, the entire field. That was why Sec. 4 gave the Act overriding effect. Yet it visualises that any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of the Act would still have force, if for any matter provision was not made in the Act and also any other law not inconsistent with any of the provisions of the Act, may continue to have force. Chapter II of the Act deals with intestate succession, first, in respect of an interest of a coparcener in coparcenary property and then with devolution of interest in coparcenary property and in the property of a tarvad, Tavazhi, Kutumba, Kavara or Illom. We have then S. 8 providing for general rules of succession in the case of males. It abolishes at one stroke the scheme of succession under the Hindu Law and provides for devolution of the property of a male Hindu dying intestate, as provided therein read with the Schedule. This course was designed to give effect to the popular desire to prefer the closer relatives of the deceased such as those mentioned in Class I and Class II of the Schedule.

Having provided for such a devolution of the property of a male Hindu dying intestate, rules also have been prescribed by the next five sections relating to the order of succession among the heirs in the Schedule, distribution of property among heirs of class I and Class II, the order of succession among agnates or cognates and computation of degrees. Section 14 deals with property of a female Hindu. Any property possessed by a female Hindu, whether acquired before or after the commencement of the Act, shall be held by her as full owner thereof and not as a limited owner. The Explanation to sub-sec. (1) is to the effect that for purposes of the sub-section, property includes both moveable and immoveable property acquired by a female Hindu by inheritance etc., sub-sec. (2) of S. 14 provides for certain exception to the rule of enlarging what was a limited estate of a female Hindu into a full and absolute estate. Consistent with the effect of S. 14, the next section provides for a drastically new rule of devolution of property of female Hindu dying intestate. But is this sweeping change in the scheme of succession only confined to limited property converted into absolute one in the hands of a woman? What is the effect in this context of the Explanation to S. 8 (1) on that matter vis-a-vis S. 14?

The order of succession and the manner of distribution among the heirs of a female Hindu are then provided for by S. 16 and special provisions respecting persons governed by the Marumakathayam and Aliyasanthana also have been made in S. 17. Then follow certain general provisions relating to succession as to the preference between full blood and half blood and mode of succession of two or more heirs who will take the property as tenants-in-common and not as joint tenants. The child in the womb is also taken care of. S. 20 provides that the child in the womb at the time of the death of an intestate who is subsequently born alive shall have the same right to inherit to the intestate as if he or she had been born before the death of the intestate, and the inheritance shall be deemed to vest in such a case with effect from the date of

the death of the intestate. Rules of presumption in cases of simultaneous deaths and preferential right to acquire property in certain cases, special provisions respecting dwelling houses, rules of succession wherein certain widows remarry and disqualifications for a murderer and convert's descendants have been made. Finally, provision is made for devolution where there is failure of heirs. Chapter III deals with testamentary succession. That sums up the scheme of the Act. This brief survey indicates that the Act is intended to be a complete Code governing succession to a Hindu male or female dying intestate.

3. The expression 'a male Hindu dying intestate' had received judicial interpretation and, as held by the Privy Council with reference to the Hindu Law of Inheritance Amendment Act 1929, it only referred to the status of the person dying and it had no effect upon the time of death so that the expression would be apt to apply to a Hindu dying intestate before or after that Act. If that be so, S. 8 would have applied itself when in the instant case the husband died, before the Hindu Succession Act 1956. Does not S. 8 have reference only to his physical death? Can it be said, that, in spite of it, by reason of the succession opening by the death of the widow after the Act came into force and of the rule of Hindu Law, that the particular reversioners entitled to succeed to the estate must be ascertained as on the date of her death as if her husband also had died on the same date, S. 8 would have a further application? The question assumes a little more importance because of the Explanation to sub-sec. (i) of Sec. 14. It says that for purpose of that sub-section property includes both moveable and immoveable property acquired by a female Hindu by inheritance. It is true that Sec. 14 would enable the limited estate to be enlarged only if the widow was possessed of such property. But if she had already inherited and the property is hers, though not enlarged into a full estate, what be the effect of such inheritance on the scope of Sec. 8? On this aspect extensive argument has been addressed to us.

4. Equally, it has been contended forcibly that the Act being an amending and codifying law regarding intestate succession among Hindus, we should interpret S. 8 consistent therewith. It is said that if a woman inherited the property of her husband, who died before the Act but never took or lost possession and died after the Act, succession opens on her death and if the presumption that the reversionary heirs will have to be determined as on that date would necessarily imply a presumption that the husband died on that date, there is nothing in Sec. 8 which would prevent such presumption from applying further to such a case, as it would be still a case of property of a male Hindu dying intestate. But is not the presumption limited only to determine who the reversionary heirs are and can its application be extended further to enlarge the scope of S. 8? There are other contentions too urged before us.

5. Mr. Thiruvenkatachari for the respondents also contended that the case of a widow inheriting but dying not possessed of her husband's property is a casus omissus to which Sec. 4 (1) (b) would be applicable, and that, in any case Daya Singh v. Dhan Kaur, AIR 1974 SC 665 should be distinguished on the ground that it is a decision justified by the particular custom and usage regulating succession to Punjabis.

6. Interesting as these arguments have been, and we must confess that throughout the address we felt a considerable difficulty in construing S. 8 especially in the light of the related sections, it will, in our opinion, be futile to deal with them and express our view because of Daya Singh v. Dhan kaur AIR 1974 SC 665.

7. As we see from the judgment of the Supreme Court, it was directly seized of the very question we are called upon to answer. There as here, the husband had died before the Act. The widow inheriting his property was not possessed of it and she died subsequent to the Act. The Supreme Court reviewed all the decisions on the subject rendered by the High Court among whom there was no unanimity, referred to Moniram Kolita v. Kerry Kolitari (1880) ILR 5 Cal 776 (PC) and held that, once it is taken to be the law that succession in a case like this opens when the widow dies as if her husband also died on the very date, this presumption should not be boggled with and should be applied as a fact, so that Sec. 8 of the Act is attracted to the situation. We are bound by this approach. Every possible argument against that view has also been visualised by the Supreme Court and it resolved the difference of opinion among the High Courts.

8. As to the arguments based on custom before us, in the penultimate paragraph of the judgment, the Supreme Court noticed the custom and said that on the view it had taken of the scope and application of S. 8 of the Hindu Succession Act, that section

governed the succession and not the customary law of the appellants before it. The argument is, therefore. not open that the decision rested on the peculiar customary law governing the Punjabis for which provision has been made in the Act itself.

9. Reference was made to Erramma v. Veerupana AIR 1966 SC 1879 and certain observations made therein and it was pointed out that Daya Singh v. Dhan Kaur AIR 1974 SC 665 which was decided by the two learned Judges, was contrary to the opinion earlier expressed by a Bench of three learned Judges in the former decision. But, here again, the point is answered by the Supreme Court itself in the latter case. The Supreme Court extracted in Daya Singh v. Dhan Kaur AIR 1974 SC 665 those very observations in the earlier decision and proceeded on the basis that the precise point has not been considered or was not decided in the earlier case.

10. That being the case, we do not think it necessary to say more except that following Daya Singh v. Dhan Kaur, AIR 1974 SC 665 we answer the question referred to us in the affirmative.

(After the opinion of the Full Bench, this appeal coming on for final hearing before the Bench, Ramaprasada Rao and Ratnavel Pandian JJ. the court made the following Order): 21-7-1976—

RAMAPRASADA RAO, J.:— 11. The fundamental principle in a second appeal is that only on question of law, the decision of the lower court has to be interfered. It is also well known that if the trial court and the appellate court concurrently find on a particular issue, but after legal adjudication, then such a concurrent finding of fact also is equally binding on the second appellate court. One other situation can easily be conceived. When the trial court as well as the appellate court base their conclusion on a public register which is challenged on several grounds by the opponent and if in the light of such challenge, both the trial court and the appellate court do not delve into the recitals in that public register and give satisfactory reason as to why the public register should be accepted or rejected, then it cannot reasonably be said that there has been a legal adjudication on the main issue in controversy. If the trial court fails to advert to the public register and its various limbs and the recitals therein and sustain its judgment on a well-founded reasoning or if the appellate court mechanically accepts such a finding rendered by the trial court which as we said, did not make a detailed examination of a challenged public register, then, in either of the above two contingencies, it cannot be said that there was a concurrent finding of fact. The situation in the present case falls within the excepted principle set out by us.

12. This litigation started in 1960 is yet limping as one or two of the facts of such a litigation only have been fully thrashed out and concluded and there remain the other points which arise in the litigation and which have an important impact on the success or failure of one or the other of the parties in the case and yet to be decided. Whilst the first respondent-plaintiff's case is that he is the nearest reversioner of one Sengammal who is referred to in the judgment appealed against, the case of the appellants-defendants 23 and 33 is that he is not. In order to sustain their contention, the appellants examined DW 6 and DW 8 to prove the date of death of one Kaliammal alias Kaliakkal who, according to them is a reversioner to Sengammal but nearer to the plaintiff. Their specific case, as spoken to by D. Ws. 6 and 8, is that Kaliammal alias Kaliakkal died on 6-10-1960 when Sengammal died in the year 1958 and that therefore when Kaliammal alias Kaliakkal was alive on the date of death of Sengammal, the plaintiff cannot project himself as the nearer reversioner on the foot of which he can institute the present action for possession of the suit properties from the defendants which he filed on 15-6-1960. During the earlier period of the litigation between the parties and until 1964 it was nobody's case that Kaliammal alias Kaliakkal, the reversioner to the estate of Sengammal, was alive on the date of death of the latter. It is only on 16-9-1964 that this was brought to the notice of the court through an additional pleading filed by the defendants on record which was to the effect that Kaliammal alias Kaliakkal died in 1960 but was alive on the date of death of Sengammal and hence she should be adjudged as the reversioner nearer to the plaintiff and therefore the plaintiff has to be non-suited.

13. The parties went to trial on various issues with which we are not concerned at present, but the matter in controversy revolves around the fact whether the appellants have proved that on the date of death of Sengammal Kaliammal alias Kaliakkal was alive. In order to establish that fact, the defendants examined two witnesses to prove the date of death, namely, D. Ws. 6 and 8. That Kaliammal alias Kaliakkal is no more is not in dispute but the only question is as

to when she died. Of course, the parties who appeared to be very rich have been rightly characterised by the trial Judge as belonging to a group to whom relationship is of no value. But such embellishments are common in litigations involving heavy stakes. The point in issue and the crucial point in controversy is as to when Kaliammal alias Kaliakkal died. The trial court referred to the evidence of D. Ws. 6 and 8. D. W. 6 is the Maniyagarar of Narasimapuram and he speaks to the date of death of Kaliammal alias Kaliakkal but refreshes his memory and gains support only from Ex. B-62 which is the register of deaths kept by him in the regular course of business. The learned trial Judge did not even refer to certain salient features in the testimony of D. W. 6. The case of the plaintiff was that the entry in Ex. B-62 appears to be not genuine and that it was made for the purpose of the case.

14. Neither the trial court nor the appellate court adverted to these obvious discrepancies in the register. If they had considered and expressed their view on it and either concurred with each other or differed, matters would have been different. But when they have totally abstained from adverting to this telling but rather doubtful features in the public register, we are unable to accept mechanically the theory that there is a concurrent finding of fact and therefore S. 100, C. P. C. is a bar for a further hearing of the second appeal on such a question. Not being satisfied with the manner and method and treatment of such an important issue and having noticed that D. Ws.6 and 8 are greatly interested in this litigation, being relations to the parties, the appellate court at least should have given such thought to it so that it could be said when it comes up in second appeal that the appellate court did reasonably go into the matter and gave out its view. We are unable to accept the contention of Mr. Kesava Iyengar that the judgment in question being one of affirmance in so far as this matter is concerned, there cannot be a re-adjudication or a relook into it. We accept the contention of the learned Advocate General that the matter requires a further probe and scrutiny.

(Finding of lower court ....)

(The lower court is of opinion that Ex. B-62 can be successfully challenged by plaintiff-1st respondent and the attack on Ex. B-62 cannot be said to be spurious and reckless attack and answered the finding accordingly.)

(After receipt of the finding from the lower court, the appeal coming on for final disposal the court delivered the following judgment. 28-10-1977).

RAMAPRASADA RAO J.:— **15.** This second appeal, which had a long history behind it, is yet to see the end of litigation. When it was taken up by us earlier, a question arose whether the plaintiffs could be said to be the nearest reversioner at all, who could file the present action. The doubt arose because there was not a clear finding as to the date of death of Sengammal. The issue was whether on the date of death of Sengammal, one Kaliammal was alive. If Kaliammal was alive, on the date of death of Sengammal, then the plaintiffs would not be the nearest reversioner. In order to ascertain the date of death of Sengammal as also the date of death of Kaliammal, a finding was called for by us. It is now common ground that Kaliammal died on 6-10-1960 and she was alive on the date of death of Sengammal which was earlier. The finding of fact rendered by the court below is not challenged before us and the position as above that Sengammal predeceased Kaliammal is also not disputed. It is in the above background that the relevant facts, which are to be considered may be briefly stated.

16. Sami Gounder, Peria Ramana Gounder and Chinna Ramana Gounder were the sons of one Nanjappa Gounder, the first two through his first wife Velakkal and the third through his second wife, Vellayammal. Chinna Ramana Gounder obtained his share of the properties belonging to the joint family in an earlier litigation initiated by him. The plaintiffs' case is that Sami Gounder and Peria Ramana Gounder became divided in status. The further case of the plaintiffs is that Sami Gounder and Peria Ramana Gounder divided only certain properties and kept certain other properties in common. Peria Ramana Gounder died without issues but was survived by his wife, Sengammal. In the suit filed by Chinna Ramana Gounder (OS 2 of 1892) for partition, Sengammal was brought on record as heir of Peria Ramana Gounder and as being entitled to widow's estate. The case of the plaintiffs is that Sami Gounder forcibly entered into possession of the properties of late Peria Ramana Gounder and dealt with such properties as if the family remained still joint. It is said that there was a mingling of the properties of the two brothers as above with the result the properties to which Sengammal was entitled was also dealt with by them without reference to her. It was in those circumstances, that Sengammal died in 1958 which event threw open the reversionary succession to

her husband Peria Ramana Gounder who died long before.

The primary claim of the plaintiffs as well as the first defendant in the suit out of which the second appeal arises, is that Peria Ramana Gounder died being divided from Sami Gounder and that Sengammal had only a life estate without being in possession of the properties and the plaintiffs and the first defendant the only nearest reversioners and heirs to the estate of Peria Ramana Gounder. The case of the defendants 2 and 3 was entirely different. They pleaded that Sami Gounder and Peria Ramana Gounder always remained undivided and on the death of Peria Ramana Gounder and Sengammal did not succeed to any property in which she could claim a woman's estate. Alternatively it was pleaded that even if there was a division between the brothers, succession to Peria Ramana Gounder had to be treated not as a member under the orthodox Hindu Law but in accordance with the Hindu Succession Act. In this sense, they would say that Kaliammal, who died on 6-10-1960, after the death of Sengammal, should be deemed to be the heir of Peria Ramana Gounder and the plaintiffs can project no title at all to the estate of Peria Ramana Gounder.

17. The first appellate court decreed the suit for partition and separate possession of the shares of the plaintiffs and the first defendant and quantified their entitlement as 1/4th share each in the suit properties. The appellate court held that the remaining half share will go to defendants 2 and 3. They upheld the claim for mesne profits in favour of the plaintiffs and the first defendant and the quantum of which has to be determined at the time of the final decree.

18. In the course of hearing of the second appeal, one of the main questions of law involved in this case was referred to a Full Bench. The question was whether the succession to Peria Ramana Gounder's estate is governed by the Hindu Law as it existed before the Hindu Succession Act or whether succession to such estate has to be determined under the Hindu Succession Act, 1956. The Full Bench of our court held that succession has to be traced to Peria Ramana Gounder on the death of Sengammal in 1958 by applying the Hindu Succession Act. This opinion of the Full Bench was given on 29-10-1974. When the matter again came up before us, we sought for a further investigation and probe into the fact whether Sengammal died first or Kaliammal died first. The parties were at variance on this also. Strong reliance was placed on Ex. B 62 containing an entry relating to the alleged death of Kaliammal. The first appellate court rendered a finding in favour of the plaintiffs and the first defendant, but before us we admitted additional evidence and satisfied ourselves that Kaliammal, sister of Peria Ramana Grounder died on 6-10-1960. It was in the light of such a disclosure as to the date of death of Kaliammal, we called for a finding from the court below whether Ex. B 62 is a genuine document and is it not open to challenge.

The court has given a finding that Ex. B 62 could be challenged and it does not appear to be a true document. After the court below rendered the said finding the matter came up once again for final hearing. There was no serious argument before us about the finding of the court below that Ex. B 62 does not appear to be a genuine document. We have, therefore, rejected Ex. B 62 as unreliable. The net result of the discussion on this part of the case is that it has been proved that Kaliammal was alive on the date of death of Sengammal. Under the Hindu Succession Act, the estate would devolve on Kaliammal as she is the sister of Peria Ramana Gounder. Because of the later discoveries, if we can use that expression, made, a new complexion had been given to the suit. The plaintiffs having been put in such an inconvenient position, have applied for an amendment of the plaint in C. M. P. 9869 of 1977. They would allege that the title of Kaliammal and her successors-in-interest stands extinguished by the operation of S. 27, Limitation Act 1963 and on that ground alone, the plaintiffs and the first defendant are entitled to the suit properties as being the next in the line of succession. They sought for introduction of the following paragraphs—

"15-A. Assuming without admitting that Sengammal was survived by Kaliakkal her husband's sister and that Kaliakkal died on 6-10-1960, the conduct of Kaliakkal and after her death the conduct of Janakiammal, the universal legatee under the will of Kaliakkal, dated 16-3-1958 and the conduct of Periasami the husband of Janakiammal clearly manifest an abandonment of their title to the reversionary succession and the plaintiff and the 1st defendant being the next in the line of heirs under the Hindu Succession Act are entitled to the properties and can therefore recover the property. It is, therefore, submitted that even on the footing that the reversionary succession to Sengammal has traced not under the old Hindu law, but under the Hindu Succession Act, the plain-

tiff and the first defendant are entitled to the decree as prayed for.

15-B. The plaintiff further submits that the reversionary succession to Peria Ramana having opened in 1958 on the death of Sengammal, the title if any of Kaliakkal and her successors-in-title stands extinguished by virtue of the provision of the Limitation Act. By virtue of such extinguishment the plaintiff and the first defendant are entitled to succeed as reversioners as defendants 2 and 8 and the other defendants claiming under them are not in the line of succession. Nor have they prescribed a title as against the plaintiff and the first defendant. The plaintiff and the first defendant have better title as against the second and third defendants and the other defendants claiming under them as the plaintiff and the second defendant are Class II heirs of Peria Ramana. They are, therefore, entitled to a decree as prayed for."

19. Having regard to the age of this litigation, and also for the reason that the amendment sought for sets up a totally different cause of action which ex facie cannot stand on a line with the original pleading, we are unable to allow this application for amendment. A pleading could only be amended if it is to substantiate, elucidate and expand the pre-existing facts already contained in the original pleadings; but under the guise of an amendment a new cause and a case cannot be substituted and the courts cannot be asked to adjudicate the alternative case instead of the original case. Though it is expedient under certain circumstances to take into consideration the supervening facts in the course of a litigation which is long drawn, yet the march and lapse of such time alone cannot be the foundation to mechanically accept the request for amendment because due to such passage of time, several events have happened and several matters have intervened. It would be hazardous to accept such an application for amendment to a plaint on the only ground of passage of time and change of circumstances, for, that would run counter to the essential ratio governing the principle of amendment of pleading which is that no amendment can introduce a cause of action which was never thought of originally or could not have been thought of earlier and which is diametrically opposite to that stated in the original plaint. We are also of opinion that the application for amendment is an afterthought and therefore, lacks bona fides. This is so because the plaintiffs denied that Peria Ramana Gounder had a sister by name Kaliammal and his filing of the suit during the lifetime of Kaliammal, is obviously in deliberate disregard of truth. The courts below found that the plaintiffs should have been aware that Kaliammal was alive on the date of suit and their pretended ignorance about it was not tolerable. We dismiss the application for amendment.

20. The contention of Mr. Parasaran, learned counsel for the respondents-plaintiffs is that in any event the plaintiffs and the first defendant have a better title as against the second and the third defendants and other defendants claiming under them, as the plaintiffs and the second defendants are Class II heirs of Peria Ramana Gounder. The case of Mr. Parasaran is that the dichotomy created in the enumeration of heirs in Class II in the schedule to the Hindu Succession Act cannot be given an eo nomine weightage and that like the heirs enumerated in Class I, those classified heirs in Class II, would take cumulatively and not to the exclusion of one to the other. We are unable to appreciate this contention. The style of enumeration of the heirs in Class II in the schedule is different from that accepted in Class I. It gives the key for understanding and interpreting the same. Under the head of Class II heirs, 'father' comes first, secondly, son's daughter's son, son's daughter's daughter, brother and sister are closeted in item No. II in the list of enumerated Class II heirs. It goes on like that. It may be that the son's daughter's son, son's daughter's daughter, the brother and the sister of a Hindu, who died intestate may all be the heirs of the deceased Hindu having been so closeted and grouped as item II heirs in Class II of the schedule. But it cannot be said that all the heirs enumerated in the various items to Class II take together and they would be entitled to succeed to the estate of a Hindu who died intestate.

Peria Ramana Gounder died intestate leaving behind him his widow, who died after the Hindu Succession Act in 1958. After the death of Sengammal inheritance again opened out to the estate of Peria Ramana Gounder because he had no issues. Under Sec. 8 of the Hindu Succession Act, Kaliammal as sister is the Class II heir being one of such enumerated heirs in item II heirs in the schedule to the Hindu Succession Act. It is, therefore, fairly clear that Kaliammal, who was the nearest heir of Peria Ramana Gounder, on the death of Sengammal, inherited the properties of Peria Ramana Gounder as full owner under Ss. 14 to 16 of the Act. She became a fresh stock of descent and

on her death on 6-10-1960, succession has to be traced to her alone, testamentary or intestate as provided for in Sec. 15 of the Act. It, therefore, follows that after such absolute vesting of the rights in Kaliammal as per the provision of the Act there can be no question of any preferential claim by reversionary succession to Peria Ramana Gounder.

It appears, therefore, to us that neither the plaintiffs nor the first defendant as such reversioners to the estate can with any competence further their status as nearest reversioners and compete with Kaliammal, who is obviously the statutory heir. Analogies cannot be mechanically sought for purpose of application and implementation. On the only ground that the enumerated heirs in Class I all take together in equal shares, it cannot be said by the mechanical invocation of the doctrine of analogical application that such enumerated heirs in the various items set out in Class II should also be treated as such and all of them pooled up together so as to vest in them an entitlement to share the estate of the deceased equally as Class II heirs.

This would mean that mother's brother and mother's sister if they are alive along with the father, the three such heirs enumerated in Class II will each take a one-third share in the estate of the deceased, who died intestate. This will lead to an anomalous position which could never have been intended by the Legislature. The heirs referred to in each item in Class II would exclude the heirs referred to in the next item. If the father is alive, then the son's daughter's sons or the son's daughter's daughter, the brother or the sister would not come into the picture and so on. In this view of the matter, we are unable to agree with the contention of Mr. Parasaran that the plaintiffs who are not the nearer statutory heirs are also competent to institute the action in the light of the present finding that Kaliammal was alive on the date of death of Sengammal, when fresh inheritance opened to the estate of Peria Ramana Gounder. If the suit is not maintainable by the plaintiffs, no other question arises for consideration.

21. The further argument of Mr. Parasaran is that the appeal has been filed only by the second, third and the 32nd defendants and the other alienees have not filed their appeals and as such alienation should be the subject matter of a separate cause of action, the finding of the court below, in so far as the other defendants and the other alienations are concerned, should not be disturbed. It is no doubt true that the first appellate court has given an elaborate judgment on the alienations made by defendants 2 and 3 and their sustainability. But in the view held by us that the plaintiffs cannot file the present action as the nearest reversioner, it is unnecessary to go into this question.

22. Order 41 R. 4, C. P. Code would govern the situation arising here. The common ground which was agitated to the core before the courts below was whether the alienations made by defendants 2 and 3 of some of the suit properties are sustainable at all. Some of the alienees, who are dissatisfied with the ultimate decision have come up in appeal, but the poser is whether the alienations made by the second and the third defendants are sustainable or not. It is a ground common to all the defendants. The fact that some of the defendants have appealed against the whole decree entitles the appellate court to pass such judgment as the circumstances of the case would require in order to render justice. Order 41 R. 33, C. P. C. also meets this purpose. Under O. 41 R. 4, C. P. C., on an appeal by one or more of the parties to a suit on a ground common to all, the decree may be varied in favour of all. Under O. 41, R. 33, the court has the power to make the proper decree in order to render justice between the parties even though the appeal is directed against a part of the decree and even though the appeal might have been filed by some of such parties and the other affected parties are not even before the appellate court. The rules based on just equity and good conscience compel us to treat the present second appeal as one filed for the benefit of all the alienees, and in the light of such an understanding of the subject matter, the allowance of the appeal should benefit all the alienees as well.

23. Even in the alternative, Mr. Kesava Iyengar would contend that the plaintiffs' claim is barred by res judicata by virtue of the decision of the trial Court in OS No. 67 of 1924, marked as Ex. B. 25 which was affirmed by the High Court in A. S. No. 147 of 1926 (Mad) marked as Ex. B. 26. Chinna Nanjappan is the son of Sami Gounder, who as such son and having inherited his father's property, dealt with the same under a will Ex. B-63. He bequeathed the suit properties in favour of the predecessors-in-interest of defendants 2 and 3. That will was upheld as true and binding on the plaintiffs, who were parties to that litigation. What is con-

tended is that on such adjudication on the will of Chinna Nanjappan and the same having been upheld by decision of this court, the plaintiffs and the first defendant can no longer project an inconsistent source of title and file the suit once again laying their hands on the suit properties on the foot that they are the owners-reversioners entitled to the estate of Perla Ramana Gounder after the death of Sengammal. It is also incidentally urged that Kaliammal herself knew of the proceedings in OS No. 67 of 1924, Sub Court, Coimbatore (Ex. B. 25) and that she gave evidence as P. W. 4. Kaliammal did not agitate thereafter against the resultant decree and judgment of the above proceedings and that, therefore, Kaliammal herself or her legal representatives cannot reagitate a closed matter. We are not inclined in this action to go into the said controversy about the alleged right of Kaliammal or her heirs to the suit properties. Suffice it however to hold in this suit that the plaintiffs and the first defendant have no locus standi to institute the suit. We are however constrained to accept the contention that the decision of this court in A. S. No. 147 of 1926 Ex. B 26 has become final and binding on the plaintiffs in the present action.

24. In the result, therefore, the second appeal is allowed. In passing we trust that a curtain would be drawn at least now to this long drawn litigation and with that objective we are not awarding costs in this appeal.

Appeal allowed.

AIR 1978 MADRAS 294

ISMAIL, J.

State Trading Corporation of India Ltd., Petitioner v. K. V. Vaidyalingam and others, Respondents.

C. R. P. No. 2648 of 1977, D/- 16-12-1977*.

(A) Civil P. C. (5 of 1908), O. 22, R. 4 — Suit filed against dead person — Legal representatives cannot be impleaded under O. 22, R. 4. (Para 2)

Anno: AIR Comm. Civil P. C. (8th Edn.), O. 22, R. 4, N. 19.

(B) Civil P. C. (5 of 1908), O. 22, R. 4 and O. 1, R. 10 — Difference between — Parties impleaded under each have different status and rights. (Para 3)

Anno: AIR Comm. Civil P. C. (8th Edn.), O. 22, R. 4, N. 21-A; Civil P. C. (9th Edn.), O. 1, R. 10 N. 40.

Cases Referred: Chronological Paras
AIR 1955 Mad 644 3

R. Subramaniam, for King and Partridge, for Petitioners.

ORDER:— The petitioner who was the plaintiff in O. S. No. 720 of 1975, on the file of the learned First Additional Subordinate Judge, Coimbatore, instituted the suit against five defendants, and the fourth defendant was dead even on the date when the suit was instituted. Subsequently, the petitioner filed I. A. No. 736 of 1976 under O. XXII R. 4 and S. 151, C. P. C. to implead the legal representatives of the said fourth defendant. On that application being opposed, the trial court dismissed the same. It is against the dismissal of the said application, the present civil revision petition has been filed.

2. The suit was filed on 3-11-1975 while the fourth defendant had died even on 19-8-1975. Consequently, the suit was filed against a dead person as far as the fourth defendant was concerned. A suit against a dead person is admittedly a nullity. Therefore, as far as the fourth defendant was concerned, it was as if no suit whatever had been filed. If so, O. XXII, R. 4, C. P. C. cannot be invoked for the purpose of impleading the legal representatives of the fourth defendant as parties to the suit.

3. The learned counsel for the petitioner, relying on the decision of this court in K. Ismail v. Pavu Amma AIR 1955 Mad 644, contends that these persons could be impleaded under O. 1, R. 10, C. P. C. But that was not the claim of the petitioner herein. It is one thing to file an application to implead certain persons as parties to a suit in the place of a deceased party under O. XXII, R. 4, C. P. C. and it is entirely another thing to file an application under O. I. R. 10 to implead a new party, because the rights of the parties will not be the same. When a legal representative is brought on record under O. XXII, R. 4, C. P. C., his status and rights will be the same as that of the person who died in whose place he has come on record, while the rights and obligations of a person impleaded as a party under O. I, R. 10 C. P. C. will not be so circumscribed, but will be different and independent. Therefore, I am unable to accept the contention of the learned counsel for the

*(Against Order of 1st Addl. Sub J. Coimbatore in I. A. No. 736 of 1976 in O. S. No. 720 of 1975.)

petitioner that the proposed parties could be impleaded under O. I. R. 10 C. P. C. and the suit itself must be deemed to have been instituted against them. Hence the civil revision petition fails and the same is dismissed.

Revision dismissed.

AIR 1978 MADRAS 295

RAMAPRASADA RAO AND SURYAMURTHY, JJ.

Alvel Sales, Applicant v. Dujadwala Industries, Respondents.

O. S. Appeal No. 6 of 1975, D/- 29-6-1977.

(A) Arbitration Act (10 of 1940), S. 14 (2) — Filing of award — Notice — Intelligence or warning or information about filing of award is sufficient.

What is necessary is that the person aggrieved who can be either party to the arbitration dispute should have the intelligence or a warning or information about the filing of the award. Where the notice was received by a person who had implied authority to act for the respondent firm, he ought to have conveyed the information of such service to the respondent firm and it should be deemed to be service on the respondent firm. : AIR 1962 SC 666 Rel. on. (Para 16)

Anno: AIR Manual (3rd Edn.) Arbitration Act, S. 14, N. 7.

(B) Arbitration Act (10 of 1940), S. 17 — "Pronounce judgment according to the award" — Decree under S. 17 in absence of defendant is not ex parte decree. : AIR 1924 Pat 603, AIR 1956 Pat 28 and AIR 1962 Raj 12 Rel. on. Appln. 2703 of 1972 in O. P. No. 195 of 1971 (Mad) Reversed.

(Para 19)

Anno: AIR Manual (3rd Edn.), Arbitration Act, S. 17, N. 12.

Cases Referred:	Chronological	Paras
AIR 1962 SC 666		12
AIR 1962 Raj 12		19
AIR 1956 Pat 28		19
AIR 1924 Pat 603		19

RAMAPRASADA RAO J. :— This appeal is directed against the order of Paul J. in Appln. No. 2703 of 1972 in O. P. 195 of 1971.

2. In connection with certain disputes which arose between the appellant and the respondent, one Mr. V. Venkataraman was appointed as Arbitrator by the appellant in the first instance and as per clause 21 of the arbitration agreement the respondent was called upon to nominate its arbitrator. On the failure of the respondent to do so, Mr. Venkataraman, in accordance with law, became the sole Arbitrator and he entered upon the reference as per the arbitration agreement in or about Aug. 1970. We are not, in this appeal, quoting the arbitration agreement, or the nature of the dispute between the parties, as it is not necessary.

3. The sole Arbitrator Mr. Venkataraman gave notice of his having assumed office, to both the parties and asked them to attend the enquiry on a date fixed by him in Aug. 1970. The respondent was not prepared to participate in the enquiry and wanted the Arbitrator not to proceed with the enquiry. In spite of it, the Arbitrator who was entitled to proceed with the enquiry in terms of his appointment, intended to hear the parties and fixed the 12th Sept. 1970, as the date of hearing of the contentions of the parties on the disputes raised. It appears that the then counsel, whom we characterise as the general counsel, appearing for the respondents, telephoned the Arbitrator and wanted time. Thereafter, the same counsel said that he did not want to participate in the arbitration enquiry as it would prejudice him.

4. By that time, a civil suit, C. S. 75 of 1970 was pending between the parties. In that suit, the relief prayed was for a direction to the respondent to produce the arbitration agreement into court for purposes of appointing an arbitrator through the intervention of court. As the said proceeding was by then pending, the sole Arbitrator Mr. Venkataraman who was appointed at the instance of the appellant in the circumstances already stated, filed an application for extension of time for passing of the award. In the view that an arbitrator had already been appointed, suit C. S. No. 75 of 1970 was withdrawan. The position, therefore, early in 1971, was that the respondent did not participate in the enquiry started by the arbitrator. In these circumstances, the arbitrator passed his award on 9-3-1971 and, admittedly, gave notice of such passing of the award to both the parties, which was received by the respondent thereafter. At this stage, therefore, it is obvious that the respondent had notice of the passing of the award by the arbitrator. Duty-bound, as he was in law, the arbitrator filed O. P. 195 of 1971, that being a petition under S. 14 (2) of the Arbitration Act, for reception of the award and for further proceedings.

5. It is common ground that the said O. P. 195 of 1971 filed by the Arbitrator was taken on file, and Ganesan J. issued notice to all parties concerned. This notice, according to the appellant, was served through the office of the Sheriff of the High Court on one of the representatives of the respondent firm, which by then, opened a branch office in Madras. We shall, of course, refer to this aspect in full at a later stage. It is common ground, however, that one Nandalal Agarwal working in the Madras branch of the respondent firm, received the said notice, affixed the seal of the company and thus received the court notice issued under S. 14 (2). As such notices are only intended as steps-in-aid for either party to process its grievances, one party for obtaining a decree in terms of the award, and the aggrieved party for setting aside or modifying the award in accordance with the provisions of the Arbitration Act, the appellant discretely waited for passage of time and never took any steps till he came to court in Appn. No. 1043 of 1972 in O. P. 195 of 1971, for passing a judgment in terms of the award of Mr. Venkataraman dated 9-8-1971.

6. A decree in terms of the award was passed by Gokulakrishnan J. on 22-6-1972, in Appn. No. 1043 of 1972. Thereafter, the appellant filed an execution petition to obtain his remedy under the decree as above and even sought for the issue of a precept in Appln. No. 2541 of 1972, to a court in Bombay. Thereafter, the respondent, pleading that it had knowledge of the passing of the decree only in November 1972, filed Appn. Nos. 2703 and 2704 of 1972, seeking for orders from this court to set aside the so-called ex parte decree passed by the court in Appn. No. 1043 of 1972 and for reopening the entire matter to enable it to place its objections as against the award passed by the arbitrator. The Judge's summons in Appn. No. 2703 of 1972 was to the effect that the 'ex parte' decree dated 22-6-1972 should be set aside. In the other application, viz, Appn. No. 2704 of 1972, the respondent sought for stay of execution of the decree and further processing of the same.

7. In the affidavit filed in support of the application for setting aside the so-called ex parte decree, the allegation was that the court, while issuing notice in O. P. 195 of 1971, did not issue the same to the Bombay address of the respondent firm, as was usual on prior occasions when the arbitrator was corresponding with the parties, but such a notice under S. 14 (2) was sought to be served on a clerk of the respondent firm then set up in Madras and that the said clerk had no authority to receive the said notice issued by the court. The respondent would add that it came to know about the passing of the ex parte decree only in November 1972, and in these circumstances, sought for the setting aside of the ex parte decree. The prayer in the other application was, as already noticed, only consequential to that asked for in Appn. No. 2703 of 1972.

8. In the counter affidavit, the appellant specifically brought to the notice of the respondent that the notice in O. P. 195 of 1971 was acknowledged by one Nandalal Agarwal. describing himself as Assistant Manager of the respondent-company working in Madras and that he had the requisite authority to receive the same and he was also directed to do so by the Manager of the office.

9. A reply affidavit was filed to this counter affidavit. Here again, the respondent did not say that Agarwala did not bring the matter of such service of court notice regarding the filing of an award into court to the notice of the local manager, or of the Bombay Office but would spin up the matter by reiterating that Agarwala was not competent to receive any notice on behalf of the respondent and no one in Madras office was authorised to represent the company.

10. The matter came up before Paul J. The learned Judge was of the view that it was an ex parte decree, as is ordinarily understood in legal parlance, and that in the absence of such notice, knowledge, information or intelligence of the proceedings in court, on the part of the respondent herein, it would not be fair to sustain the ex parte decree under which the appellant should be allowed to work out its rights. In these circumstances, the learned judge set aside the decree passed on the basis of the award, viewing it as an ex parte decree. It is against this decision, the present appeal has been filed.

11. The two questions that arise for consideration in this appeal are — Firstly, whether the service of notice issued by the court under S. 14 (2) of the Arbitration Act is sufficient notice to the parties concerned and whether there is any void in either the processing of such service or the effecting of such service. Secondly, whether the respondent can agitate in this court, in the manner it has attempted to do, on the foot that there was no notice to it under S. 14 (2) and that the service on Agarwala was with-

out warrant and whether in those circumstances, it could consider it as an ex parte decree and avoid the same in a manner ordinarily known to common law.

12. Though under S. 41 of the Arbitration Act, there is a general miscellaneous provision enabling the adoption of the provisions of the C. P. C., 1908, to all proceedings arising under the Arbitration Act, yet the same is subject to the provisions of that Act. Caution, therefore, is required while mechanically adopting or invoking the procedural provisions of the C. P. C., 1908, when dealing with substantive provisions under the Arbitration Act. That this is the intention is clear from a comparison of certain relevant provisions of the C. P. C. and the Arbitration Act and the interpretation given to them by the highest court of the land. We are here concerned with service of notices, and not with reference to service of summons. S. 142, C. P. C. expressly lays down a mandate that all orders and notice served on or given to any person under the provisions of the Code shall be in writing. The Supreme Court, however, while interpreting the word 'notice' appearing in S. 14 (2) of the Arbitration Act have expressed themselves very clearly that such a notice need not be in writing. In fact, they said that an oral notice to the parties concerned shall be a substitute and could be validly acted upon. In fact, the ratio of the decision of the Supreme Court reported in Nilkantha v. Kashinath, AIR 1962 SC 666 categorically gives the impression that such notice as is required under sub-sec. (2) of S. 14 of the Arbitration Act need not necessarily mean communication in writing, but, on the other hand, the learned Judges were of the view that if in a given case there is proof of intimation or the gaining of intelligence of the administration of a warning by the court to the party concerned, that an award has come to court and that it was filed by the Arbitrator as required under S. 14 (1) of the Act, then, the Supreme Court is of the view that such a notice is a valid notice. In that case, the Supreme Court observed as follows (at p. 668):

"Sub-sec. (1) of S. 14 of the Arbitration Act, 1940 (Act X of 1940) requires the arbitrators or umpire to give notice in writing to the parties of the making and signing of the award. Sub-sec. (2) of that section requires the court, after the filing of the award, to give notice to the parties of the filing of the award. The difference in the provisions of the two sub-sections with respect to the giving of notice is significant and indicates clearly that the notice which the court is to give to the parties of the filing of the award need not be a notice in writing. The notice can be given orally. No question of the service of the notice in the formal way of delivering the notice or tendering it to the party can arise in the case of a notice given orally. The communication of the information that an award has been filed is sufficient compliance with the requirements of sub-sec. (2) of S. 14, with respect to the giving of notice to the parties concerned about the filing of the award. 'Notice' does not necessarily mean 'communication in writing.' 'Notice' according to the Oxford Concise dictionary, means 'intimation, intelligence, warning' and has this meaning in expressions like 'give notice, have notice' and it also means 'formal intimation of something, or instructions to do something' and has such a meaning in expressions like 'notice to quit, till further notice.' We are of opinion that the expression 'give notice' in sub-sec. (2) of S. 14, simply means giving intimation of the filing of the award, which certainly was given to the parties through their pleaders on 21-2-1948. Notice to the pleader is notice to the party, in view of Rule 5 of O. III C. P. C. which provides that, any process served on the pleader of any party shall be presumed to be duly communicated and made known to the party whom the pleader represents and unless the court otherwise directs, shall be as effectual for all purposes as if the same had been given to or served on the party in person. No doubt, in that case, the Supreme Court was considering whether a notice to the pleader was notice to the party. They held it was, and added that it was so, in view of R. 5 of O. III C. P. C.

13. Taking advantage of this observation of the Supreme Court, a contention is sought to be made by Mr. Shanmugham that in the instant case even if Agarwala is to be treated as an authorised representative or an agent such a service should be in the manner provided for in the C. P. C. under O. III, Rule 6. Here again, we have to point out that O. III is a special procedure in the Code touching the manner and method by which courts should recognise agents and pleaders. If no such norm is prescribed or a mandate set for the courts to act and accept agents of parties, it is likely to lead to confusion. Therefore, it was the Procedural Code thought of prescribing certain conditions by which the courts should recognise agents as provided in O. III, R. 6, that such

agents who are to be recognised as 'agents' within the meaning of O. III should be persons who have a special or a general authority in writing from the principals concerned. This is not the apposite rule for consideration at all and particularly in the light of the observations made by the Supreme Court, as above, that a notice under S. 14 (2) of the Arbitration Act need not be in writing. Obviously, the Supreme Court, conscious of the difference between the provisions in the C. P. C. and the Arbitration Act, made a departure in the matter of the understanding of the words 'service of notice' contemplated in S. 14 (2) of the Arbitration Act and observed that it need not be in writing and it would suffice if an intimation or an intelligence or a warning is given to the party concerned about the bringing of an award into the court.

14. In the light of the discussion, as above, it is for us to consider whether the service on Agarwala should be deemed to be valid service in the circumstances of the case. We have referred to the pleadings. The respondent would allege in the affidavit in support of the application to set aside the so-called ex parte decree that no one had any authority to receive the notices from court. When the respondent was confronted with a specific allegation in the counter affidavit that the notice under S. 14 (2) of the Arbitration Act was served on Agarwala who represented himself as Assistant Manager has affixed the seal of the firm to the copy of the notice served by the bailiff of this court on him, even then, the respondent would barely reiterate that Agarwala did not have the requisite authority to receive the notice. The respondent would not even state at that critical stage that Agarwala did not pass on the information of such service to it. As we felt a doubt whether the words of Assistant Manager appearing in the docket proved such service of notice on Agarwala who was admittedly functioning in the Madras Office of the respondent firm we thought fit to examine him as a court witness.

15. Mr. Agarwala gave evidence today before us. He is a graduate and obviously therefore is well acquainted with commercial practice. According to him, Mr. Gupta who was the manager of the firm was not present in the office on the date when the bailiff sought to serve the notice on the respondent firm on 15-9-1971. Not only Mr. Agarwala admits that he received the notice, he also says that he has affixed the seal of the firm. But he would say that the seal was openly available to anybody in the firm. We do not believe him in this respect. Being an educated person entrusted with the administration of the office during the absence of the Manager, the elementary duty of his was to see that the seal of the office was not misused or lightly used by anyone functioning therein. Apart from this, he would say that he received the notice, mislaid it and never informed his employer about it. Here again we are unable to believe this witness. That this witness is speaking falsehood is clear from the fact that even in the reply affidavit filed by the respondent firm, it would not allege that Mr. Nandalal Agarwala did not inform it about the service of notice under S. 14 (2). We hold that Nandalal Agarwala received the notice as a person who had implied authority to act for the respondent firm functioning in Madras and that in the peculiar circumstances he ought to have conveyed the information of such service to the respondent firm.

16. This is what is required under the rule laid down by the Supreme Court. What is necessary is that the person aggrieved, who can be either party to the arbitration dispute should have the intelligence or a warning or information about the filing of the Award. In the circumstances stated, and as we hold that service on Nandalal Agarwala has been effected and it should be deemed to be service on the Madras branch of the respondent firm, we have no hesitation to hold that he should have passed on that information either to his Manager soon after his return, or to the head office at Bombay immediately thereafter.

17. The plea is that even though such service was effected on 15-9-1971, the respondent firm came to know about it only in November 1972. Under Art. 119 of the Limitation Act 1963, a period of 30 days is provided for setting aside an award or getting an award remitted for reconsideration, from the date of service of the notice of the filing of the award. The date of service of the notice of the filing of the award is 15-9-1971, as it was served on Agarwala who was functioning on behalf of the respondent company at Madras. The reasonable impression which we gain on a perusal of the pleadings and particularly after hearing the court witness, Agarwala, is that he should have informed the respondent within a reasonable time after 15-9-1971. The respondent company obviously lost its right and entitlement to have the award set aside in a manner known to law and as prescribed under the Limitation Act.

18. On the other hand, the appellant, after having been satisfied that no applica-

tion was filed by the other party either for modification or correction of the Award within the meaning of S. 15 for remittance of the award within the meaning of S. 16 of the Arbitration Act, filed the application, Appn. No. 1043 of 1972, for passing a decree in terms of the award in O. P. 195 of 1971. This application was ordered by Gokulakrishnan J. and a decree in terms of the award was passed on 22-6-1972. Rightly in the Judge's summons taken out by the appellant, notice was not intended to be served on any one. Mr. Shanmugham, learned counsel for the respondent, fairly concedes that no notice is required on that application, because it is the duty of the aggrieved party to take steps as per the provisions of the Arbitration Act read with the Limitation Act within the time provided, the appellant applicant who seeks relief under the award in the shape of a decree in terms thereof need only wait to see whether this process would in any way be interdicted by the other party filing an application to set aside the award in a manner known to law or to cause a remittance of the same as provided under the Act. Therefore, we are satisfied that no notice was called in the Appn. No. 1043 of 1972 and it was in these circumstances the learned Judge passed the decree. The question is whether this is an ex parte decree.

19. We could do no better than quote the expressive language used by a Division Bench of the Patna High Court reported in Roshan Lal v. Firm Bridhichand, AIR 1924 Pat 603 which principle was followed in later decisions reported in Rajeshwar v. Ambika Prasad, AIR 1956 Pat 28 and Ramchander v. Jamnasankar AIR 1962 Raj 12. In the words of the learned Judges (at p. 30 of AIR Pat):

"The second point is equally clear. It is asserted by the appellants that as they had no opportunity to place their case before the court the decree must be regarded as ex parte; but it is nothing of the sort. An ex parte decree is a decree passed by the court in the absence of the defendants where the plaintiff has proved his case; but here the presence of the parties was not necessary to enable the court to pronounce judgment according to the award."

We respectfully agree with these observations and hold that the decree in the case on hand is not an ex parte decree at all. This is a decree which the court is bound to pass under Sec. 17 of the Arbitration Act, which appears to be rather mandatory in scope. S. 17 of the Arbitration Act says:—

"Where the court sees no cause to remit the award of any of the matters referred to arbitration for reconsideration or to set aside the award, the court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award and upon the judgment so pronounced a decree shall follow."

It, therefore, appears to us that there is no scope for the contention that this is a case in which an ex parte decree ought to be set aside. Even otherwise, the respondent had lost its rights to seek for the setting aside the award, as under the Limitation Act, the period had expired and we are unable to believe without any further evidence, that it was only in Nov. 1972 that the respondent had knowledge of the passing of the award and the same having been brought into court at the instance of the arbitrator.

20. For all the reasons stated above, we are unable to agree with Paul J. The Original Side Appeal is allowed. There will, however, be no order as to costs. The appellant is at liberty to take further steps to execute the decree obtained by it in Appn. No. 1043 of 1972.

Appeal allowed.

AIR 1978 MADRAS 299

MOHAN, J.

Villa Venkata Rao, Petitioner v. Satyanandam Mummidi and others, Respondents.

Writ Petn. No. 4490 of 1976, D/- 16-1-1978.

Motor Vehicles Act (IV of 1939), S. 47 (1) read with Pondicherry Motor Vehicles Rules D/- 15-12-1959, Sub-r. (iii) — Grant of stage carriage permit — Financial stability of the applicant — Determination of — Matters to be considered.

Where the tribunal while deciding the financial stability of the applicant for stage carriage permit took into consideration the fact that he sought to avail of the benefit of a moratorium law in certain proceedings before the court in Andhra Pradesh and hence defrauded that Court, and he was sharing the profits with his son-in-law and hence financially unstable, the points considered by the tribunal were unwarranted under the scope of the Rules. However desirable it may be to decide the honesty or the conduct of an

applicant for stage carriage permit the Rules do not provide for such an examination.

(Paras 8, 9, 10, 11)

Anno: AIR Comm. Motor Vehicles Act (1st Edn.), S. 47, N. 2.

K. Parasaran, for C. S. Prakasa Rao, for Petitioner; K. K. Venugopal, for M. Manivannan and M. Krishnappan and T. Somasundaram, Govt. Pleader, Pondicherri, for Respondents.

ORDER:— This writ petition seeks to quash the order of the State Transport Appellate Tribunal, Pondicherry in M. V. A. No. 87 of 1975 dated 19-11-1976.

2. The petitioner, the applicant No. 1, was granted permit on the ground that he was the existing operator of one bus and as such he had an edge over the new entrants. He had maintained his workshop and workshop arrangements on the way. Thus his claims were taken to be superior than the other applicants. Against this order, the matter was taken up in appeal to the Tribunal. The first respondent's appeal is M. V. A. N. 87 of 1975. The Tribunal posed two questions— (1) Whether the grant of permit to respondent 1 is justified; and (2) if not, whether any of the two appellants is entitled to the permit. Concerning this, it was found that the grant of permit made by the Regional Transport authority was not correct, because he did not have the necessary financial stability. On an analysis of the materials before it, it came to the conclusion that, on an overall assessment of the position, the grant made in favour of the writ petitioner who was suffering under financial pressure was not justified. Accordingly, it was set aside. It further proceeded to consider who among the two applicants would be better suited and it came to the conclusion that the first respondent herein was entitled to the permit because of his financial stability as he had immoveable property worth Rs. 40,000 and he was also a new entrant. Hence the present writ petition.

3. Mr. K. Parasaran, learned counsel for the petitioner, urges that the reasons adduced by the Appellate authority for arriving at a conclusion that the writ petitioner was financially unstable is based upon improper and incorrect reasonings. He would urge that merely because the petitioner had filed an application claiming the benefit of certain moratorium law, which claim was found to be false, that does not prove that he was suffering from financial pressure. Equally, the fact that he was sharing 40 per cent of his profits in partnership with his son-in-law, however illegal it might be under the law of income-tax, assuming that be so, that cannot form the basis for concluding that the petitioner was under financial pressure. In fact, for the assessment year 1975-76, documentary evidence was produced to show that the petitioner was accorded the status of a Hindu undivided family, instead of registered firm, which is proof enough to show that the partnership ceased to exist. Therefore, the insistence on the production of a deed of partnership or any other evidence was wholly unnecessary to hold that such an arrangement would amount to a manoeuvre resulting in a permanent disqualification or a financial pressure is a perverse reasoning.

4. Mr. K. K. Venugopal, learned counsel for the contesting respondent, would, however, submit that this is a case in which the fact that there was a suit against the petitioner and he claimed the benefit of certain moratorium falsely alleging that he is a marginal farmer would itself disclose that he was putting forth a different plea, pressed by financial instability. Otherwise, there was no need to claim such a benefit. Therefore, there was a prima facie evidence before the appellate authority, which evidence that authority can well take into consideration to conclude that he was under financial pressure. Equally, when the petitioner had denied entering into partnership agreement for running Veerabadra Bus service with his son-in-law, later on was confronted with the income-tax returns for the year 1973-74 and 1974-75, would show that he was attempting to defraud the tax authorities, that amounting to dishonesty. It is not merely dishonesty alone that weighed. Such a course became necessary since the petitioner did not have necessary financial stability. The recourse to such methods would be sufficient to show that the petitioner did not have the necessary financial stability.

5. Then again there were suits pending between the petitioner and his son-in-law, though it was stated that they were withdrawn, no evidence was produced in support of that plea. Where by an overall assessment, the appellate authority found financial instability, this court exercising writ jurisdiction cannot interfere on a question of fact, since a person like the petitioner who has been dishonest both before the court and before the income-tax authority cannot be safely entrusted with the public utility service; and rightly therefore the grant made in favour of the petitioner had come to be set aside.

6. In order to appreciate rival contentions advanced before me, it is necessary for me to note the relevant law which formed the basis for the grant of the permit. Section 47 of the Motor Vehicles Act lays down the various factors to be taken into consideration before the grant of a permit and regard has to be had to the following matters—

(a) the interest of the public generally;

(b) the advantages to the public of the service to be provided including the saving of time likely to be effected thereby and any convenience arising from journeys not being broken;

(c) the benefit to any particular locality or localities likely to be afforded by the service;

(d) the operation by the applicant of other transport services, including those in respect of which application from him for permits are pending;

(e) the condition of the roads included in the proposed route or area.

7. The Pondicherry Motor Vehicles Rules dated 15-12-1959 state that "the State Transport Authority shall in deciding whether to grant or refuse a stage carriage permit have regard to the following matters in addition to those mentioned in Sec. 47 (1) of the Motor Vehicles Act 1939". The relevant subrule (iii) says "the applicant should have financial stability and must be free from undue financial pressure; and this may be judged from the income-tax returns, solvency certificate, encumbrance certificate, or other appropriate evidence". In this case, fortunately for the petitioner, in no unmistakable terms, the appellate authority has found as follows—

"It is true that he has got immoveable property worth more than a lakh. But it is not the financial worthiness of a person which should be taken into account, but his financial stability, resulting from his capacity to manage his estate or his business, in order to ascertain his ability to run smoothly the bus service."

From the above, it will be clear that the Tribunal was drawing niceties between financial worthiness and stability. Even accepting this as a correct approach, the question to be posed is, has the Tribunal on proper reasons arrived at the conclusion that the petitioner did not have the necessary financial stability.

8. The first point that is put against the petitioner is, he advanced a false plea before court in Andhra Pradesh that he was entitled to the benefit of a moratorium law. This according to the Tribunal would show that he was under financial pressure. To use the very words of the Tribunal "the learned counsel for respondent 2 (writ petitioner herein) would say that the respondent 2 was entitled to plead that he was a marginal farmer and nothing else, because such was his position as far as his assets in Andhra Pradesh were concerned and that such plea taken before that Court would have no bearing, on this case. In making such a submission, the respondent 2 is falling from Scylla into Charybdis. If his version is true, he would be an affluent person attempting to take shelter under a provision of law intended to protect poor persons in order to avoid payment of debt contracted by him and making a clear misrepresentation in a court of law disclosing dishonesty which would be a permanent disqualification worse than financial pressure. I, therefore, consider the affidavit for what it is on the face of it, that is to say, a declaration of inability to pay the debt he contracted disclosing financial pressure". I am hard put to appreciate this reasoning. If in law a person is entitled to claim a benefit of a moratorium law, the fact that he availed himself of the claim would not go to show financial pressure. For aught one knows, it may be with a view to evade payment and not avoid payment.

9. Then again, stronger proof is necessary than a mere affidavit to show that he was under financial pressure. In this connection it is to be remembered that the Tribunal is not a court of equity, but a Tribunal set up under certain rules; and regard shall be had only to those criteria mentioned in S. 47 and the rule which I have extracted above. However desirable it may be to decide the honesty of a person, that is not warranted under the scope of the rules.

10. The second point of attack levelled against the petitioner, and which weighed with the Tribunal, is that for two assessment years, 1973-74 and 1974-75, he was assessed to income-tax as a registered firm wherein it was shown that he was sharing profits with his son-in-law. Sharing of the profits with the son-in-law would hardly disclose financial instability. On the contrary, if any person is affluent enough to share his profits with his son-in-law, that only proves his financial stability. Therefore, that cannot be put against him.

11. Then again, the writ petitioner had filed a valuable evidence by producing the assessment order in respect of 1975-76, which discloses that he was accorded the status of the Hindu undivided family instead of a registered firm. This is proof enough to hold that the contention to the contrary

cannot prevail. Nevertheless, the Tribunal insisted upon the production of a partnership deed and evidence as to how the partnership had come to an end. Be it noted that the Tribunal was not concerned with a partnership dispute, but only the financial stability. Again to characterise "such manoeuvre as a permanent disqualification worse than financial pressure for being in charge of a public utility service like the operation of a bus route" is to say the least most uncharitable. As I stated above, however desirable it may be to decide the honesty or the conduct of an applicant for a stage carriage permit, the rules do not provide for such an examination and therefore if these considerations had prevailed with the Tribunal, I have to unhesitatingly say that such reasonings are perverse.

12. The last straw which the first respondent herein could clutch at was, there were suits against the petitioner by his son-in-law. The details relating to the suits were lacking. In any event it was said they had been withdrawn or in the process of being withdrawn. Therefore, the Tribunal was not justified in holding against the petitioner on this point.

13. Looked at from any point of view, therefore, the order suffers from various perverse reasonings which I have clearly indicated above. Therefore, this writ petition will stand allowed and the matter is remitted to the Tribunal for fresh disposal in the light of the observations made above. The petitioner will be entitled to his costs. Counsel's fee Rs. 200 to be paid by the contesting respondent.

Petition allowed.

AIR 1978 MADRAS 302

RAMAPRASADA RAO AND SURYAMURTHY, JJ.

Binny Ltd., Madras, Appellant v. Land Acquisition Officer, Madras, Respondent.

Appeal No. 696 of 1975 D/- 29-11-1977.*

(A) Land Acquisition Act (1 of 1894), Section 23 — Market value — Determination of — Prices of similar lands situated in neighbourhood of the acquired land is material.

For the purpose of assessment of compensation when sales of land in the neighbourhood and nearer to the acquired land are available then it will be an empty exercise to seek for more hypothesis and material and rely upon the data provided for sales of plots far away from acquired lands. The nearer the acquired land better for purpose of comparison. (Para 2)

Anno: AIR Man. (3rd Edn.), Land Acquisition Act (1894). S. 23, Notes 2, 7, 8.

(B) Land Acquisition Act (1 of 1894), S. 23 (3) — Compensation for damage or loss by severance — When can be granted.

Severance compensation which is the subject-matter of Cl. (3) of S. 23 of the Act has a special significance. It is not every severance within the dictionary meaning of that word that could provoke the owner whose property has been sliced to come to the court or before the Land Acquisition Officer for getting severance compensation. It is such severance which in the eye of law could be said to have damnified by reason of a compulsory acquisition that could be the subject-matter of the claim. In every case such damage has not only to be pleaded but also to be proved by acceptable evidence. (Para 4)

Hence, where, in a case of compulsory acquisition of land the evidence gives the impression that excepting for shortening the road frontage no damage has been done at all, the land remains as a corner plot which has the advantage of three roads in the neighbourhood and no one either inside the property or outside complained that by reason of the acquisition it has become inconvenient for them to get ingress or egress from the remaining portion of the land, the claim for severance compensation was rejected by the court. AIR 1972 SC 1417, Disting. (Para 4)

Anno: AIR Man. (3rd Edn.). Land Acquisition Act (1894), S. 23, N 15.

Cases Referred: Chronological — Paras
AIR 1972 SC 1417 — 4

RAMAPRASADA RAO J.:— The aggrieved claimant in L. A. C. No. 35 of 1972, on the file of the City Civil Court, Madras, is the appellant. An extent of 19 grounds 683 sq. ft. which roughly forms about 1/19th of the total extent owned by the appellant-claimant was the subject-matter of compulsory acquisition pursuant to a notification under S. 4 (1) of the Land Acquisition Act dated 6-11-1968. The property is situate in Purasawalkam comprised in R. S. 2201/10. The public purpose for which the property was acquired was for the Corporation school and playground. The Land Acquisition Officer relied upon Exs. B-2 and B-3 which were sales of plots of land to the south west of

*(Against decree of City Civil Court Madras, in L. A. C. No. 35 of 1972.)

the acquired land. Under Exs. B-2 and B-9 properties were sold at the rate of Rs. 5500 per ground. The Land Acquisition Officer bearing in mind the locality in which the acquired property is situate increased the compensation and awarded a sum of Rs. 6000 per ground as just compensation payable to the appellant. The appellant not being satisfied with the ground (award?) sought for a reference under S. 18 of the Land Acquisition Act to the civil court and asked for compensation at the rate of Rs. 12000 per ground. The claimant relied upon Exs. C. 1 and C. 2 and sought for the increased compensation as above. The court below however noticed Exs. B-8 and B-9, which were also sales enumerated by the Land Acquisition Officer in the list of data sales referred to by him in his award. Exs. B-8 and B-9 relate to sales of plots of land to the west of the acquired land under which a price of about Rs. 9000 per ground was paid in the years 1967 and 1968. This was adopted by the court below. The appellant appeals against this grant.

2. Learned counsel for the appellant strenuously relies upon Ex. C.1 and C.2, and would urge that the price paid thereunder represents the fair price for the acquired lands as well. It is no doubt true that the property acquired is part of a vast extent of land belonging to the appellant and this has been sliced away from it for a public purpose. It is abutting a road known as Angalamman Koil Street in Purasawalkam division and it had an access throughout its length on the east to that road. That it is a fairly busy and popular locality is not in dispute. But what is sought to be relied upon for purposes of evaluation is the hypothesis provided for under Ex. C-1 and C-2. From Ex. B-1 which is the tope sketch which contains both the acquired lands and the lands with which they are compared we find Ex. C 1 and C 2 relate to sales of plots of land far removed from the acquired land. They are to the south of it and in a locality which is different from the acquired land. Learned counsel for the appellant himself had to say at one time that Ex. C.1 and C.2 may not provide a safe and absolute guide for valuation of the acquired lands. We are also of the view that when sales of land in the neighbourhood and nearer to the acquired land are available then it will be an empty exercise to seek for more hypothesis and material and rely upon the data provided for sales of plots far away removed from it and try to value the compulsorily acquired lands. The nearer the acquired land, the better for purposes of comparison. In Ex. B 1 we see that the lands sold under Ex. B 8 and B 9 provided the data for comparison in the sense that the lands sold thereunder could easily and reasonably be said to be lands which are similar to the acquired lands and are situate in the neighbourhood of it. In such circumstances, therefore, the price paid under Ex. B 8 and B 9 could safely be taken for purposes of valuing the acquired land.

3. This was attempted and done by the court below. We are unable to grant an increased compensation for the reason that Ex. C-1 and C-2 cannot for any purpose be taken into consideration for fixing the market price of the acquired land. We therefore agree with the court below that the price paid under Ex. B-8 and B-9 can be adopted and that the acquired lands could be valued at Rs. 9000 per ground.

4. One another head of claim which was made by the claimant was severance compensation under S. 23 (3) of the Land Acquisition Act. What is urged by Mr. Ramasubramaniam is that by reason of the acquisition the frontage of the property has been sufficiently and conspicuously cut and the left out portion is at a disadvantage having lost such an access to the east of it. But the question is whether there has been severance at all and if there was a severance whether there was a damage as a result thereof and if such damage is alleged whether it has been proved. C. W. 1 was examined on the side of the claimant. He would say that the portion left behind has lost its value because it is no longer abutting the road. 57½ grounds have been left out of acquisition and therefore the severance compensation claimed at the rate of Rs. 1100 per ground was payable. But in cross-examination he admitted that the unshaded portion left out of the acquisition is also a corner property and that the unacquired property has access or frontage to Perambur Barracks Road. He had to admit that on the south it has access to Kalyana Maistry Street and on the east the remaining portion has got access to Angalamman Koil St. C. W. 1 virtually had to admit in cross-examination that excepting for the loss of part of a frontage on a pre-existing road, there has not been any further damnification to the unacquired portion of the land. Severance compensation which is the subject-matter of Cl. (3) of S. 23 of the Land Acquisition Act, has a special significance. It is not every severance within the dictionary meaning of that word that could provoke the owner

whose property has been sliced to come to the court or ask for the same before the Land Acquisition Officer. It is such severance which in the eye of law could be said to have damnified by reason of a compulsory acquisition that could be the subject-matter of the claim. In every case such damage has not only to be pleaded, but also to be proved by acceptable evidence. We have already referred to the evidence in support of this claim which does not support the claim for severance compensation. On the other hand, the evidence of C. W. 1 gives the impression that excepting for the shortening of the road frontage no damage has been done at all to the property. It remains as a corner plot which has the advantage of the three roads in the neighbourhood. No one either inside the property or outside has complained that by reason of the acquisition it has become inconvenient for them to gain ingress or egress from the remaining portion of the land. Conspicuous evidence is necessary for a court to accept such a claim for severance compensation. Mere slicing of a property and particularly 1/19th of a property from a large extent without further proof of damage cannot be the basis of the award for severance compensation, under Section 23 (3) of the Land Acquisition Act. Mr. Ramasubramaniam relied upon a passage in Tribeni Devi v. Collector Ranchi AIR 1972 SC 1417. In that case the Supreme Court did not want to interfere with the grant which the Judicial Commissioner (probably the civil court) made towards severance compensation. In that case the High Court disallowed the award made by the Judicial Commissioner as compensation for severance. The High Court apparently expressed the view that merely because there was an entrance to the land before and there was a diminution of that amenity later by reason of the acquisition the severance compensation granted by the Judicial Commissioner has to be disallowed. It was in those circumstances the Supreme Court was of the view that when a portion of the land is acquired and a large portion is left out there would be diminution in the value of the land that is left out for which some compensation has to be allowed. We are of the view that this is not a generic statement made by the Supreme Court to be adopted axiomatically in every case where there has been a slicing of a property from a large extent of quondam property by reason of the acquisition. The facts therein shown have established damage as a fact. If this were to be the intention then no proof of damage which is contemplated under Sec. 23 (3) of the Land Acquisition Act would be required. Such grants are made and compensations are given only on proof of damage and not by a mere allegation as to damage. In this case, we are of the view that there is no proof of such damage though it has been alleged. Presumably in the other case referred to by the Supreme Court there was such proof. We are not inclined to accept the contention of learned counsel for the appellant that severance compensation should mechanically be granted in this case because 1/19th of the property has been taken away from the whole. In the result, therefore, the appeal fails and is dismissed. No costs.

Appeal dismissed.

AIR 1978 MADRAS 304

RAMAPRASADA RAO AND RATNAVEL PANDIAN, JJ.

G. Shanmugham Chetti and another, Appellants v. Chinnammal, Respondent.

O. S. Appeal No. 4 of 1975, D/- 6-10-1977.*

Succession Act (39 of 1925), S. 263 — Revocation of grant — Discretion to be judicially exercised — 'Just cause' in explanation illustrative — Grant when can be revoked for just cause — Appln. No. 1218 of 1974 D/- 20-11-1974 in O. P. No. 287 of 1973, (Mad), Reversed.

The discretion vested in the probate Court either to revoke or annul the earlier grant has to be judiciously exercised. It is not every non-conformity with procedural irregularities which were not made as an issue at the time of the grant, nor such infirmities which do not shake the foundation of the grant would ever be the cause for revocation or annulment of an earlier grant. The expression 'just cause' explained in Sec. 263 of the Act is obviously illustrative and not exhaustive. A mere error in form and procedure but not in substance cannot vitiate an earlier grant. Fraud or material concealment must not only be pleaded but also be proved at least prima facie to enable the court to re-act and issue a direction by way of a citation to the primary grantees to lodge the original letters of administration in court. Vague suggestions about concealment which

*(Against order of Mohan J. in Appln. No. 1218 of 1974 D/- 20-11-1974 in O. P. No. 287 of 1973 (Mad).)

do not go to the root of the matter and which are not material in the case, cannot also be considered as a just cause for revocation. In effect, therefore, there must be abundant material which is acceptable to a reasonable person to come to the conclusion that the court has been misled in making the original grant and that there was a deliberate design and a motive for the making of untrue allegations of facts which are essential in point of law. No doubt, the propounders of the will cannot take shelter by pleading that an untrue allegation of fact which is essential in point of law, was ignorantly or inadvertently made. If an allegation has been proved to be untrue and if that fact formed as it were the basis for the grant in law, then also the statute assumes by way of a fiction that there is just cause for revocation.

(Para 7)

The mere fact that there is a mistake in the petition about the place of death of the testator cannot form the foundation for refusal of a grant or of the revocation of a proper grant made by a competent court.

(Para 6)

Held: when the respondent had conceded that there was a will, a mistake in the application for the grant relating to the place of death of the testator or the non-mention of the time of death were not substantial matters which would come within Cl. (a) to the Explanation to S. 263 of the Act. Nor could it be said that within the meaning of Cl. (b) or (c) there was a fraudulent suppression of true materials and the projection of false particulars or facts essentially in point of law to justify the grant.

(Para 8)

The fact that a person is not made a party to a proceeding cannot always and necessarilly be understood as a proceeding which is defective in substance. When the person interested to enter a caveat has been notified either by a special notice through court or by general publication in the dailies as is contemplated under R. 30 and R. 32 of the Original Side Rules obtaining in the High Court of Judicature at Madras, then it cannot be said that the proceedings to obtain the grant were defective in substance. A defect arising out of the absence of citation on the proper person is not a defect of substance and therefore, not a just cause. In the instant case, the knowledge of the respondent about the existence of the will and attempts made by her to challenge the same in a civil court in which she failed, are all important factors to be taken into consideration while adjudicating upon the fact whether there is a just cause for revocation. The respondent had the full opportunity of putting forward her just cause even at the time when she was served with the citation. She did not do so for reasons known to her. She cannot, therefore, be permitted to invoke the just and equitable rule in Sec. 263 of the Act and ask the Court to revoke the original grant. Case law reviewed. Appln. No. 1218 of 1974 in O. P. No. 287 of 1973. D/- 20-11-1974 (Mad), Reversed. (Paras 9, 12, 13)

Anno: AIR Manual (3rd Edn.), Succession Act, S. 263, Notes 7, 10, 11, 12.

Cases Referred:	Chronological	Paras
AIR 1955 SC 566 : 1955 SCJ 578		11
AIR 1947 Pat 434		12
AIR 1924 Mad 578 : 46 Mad LJ 383		13

S. Govind Swaminathan and M. Ramachandran, for Appellants; V. M. Lenin, for Respondent.

RAMAPRASADA RAO J.:— This is an appeal against the judgment of Mohan J. who on an application filed by the respondent in this appeal, revoked the Probate granted in favour of the appellants by Paul J. This order is dated 14-2-1974, whereunder he granted letters of administration to the will of one Alagirisami Chetti. The respondent applicant has briefly stated in the affidavit in support of the Judge's summons for revocation as follows:—

2. She was admittedly a person to whom notice was ordered before the grant was made. But according to the respondent such a notice which was served on her on 12-1-1974, was not accompanied by the copy of the petition filed for the grant and that no publication was made about the date of hearing of the testamentary proceedings and that she sought for inspection of the records as per order of the Master of this court dated 19-3-1974 and it was only thereafter she entered caveat. But as by then the letters of administration was ordered on 14-2-1974, the respondent's allegation is that the grant was obtained on false and fraudulent misrepresentations. She concedes that she has questioned the legality of the will in earlier proceedings, but could not prosecute the litigation for want of funds. She is also aggrieved over the form of the petition in that her name was not impleaded as one of the respondents. According to her Alagirisami Chetti, the testator, who is her husband, was under medical treatment and that the appellants manipulated to get a Will from him to her prejudice and to their advantage. She refers to the prior litigation to which she was party and to which we shall presently make

a reference to and would add that when the counsel for the appellants were contacted for a copy of the original petition by the clerk of the respondent's counsel, it was not even handed over to him. Her further allegation is that in the petition for the issue of the grant, there are two important aspects which have been suppressed, namely. about the place of death of the testator and about the incompleteness of the affidavit ot assets. According to her, the will dated 24-11-1964, was revoked by a further will by the testator himself in his last will and testament dated 17-3-1966 and that, therefore, the grant of such a will which has been subsequently cancelled by the testator ought not to remain on record. Paul J. granted the letters of administration after following the usual procedure. Mohan J., however, thought that the allegations made by the respondent in the affidavit for revocation of the grant were sufficient to revoke it and directed a citation to issue to the appellants to lodge the original letters of administration in this court. The appellants in spite of their opposition to the application for the revocation for the grant could not succeed. Hence the appeal.

3. We shall now trace the earlier history of this litigation, as it would furnish a sufficient background for due appreciation of the facts and circumstances of the subject-matter.

4. On 12-12-1959 and 2-5-1960 Alagirswami Chetti executed two deeds of settlement which were questioned by the respondent. The result of it was a suit in this court in C. S. No. 46 of 1962. for maintenance of the respondent. This suit ended in a compromise whereunder she was awarded a sum of Rs. 500 as and towards her maintenance and therefore the above suit which was to set aside the settlement deeds ended. Then Alagirisami Chetti executed the will which was the subject-matter of the grant by Paul J. on 14-2-1974, lived for two years and more thereafter and died on 17-3-1966. Once again the respondent initiated proceedings questioning the settlement deeds and the Will. A pauper application No. 361 of 1967 to that effect was filed. In those proceedings filed in forma pauperis Appln. No. 509 of 1967 was taken for the appointment of a receiver. One of us dismissed the said application. The Master of this court who heard the main pauper application No. 361 of 1967, dismissed the same. A further appeal by the respondent to Palaniswamy J. sitting on the original side was also unsuccessful. In the pauper application filed by her in 1967 and until it was dismissed by this court on 6-8-1970, there was no whisper at all anywhere in the pleadings that the will dated 24-11-1964 was ever revoked. This allegation made by the respondent looms large in the present proceedings under appeal and in fact, the learned single Judge, who revoked the probate almost accepted this contention. After the challenge against the will dated 24-11-1964, which is obviously the only will, ended in 1970, the appellants filed for letters of administration of the said will in O. P. No. 287 of 1973. In that petition though eo nomine the respondent was not made a respondent to the said original petition. yet, in paragraph 8 to that petition, the appellants have stated that the respondent was the junior widow of Alagirisami Chetti. They filed for the grant of letters of administration as sole beneficiaries under the will and would say that the delay in seeking for the relief of the grant ot letters of administration was not deliberate or wilful and that they were engaged in their business activities and hence could not come up earlier. To this they annexed the affidavit of assets. It is common ground that under directions of the learned Judge, sitting in testamentary and intestate jurisdiction, notices were issued amongst others to the respondent about the application of the appellants for the grant of letters of administration with the will annexed, of the will dated 24-11-1964 of V. Alagiriswami Chetti.

5. With the above background we shall now consider the allegations of the applicant. The first allegation is that though notice of the original petition No. 287 of 1973 for the issuance of the grant was sought to be served on her on 12-1-1974, it was not accompanied by a copy of the petition in support thereof and that notice was not in the prescribed from. According to her she contacted her advocate who wanted her to keep a watch on the daily papers whereunder notice will be published about the date of hearing and she alleges that no such publication was made and that she came to know about the contents of the petition only after she inspected the records under orders of the Master of this Court. Countering this allegation, the appellants would plead that no advocate entered appearance at that stage for her and that a person representing himself to be a clerk of the advocate approached the appellant's advocate and wanted a copy. The person, who approached the advocate was informed that the advocate said to have been engaged by the respondent should have either entered appearance in the High Court or should at least write a letter to him ask-

ing for a copy. Thereafter, the matter ended there. The appellants' case is that due notice of the hearing of the petition for the grant was published in the dailies, one in the Madras Mail and the other in Swadesamitran and it is, therefore, incorrect to suggest that no such publication was made. The first allegation is without substance. We are of the view that the background of the case already referred to by us and the specific allegation about the publication of the proceedings in the dailies were not brought before the notice of the learned Judge. He was obviously persuaded by the fact that merely because she entered a caveat, but after some delay the letters of administration granted earlier ought not to stand and that it ought to be revoked. We are unable to share the view. There is nothing on record to show as to who entered appearance for the respondent at or about the time when she sought for a copy of the petition. The learned counsel for the respondent appearing before us is unable to satisfy us that there was a genuine request made in writing by a competent or an authorised person seeking a copy of the petition in support of O. P. 287 of 1973. The first objection therefore fails.

6. The second objection on merits is that there has been a suppression of true facts on important aspects. Firstly, it is said that the appellants in their petition incorrectly described the place of death as the Nursing Home, when, in fact, he died in the house and that the affidavit of assets is neither full nor complete. How the assets are incomplete is not elucidated before us. The mere fact that there is a mistake in the petition about the place of death of the testator cannot form the foundation for refusal of a grant or of the revocation of a proper grant made by a competent court. It is in this context that the earlier history of this case looms large. The respondent was challenging the validity of the will dated 21-11-1964. We have already made it clear that at no point of time, she referred to the other will and much less to a last will of Alagirisami Chetti dated 17-3-1966 said to have been written up by him. It is admitted before us that in the pauper application No. 361 of 1967, which was filed long after the date of execution of the alleged second will which apparently she was aware of and which was to her benefit and not adverted to till she filed the present application for revocation of the grant in 1974. The merits therefore in the above case which primarily revolve round the above facts are so simple and clinching. They do not prompt us to accede to the request of the respondent to sustain the order of revocation made by Mohan J. In fact, one of us while dealing with the application for appointment of a receiver in the pauper suit as above expressed that there was no pleading in support of the application that fraud, misrepresentation or undue influence affected the will in question. Regarding the allegation that the affidavit of assets does not disclose the correct state of affairs, no material has been placed before us to show that the contents therein are either untrue or incorrect. The exaggerated value given by the respondent that the estate is worth Rs. 20 lakhs, remains only as a bare statement. Finding that the merits in this case are so very clear and unambiguous, learned counsel for the respondent who was asked to sustain the order appealed against based his arguments mostly on alleged legal infirmities in the matter of the grant.

7. Strong reliance was placed upon Section 263 of the Indian Succession Act, which reads as follows—

"263. The grant of Probate or letters of administration may be revoked or annulled for just cause.

Explanation: Just cause shall be deemed to exist where—

(a) the proceedings to obtain the grant were defective in substance; or

(b) the grant was obtained fraudulently by making a false suggestion or by concealing from the court something material to the case; or

(c) the grant was obtained by means of an untrue allegation of a fact—essential in point of law, to justify the grant, though such allegation was made in ignorance or inadvertently; or

(d) the grant has become useless and inoperative through circumstances; or

(e) the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect."

The discretion vested in the probate Court either to revoke or annul the earlier grant has to be judiciously exercised. It is not every non-conformity with procedural irregularities which were not made as an issue at the time of the grant. nor such infirmities which do not shake the foundation of the grant would ever be the cause for revocation or annulment of an earlier grant. The expression 'just cause' explained in Sec. 263 of the Indian

Succession Act is obviously illustrative and not exhaustive. There may be cases where a just cause for revocation or annulment is available, even though they may not strictly come within the frame-work of the illustrations given in explanation to S. 263 of the Act. A mere error in form and procedure but not in substance cannot vitiate an earlier grant. If in a given case fraud is alleged or a material concealment is suggested such fraud must not only be pleaded, but also be proved at least prima facie to enable the court to react and issue a direction by way of a citation to the primary grantees to lodge the original letters of administration in court. Vague suggestions about concealment which do not go to the root of the matter and which are not material in the case, cannot also be considered as a just cause for revocation. In effect, therefore, there must be abundant material which is acceptable to a reasonable person to come to the conclusion that the court has been misled in making the original grant and that there was a deliberate design and a motive for the making of untrue allegations of facts which are essential in point of law. No doubt, the propounders of the will cannot take shelter by pleading that an untrue allegation of fact which is essential in point of law, was ignorantly or inadvertently made. If an allegation has been proved to be untrue and if that fact formed as it were the basis for the grant in law, then also the statute assumes by way of a fication that there is just cause for revocation. The other illustrative cases in the explanation to Section 263 of the Act which would enable the court to revoke an earlier grant are where the grant has become useless or inoperative and where the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account or exhibited, one which is untrue in material particulars. The argument of the learned counsel for the respondent is that the proceedings were defective in substance and the grant was obtained fraudulently by making false allegations and that there has been a wilful omission to disclose a true inventory. As regards the latter two objections there is no proof of such fraud or concealment of material particulars. What is argued is that the time of the death of the testator was not mentioned in the application for letters of administration and even so the place where he died has been incorrectly stated.

8. Another contention is that the alleged last will of Alagirisami Chetti said to have been executed by him in 1966 has been wantonly suppressed. These objections could easily be answered. It is not in dispute that Alagirisami Chetti executed an entorceable and a valid will on 21-11-1964. It was this will which was the subject-matter of the earlier proceedings in pauper Appln. No. 361 of 1967. The respondent did not pursue the matter after she was enabled to prosecute the proceedings in forma pauperis. Even at that time there was no whisper that there was a second will of Alagirisami Chetti said to have been executed on 17-3-1966. The allegation is that Alagirisami Chetti made out a will but could not register it. This fact is only pleaded in the present application for revocation. It was not even touched upon or referred to in the earlier proceedings. If once it is conceded by the respondent that there was a will dated 21-11-1964, a mistake in the application for the grant relating to the place of death of the testator or the nonmention of the time of death are not substantial matters which would come within Cl. (a) to the Explanation to S. 263 of the Indian Succession Act. Nor could it be said that within the meaning of Cl. (b) or (c) there was a fraudulent suppression of true materials and the projection of false particulars or facts essential in point of law to justify the grant.

9. One other factor pressed into service under this clause of defective issue of the grant is that the respondent was not made eo nomine a party to the original petition and that citation was issued to her only by court after the scrutiny of the application for the grant of letters of administration. The fact that a person is not made a party to a proceeding cannot always and necessarily be understood as a proceeding which is defective in substance. When the person interested to enter a caveat has been notified either by a special notice through court or by general publication in the dailies as is contemplated under Rule 30 and Rule 32 of the Original Side Rules obtaining in the High Court of Judicature at Madras, then it cannot be said that the proceedings to obtain the grant were defective in substance. Though a vague allegation was made that no publications were made, it is now proved beyond doubt that such publications were made and a citation was also issued to the respondent about the pendency of the proceeding to obtain the grant. The respondent attempted to contact the counsel appearing for the propounders of the Will through a clerk who did not have the requisite authority to obtain a copy of the affidavit and the petition for the grant. The appellants' case

is that 'somebody come with a request for a copy of the petition and he was asked to obtain the requisite authority from a duly appointed counsel so that they could give a copy of such petition and affidavit.' It is not the case of the respondent that on the date when a request was made for a copy of the affidavit and the petition, her counsel entered appearance. It is not even suggested that the clerk who approached the counsel for the appellants was authorised to get the copy of the petition and the affidavit. In those circumstances, we are unable to infer any fraud, false suggestion or undue allegation of a fact essential in point of law not to justify the grant.

10. The history of this litigation which started in 1959 clearly establishes that the respondent had knowledge of the will executed by Alagiriswami Chetti on 21-11-1964. She attempted to challenge its validity in a civil proceeding. She could not successfully do it. Her own case is that she was alerted by her lawyer to keep a watch on the daily papers wherein a notice will be published about the testamentary proceedings. She was admittedly served with notice on 12-1-1974. Excepting for the bare pleading which now appears to be incorrect that there was no publication, the conduct of the respondent is neither clear nor bona fide in not having appeared in court and made the proceedings a contentious one.

11. The allegations of fraud or the averment as to the so-called untrue allegations must be real and should not stand as bare imputations. This is a case in which a citation has been issued to the respondent. No factual material has been placed before us as to compel the exercise of our judicial discretion to revoke the grant and we are not provoked to come to the conclusion that it is necessary to have the will proved afresh. Even in a case where there was an omission as to citation, the Supreme Court observed in Anil Behari Ghosh v. Latika Bala Dasi, 1955 SCJ 578 : (AIR 1955 SC 566) thus:—

"The omission to issue citation to persons who should have been apprised of the probate proceedings may well be in a normal case a ground by itself for revocation of the grant. But this is not an absolute right irrespective of other considerations arising from the proved facts of a case."

A fortiori therefore, if an opportunity to convert a petition into a contentious suit was given to the respondent and if the respondent, as is seen from her earlier conduct, did not pursue her challenge against the Will, which she initiated in 1967, it cannot be said a citation issued to her without making her a party to the original proceedings, is sufficient for the revocation of the original grant.

12. A Bench of the Patna High Court in Sheopati Kuer v. Ramekant Dikshit, AIR 1947 Pat 434, held the view that a defect arising out of the absence of citation on the proper person is not a defect of substance and therefore, not a just cause.

13. A case more or less in pari materia with the case before us arose in our court which was decided by a Division Bench in Venkataraman v. Satyavati, 46 Mad LJ 383 : (AIR 1924 Mad 578). The question which arose therein was no doubt under S. 50 of the Probate and Administration Act. It is common ground that the expression 'just cause' appearing in S. 50 of the above Act is similar to the present provision in Sec. 263 of the Indian Succession Act. The learned Judges invoked the principle of res judicata and refused to revoke also a grant merely on the ground of an irregular citation in the proceedings. Following an earlier decision of the Calcutta High Court, the learned Judges agreed with the view that the mere absence of a special citation in proceedings in which probate of a Will is granted is not where the person to whom a citation has not been issued is otherwise aware of the proceedings a 'just cause' for revocation. In that case the Will was the subject-matter of an earlier litigation and when an occasion arose for the Judges to consider whether such an earlier grant could be revoked, they observed that even on the principle of res judicata the application for revocation is not maintainable. They finally said that it is an elementary principle that where the party had an opportunity to put forward a particular just cause and had not chosen to put it forward, he cannot be heard to agitate the same cause later and no court would, in their opinion, allow a just cause already agitated and decided upon before the grant of probate to be again made the subject of an application to revoke the grant, and it saw no difference in principle between disallowing such an application on the ground of res judicata and disallowing it on the ground that the party already had a full opportunity of putting forward his just cause and omitted to do so. In the instant case, the knowledge of the respondent about the existence of the Will and the attempts made by her to challenge the same in a civil court in which she failed, are all important factors to be taken into consideration while adjudicating upon the fact

whether there is a just cause for revocation. The respondent had the full opportunity of putting forward her just cause even at the time when she was served with the citation. She did not do so for reasons known to her. She cannot, therefore, be permitted to invoke the just and equitable rule in Sec. 263 of the Indian Succession Act, and ask the Court to revoke the original grant. Moreover the respondent has not given any details about the second will also, which she claims she has full knowledge of. The learned Judge who revoked the grant was satisfied that there was another will dated 17-3-1966. But it should be noted that this was not the case of the respondent in the earlier litigation. This appears to be an afterthought.

14. The second ground on which the learned Judge was apparently satisfied that there is just cause for revocation is based upon the fact that the respondent took earnest efforts to enter a caveat. No doubt, there is no inordinate delay in this case. But the circumstance to be noted is that after citation and after publication which was both to her knowledge and within her knowledge, she did not enter caveat and challenge the grant. What she ought to have done she did not do. She cannot, therefore, in a circuitous manner and after having pretended to have inspected the records in March 1974 and obtained information about the grant of the Probate seek for revocation of the grant. We are unable to share the view that the conduct of the respondent in the earlier litigation is not sufficient in this case to hold that there is no just cause at all for such revocation.

15. One other ground which was pressed into service anew by the learned counsel was based on Sec. 57 of the Indian Succession Act read with the provisions of the Hindu Succession Act of 1956. Under Sec. 30 of the Hindu Succession Act any Hindu may dispose of by will or other testamentary disposition any property which is capable of being so disposed of by him in accordance with the provisions of the Indian Succession Act. 1925, or any other law for the time being in force applicable to Hindus. The other portions of the section are not necessary to be noticed. We are unable to understand the implication of the argument as to how the grant is hit by the provisions of Sec. 30 of the Hindu Succession Act. The respondent's case is that Alagiriswami Chetti could dispose of his property under a Will and this is what he did.

16. We have already referred to the fact that there has not been a substantiation of the allegation that the appellants to whom the grant was made originally have wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of the Succession Act or they have exhibited an inventory or account which is untrue in material respect. Excepting for the bare ipse dixit and unproved allegations in the pleadings that the estate is worth much more, there is nothing to indicate that the inventory filed or account rendered by the appellants was in any way untrue nor were material particulars omitted without reasonable cause.

17. Since the respondent should be deemed to have had full knowledge of the proceedings initiated by the appellants in court in O. P. No. 287 of 1973, and since she failed to make any effort much less earnest effort to enter a caveat and as in the background of events she should be deemed to have avoided a contentious proceeding, since she could not substantiate it in her earlier litigation and since she failed to act at a time when she should have and for the reasons that there was no proof that there was a Will dated 17-3-1966 and for all the reasons abovestated, we allow this appeal and set aside the judgment of Mohan J. who revoked the order for the issuance of the letters of administration made by Paul J. on 14-2-1974.

18. The Original side Appeal is allowed, but there will be no order as to costs.

Appeal allowed.

AIR 1978 MADRAS 310

NAINAR SUNDARAM, J.

Lakshmana Chetty, Petitioner v. M. S. Askar Ahmed and another, Respondents.

C. R. P. No. 328 of 1975, D/- 23-1-1978.*

Civil P. C. (5 of 1908), O. 1, R. 10 (2) — Proper parties — Suit on promissory note by assignee — Assignor-original payee is a proper party. Case law discussed.

(Para 2)

Anno: AIR Comm. C. P. C. (8th Edn.), O. 1, R. 10, N. 23.

Cases Referred: Chronological Paras

(1975) CRP 1857 of 1975 (Mad) 2

*(Against Order of Sub. J. Vellore in IA 679 of 1974 in O. S. 183 of 1973).

DV/EV/B402/78/DVT

(1974) CRP 1190 of 1974 (Mad)	2
AIR 1971 Mad 328 : 84 Mad LW 25	3
(1965) 2 Mad LJ 1060	2
AIR 1962 Mad 202	2
AIR 1956 Mad 155	3
AIR 1954 Mad 960	2

R. Subbaraj, for Petitioner; Ikram Mohamood and K. Ramachandran for Respondents.

ORDER:— The defendant in O. S. No. 183 of 1973 on the file of the Court of the Subordinate Judge of Vellore is the petitioner. The first respondent filed a suit to recover the amount due on a promissory note dated 12-2-1970 executed by the defendant in favour of the second respondent viz., Abdulla Basha Sahib. The second respondent is said to have assigned the said promissory note in favour of the first respondent on 23rd April 1973. The defendant filed a written statement contending that the promissory note was executed towards the sale consideration of a sale deed dated 11th February 1970 and since he could not get possession and he was injuncted by the Court from taking possession, the consideration on the promissory note must be deemed to have failed and in any event the plaintiff is not a holder in due course. On the basis of the above findings issues were framed and issues 1 to 3 read as follows:—

1. Whether the suit pronote was executed for the purchase of the property as alleged by the defendant?

2. Whether the agreement between the original payee and the defendant as pleaded by the defendant is true, valid and enforceable?

3. Whether the assignment of the pronote in favour of the plaintiff is not valid?

The defendant filed I. A. No. 879 of 1974 under O. 1 Rule 10 (2) C. P. Code to implead the original payee assignor as a party defendant to the suit. This was resisted both by the plaintiff and the proposed party. The learned Subordinate Judge of Vellore dismissed the application on the ground that he is neither a necessary nor a proper party.

2. On the facts of the case, I feel there is justification for adding the proposed party to this action. That the assignor-original payee of the promissory note is proper party to the action laid on a promissory note, has been recognised by this Court in a number of cases. This has been laid down in P. S. Pattabhiraman v. Ganapathy, AIR 1962 Mad 202, in Rudrappa Chetti v. Narasimha Chetty 78 Mad LW 524 : 1965-2 Mad LJ 1060, in Thambusami Reddiar v. Chidambaram Pillai AIR 1954 Mad 960 : 1954-2 Mad LJ 322, in Kannammal v. Prema CRP 1190 of 1974 and in K. Madhava v. Santhi B. Mani CRP 1857 of 1975.

3. Sri K. Ramachandran, learned counsel for the proposed party relies on the ratio in Uthaman Chettiar v. Thiagaraja Pillai, 68 Mad LW 810 : AIR 1956 Mad 155. I find that the facts are different and the said ratio cannot be relied upon to negative the claim of the defendant to add the original payee-assignor of the promissory note to this action. Ramanujam J. in 84 Mad LW 25 : (AIR 1971 Mad 328), Rangaswami Kaundar v. Ramasawmi Kaunder, considered the above ratio in the light of the later decisions and held that the said ratio is no longer good law. I find that the suit is of the year 1973 and I direct the court below to take up the matter and dispose of the same expeditiously and in any event before the end of August 1978.

Petition allowed.

AIR 1978 MADRAS 311

NAINAR SUNDARAM, J.

Panchalai Ammal, Petitioner v. Muthulakshmi Ammal, Respondent.

C. R. P. No. 647 of 1975 D/-2-2-1978.°

Tamil Nadu Buildings (Lease and Rent Control) Act (18 of 1960) S. 14 (1) (a) — Application for eviction on ground of bona fide requirement for repairs — Interpretation of the words "bona fide requirement."

The bona fides under S. 14 of the Act should not be tested by stringent standards. In view of the safeguard given to the tenant under S. 14 (2) (a) for re-occupation of the premises after repairs the question of bona fides pales into less significance and it cannot be put against the landlord by applying the test stringently. (1969) 1 Mad LJ 587 Rel. on. (Para 2)

Cases Referred: Chronological Paras

(1969) 1 Mad LJ 587 2

S. Balasubramaniam and R. Nagarajan, for Petitioner; V. M. Rajavelu and S. Eswaran, for Respondent.

ORDER:— The landlady under the Tamil Nadu Buildings (Lease and Rent Control) Act 18 of 1960 (hereinafter referred to as

°(Against Order of Sm. CC Madras in HRA No. 218 of 1974 in HRC No. 301 of 1972.)

the Act) is the petitioner in this revision. The respondent herein is the tenant. The landlady filed a petition under S. 14 (1) (a) of the Act for eviction of the tenant from the portion occupied by her in the petition premises on the ground that she bona fide required the said portion to effect repairs. This move of the landlady was resisted by the tenant. The petition HRC No. 301 of 1972 was heard by the VII Judge, Court of Small Causes, Madras, and on a consideration of the materials placed before him, he found that the requirement, as projected by the landlady, is bona fide and ordered eviction of the tenant. The tenant filed an appeal HRA No. 218 of 1974 which came to be heard and disposed of by the II Judge, Court of Small Causes, Madras. The appellate authority came to the conclusion that the requirements of the landlady are not bona fide. and in this view, he reversed the order of the Rent Controller and dismissed the eviction petition preferred by the landlady. The present revision is directed against the orders of the appellate authority.

2. It is needless to point out that the bona fides under S. 14 of the Act has been held to be not tested by stringent standards when an application for eviction is filed under that provision. While laying down the test regarding 'bona fides' under Sec. 14 (1) (b) of the Act, a Division Bench of our High Court in Selvaraj v. Narasimha Rao, 1969-1 Mad LJ 587 has laid down as follows:—

"The quality and content of the expression bona fide appearing in the various sections of the Act and for purposes therein enumerated have to be weighed and construed in different lines under different circumstances having regard to the context in which the expression appears. S. 16 of the Act affords a statutory right to the tenant to reclaim possession of a building secured by the landlord under S. 14 (1) (b), if he does not substantially demolish the building and attempt at reconstruction as proposed. This controlling provision provides as it were a key to the interpretation of the expression bona fide appearing in Sec. 14 (1) (b) of the Act. It appears to us that in cases where the claim of the landlord is not per se dishonest and has not been found to be oblique or for any designed purpose to evict the tenant, then it follows that he is entitled to an order of eviction in the ordinary course, subject, however, to the tribunals constituted under the Act being satisfied that the other relevant conditions required and prescribed under the Act are complied with."

I find that Sec. 14 (2) (a) of the Act reads as follows:—

"(2) No order directing the tenant to deliver possession of the building under this section shall be passed — (a) on the ground specified in clause (a) of sub-sec. (1), unless the landlord gives an undertaking that the building shall, on completion of the repairs, be offered to the tenant, who delivered possession in pursuance of an order under sub-sec. (1) for his reoccupation before the expiry of three months from the date of recovery of possession by the landlord. or before the expiry of such further period as the Controller may, for reasons to be recorded in writing, allow."

Here is a safeguard given to the tenant that after the completion of the repairs, the building shall be offered to the tenant. If we keep this in the background, we find that the question of bona fide pales into less significance and it cannot be put against the 'landlord' by applying the test stringently.

3. On the facts of the case, I find that a notice has been issued by the Corporation treating the premises concerned as in a ruinous condition and demanding rectification of the same by the landlady. The lapse of time between the filing of the petition and the issue of this notice will not be a factor that would militate against the bona fides of the landlady. The appellate authority has chosen to apply the very stringent test of bona fides to negative the claims of the landlady. This is not the proper approach especially when we remember the principles regarding the bona fides laid down by this court. In this view, I find that the order of the appellate authority suffers from an irregularity, illegality aend impropriety. Hence this revision is allowed and the order of the appellate authority is set aside and the order of the Rent Controller is restored, and taking into consideration the facts and circumstances of the case, the respondent-tenant will have six months time to vacate and the learned counsel for the petitioner has no objection to the grant of such a time. No order as to costs.

Revision allowed.

AIR 1978 MADRAS 313

MOHAN, J.

S. Duraiswami Nadar, Petitioner v. Additional Special Deputy Collector (Land Acquisition) Railways, Nagarcoil and others, Respondents.

W. P. No. 3337 of 1976, D/- 19-1-1978.

Land Acquisition Act (1 of 1894), S. 30 — Dispute as to apportionment of compensation — Reference to Civil Court when can be made.

Before a reference to the Civil Court under S. 30 of the Act is made it is necessary to find out whether there is a prima facie case made out for reference and it should not be made mechanically or in a wooden fashion. If there is no dispute relating to ownership or title, the question of apportionment of compensation and consequently of making a reference to Civil Court under S. 30 of the Act does not arise at all. (Para 7)

When there is no dispute that the acquired property belonged to a charitable trust, the Executive Officer who managed the said property could not ask for reference for apportionment of compensation. In view of his right of management he could not claim to be the owner or title holder. (Para 7)

Anno: AIR Man. (3rd Edn.), Land Acquisition Act (1894), S. 30, N. 2, 4.

Cases Referred: Chronological Paras
1974 A. S. No. 734 of 1974 (Mad) 6

S. Chellasami, for Petitioner; N. R. Chandran for Govt. Pleader and T. R. Mani, for Respondents.

ORDER:— The following lands were acquired under the provisions of the Land Acquisition Act, 1894:—

R. S. 1228/77	..	20 acres
R. S. 1231/4	..	7 acres
R. S. 1229/4	..	17.5 acres

These lands belonged to Tiruchendur Subramaniaswami Koil Sukharavara Kattalai Trust, represented by Managing Trustee (Doraisami Nadar) the petitioner herein. The acquisition was for railways. An award was passed on 26-4-1976 and the compensation fixed in the award was Rs. 13664-80. The Additional Special Deputy Collector, Land Acquisition (Railways) Nagarcoil passed an order to the effect that since there was a dispute relating to the ownership of the property, the matter should be referred to Civil Court under S. 30 of the Land Acquisition Act, hereinafter referred to as the Act. It is this award which is sought to be quashed in this writ petition by way of certiorari.

2. Mr. S. Challaswami, learned counsel appearing for the petitioner, submits as under:— S. 30 of the Act contemplates a reference to a Civil Court only in the event of there being a dispute as to the apportionment of the amount or as to the entitlement to payment to the various persons. In the instant case, there were number of proceedings by which the title of the petitioner had come to be established. As a matter of fact, in O. S. 138 of 1971, on the file of the Sub Court Tuticorin, which was a suit to modify the scheme framed by the Deputy Commissioner filed by the second respondent herein, it was clearly admitted in favour of the writ petitioner who was arrayed as the first defendant that the property belonged to the specific endowment viz., Sukkaravara Kattalai. In paragraph 17 of the judgment in O. S. No. 138 of 1971 what is stated is this:—

"In the plaint the plaintiff has not mentioned that there are properties other than the properties mentioned in the plaint. It is not disputed that the suit properties mentioned in the plaint belong to this specific endowment."

Added to this, there was no issue concerning the title relating to these properties. Again, patta was issued under the provisions of the Tamil Nadu Act 31 of 1964, as early as 17-7-1969. These proceedings are conclusive and binding as between the parties which will prove beyond every iota of doubt that the title to the properties had come to be vested with the petitioner. Merely because an appeal has been preferred against the judgment in O. S. No. 138 of 1971, in A. S. No. 735 of 1974, to this court, that does not ipso facto render the position fluid. In other words, that does not mean that there is a dispute relating to the ownership since in the suit there was no dispute at all to the title which was admitted. Nor again any issue was framed to that effect in the suit. Therefore, the reasoning given by the Additional Special Depeuty Collector (L. A.) Railways, the first respondent herein for making a reference under Sec. 30 of the Act is totally erroneous.

3. Learned Government Pleader points out that since there is a dispute relating to the apportionment of compensation, a reference under S. 30 of the Act had to be made which is only a ministerial act and the Land Acquisition Officer has no power to decide the question of title especially when it is disputed. That is precisely the reason why a

reference is made to the Civil Court for a proper adjudication thereof which alone is entrusted with the jurisdiction.

4. Mr. T. R. Mani, learned counsel for the second respondent would, however, submit that there is no dispute that the properties belong to the Trust, but as an Executive Officer, the third respondent will be entitled to manage the trust and therefore he would be entitled to be paid the compensation under S. 30 of the Act. If that be so, there is a dispute relating to the ownership or title to the property. Looked at from this point of view, this order is unassailable. In any event, according to him, having regard to Ss. 31 and 32 of the Act, if the compensation is payable only to the trust, then the proper remedy would be to deposit the sum into court and therefore, from that point of view, at least, the directions to deposit could be upheld.

5. There is absolutely no doubt in this case, that by proceedings more than one, the title of the writ petitioner has come to be established very clearly. First of all, I may refer to O. S. 138 of 1971. That was a suit filed by the present respondents 2 and 3 wherein the writ petitioner was arrayed as the first defendant for the relief of modification of the scheme framed by the Deputy Commissioner, and subsequently confirmed by the Commissioner, Hindu Relegious and Charitable Endowment department. The following issues were framed for trial:—

1. Whether this court has jurisdiction to entertain this suit?

2. Whether the suit is in time?

3. Whether the scheme framed in A. S. 442 of 1091 M. E. by the High Court, Travancore is not valid and binding on the plaintiff?

4. Whether the modifications by the plaintiff for the scheme in question are necessary to be made?

5. Whether the said scheme is opposed to the Hindu Religious and Charitable Endowments Act?

6. Whether the plaintiffs are entitled to sue in a representative capacity under O. 1, rule 8 C. P. C.

7 Whether the election of the defendants 1 and 2 as trustees for life is invalid?

8. Whether the temple authorities have any right to manage the affairs of the trust which is an endowment for specific purpose of performing the Sukkaravara Kattalai which is only to be managed by the trustees duly elected?

9. To what relief, if any, are the plaintiffs entitled?

Relating to issue 1, the learned Subordinate Judge states in paragraph 7 thus:—

"This suit relates to a specific endowment attached to Sri Subramaniaswami temple, Tiruchendur, which temple is situate within the jurisdiction of this court. The suit is filed under S. 70 of the Tamil Nadu Act XXII of 1959 which is herein called as the Act for brevity's sake."

Then again, the learned Subordinate Judge proceeds to state as follows:—

"The suit properties belong to the specific endowment which is now attached to Sri Subramaniaswami Temple, Tiruchendur. The Charity, viz., Sukkaravara Kattalai, for which the suit properties are endowed, has to be performed only at Sri Subramaniaswami temple, Tiruchendur, which is within the jurisdiction of the Sub Court, Tuticorin. As the claim relates to the administration of the trust i. e., the administration of the said specific endowment which relates to the performance of Sukkaravara Kattalai at Sri Subramaniaswami temple at Tiruchendur, a part of cause of action arises at Tiruchendur within the jurisdiction of this court."

In paragraph 17 of his judgment, in unmistakable terms, the learned Judge holds thus:—

"In the plaint the plaintiff has not mentioned that there are properties other than the properties mentioned in the plaint. It is not disputed that the suit properties mentioned in the plaint belong to this specific endowment."

However, the learned Subordinate Judge proceeded to hold in paragraph 18 of his judgment thus:—

"In view of the fact that specific endowment is possessed of considerable extent of properties at Tiruchendur and in Nagarcoil and in view of the fact that the trustees and honorary trustees, it would be better to appoint an executive officer in the interest of efficiency in the administration of specific endowment. It would be better to appoint a whole-time officer as an Executive Officer for due collection of income, maintenance of accounts and other matters relating to day to day administration as it will not be possible for honorary trustees, to attend to such details."

6. Ultimately, the scheme came to be modified. This judgment has been taken up in appeal to this court in A. S. No. 734 of 1974. The fact of preferring this appeal as well as the cross-appeal seems to have weighed with the first respondent herein very much. But, in my view that can have no bearing over a decision whether a re-

ference under Sec. 30 of the Act has to be made or not. As found categorically by the learned Subordinate Judge that there was no dispute relating to the title or ownership, the fact that an appeal has been preferred with reeference to certain modifications of the scheme or again a cross-appeal has been filed will be totally immaterial. Therefore, that reasoning made under the impugned order will have to be ignored.

7. Not only this. Under the Tamil Nadu Act 31 of 1964, by proceedings of the Settlement Tahsildar, Sri Pandavaraka Unit II, Nagarcoil dated 17-7-1969, patta was issued in the name of the petitioner Doraiswami Nadar and one Ramanatha Nadar. What is stated in paragraph 4 of the proceedings of the Settlement Tahsildar, Sri Pandavaraka Unit II, Nagarcoil reads thus:—

"Enquiry reveals that the title to the lands has been established in the name of the claimant temple. Under the powers delegated to me in G. O. Ms. No. 1282, Revenue, dated 4-7-1967, I hereby order under S. 9 (2) read with Sec. 3 (1) of the Kanyakumari Sreepandavarka Lands (Abolition and Conversion into Ryotwari) Act 31 of 1964, that a Ryotwari Patta be issued for the R. S. No. 11990/5, 0.96 cents, 1195/7, 0.83 cents, 1238/1 2 acres 27 cents, 1196/8 0.82 cents; 1196/10 1 ac 62 cents; 1176/1, 1 ac 23 cents; 1189/12 0.74 cents, 1228/7 0.50 cents; 1229/4 0.43 cents; 1226/2 0.69 cents; 1185/3 0.28 cents; 1199/4 1 ac 24 cents; 1197/2 0.98 cents; 1231/4 0.17 cents; and 1188/10 1 ac 60 cents in the name of the Tiruchendur Subramaniaswami Sukkaravara Kattalaivagai" represented by the present trustees Duraiswami Nadar and Ramanatha Nadar."

It requires to be noted here that the lands forming the subject-matter of the acquisition are covered by this patta. In fact, the Additional Special Deputy Collector (L. A) Railways, the first respondent herein, himself notes that when he says 'as per patta No. 7464 of Aloor village'. It may be that the Executive Officer has right to manage the properties, but the right of management does not mean that there is an entitlement to be paid so as to fall under the latter halt of Sec. 30 of the Act. If there is no dispute relating to ownership or title, the question of apportionment does not arise. It is not correct on the part of the learned Government Pleader to contend that it is purely a ministerial act. If that were so, just by putting forward an objection, it could be said that there is a dispute requiring a reference under Sec. 30 of the Act. After all, before a reference is made under Sec. 30 of the Act, it is necessary to find out whether there is a prima facie case made out for reference and not mechanically or in a wooden fashion. In the instant case, there is no dispute, as I said above, as to the title. The question of apportionment also cannot arise. Nor again, the money would be payable to the Executive Officer because the word 'payable' occurring in the section postulates an entitlement to such payment. As otherwise it would mean that the Land Acquisition Officer is a disbursing authority. Therefore, looked at from any point of view, reference under Sec. 30 of the Act is illegal and therefore will have to be quashed. It is entirely a different matter whether the procedure under Sec. 31 or 32 of the Act will have to be followed or not. I am not called upon to decide the same since the reference here very clearly states that it had been made only under S. 30 of the Act, Accordingly, the writ petition will stand allowed. There will be no order as to costs.

Petition allowed.

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SETHURAMAN AND BALASUBRAHMANYAN, JJ.

K. K. Jacob (Minor), Appellant v. The Madurai University and another, Respondents.

W. A. No. 2 of 1977, D/- 29-7-1977*

Madurai University Act (33 of 1965), S. 35 — Evidence Act (1 of 1872), S. 115 — Regular admission to one year Pre-University course — Cancellation by University 4, 5 months after admission — Applicability of doctrine of estoppel.

Where a student passing qualifying examination of another Board but not with percentage of marks prescribed by rules of Madurai University availed of admission in a College affiliated to that University after foregoing fees deposited in another College and his admission was regular and not provisional as was indicated by the letter of University cancelling the admission, the University must be deemed to be estopped from cancelling the admission 4, 5 months after the admission when the regulations of the university contemplated granting exemption from the rules in appropriate

*Against order of Mohan J, in W. P. No. 4440 of 1976, D/- 29-11-1976.

BV/CV/A 377/78/SNV.

cases. In such a case, the student would be deemed to have suffered detriment by foregoing the fees deposited in the College in which he had sought admission first. W. P. No. 4440 of 1976, D/- 29-11-1976 (Mad.) Reversed . AIR 1956 Mad 309 and AIR 1968 Delhi 131 Rel. on.

(Paras 8, 16)

Anno: AIR Manual (3rd Edn.) Evidence Act, S. 115, N. 23.

Cases Referred: Chronological	**Paras**
AIR 1974 SC 2325	16
AIR 1971 SC 1021	16
AIR 1968 SC 718	16
AIR 1968 Delhi 131	11
AIR 1956 Mad 309: 1956 1 Mad LJ 25	9, 10
1951 AC 837 Powell v. Palmouth Road Construction Co. Ltd.	16
(1947) 1 KB 227: (1948) 2 All ER 767 Robertson v. Minister of Pensions.	16

SETHURAMAN J:— This is an appeal from the judgment of Mohan J. declining to admit W. P. 4440 of 1976. The petitioner was a student of Loyola School, Trivandrum and had appeared for an examination conducted by the Council for the Indian Schools Certificate Examination, New Delhi. In the said examination, the petitioner had obtained over 40 per cent of marks in all subjects except Mathematics in which he had secured 35 per cent. The authorities conducting the said examination, issued a certificate to the petitioner stating that he had passed the said examination. The petitioner applied for admission to two institutions, namely, Mar Ivanios College, Trivandrum affiliated to the Kerala University and also to the Scott Christian College, Nagarcoil affiliated to the Madurai University. He got admission first from the College at Trivandrum and he paid the sum of Rs. 175 for the first term fees. Subsequently he got an admission card from the Scott Christian College, Nagarcoil. After getting a transfer certificate from the Mar Ivanios College, Trivandrum, the petitioner joined the Scott Christian College said to be nearer his house, paying a sum of Rs. 200 towards fees etc. He joined the classes and was studying in the said College.

2. On 13-9-1976, a form was taken from the petitioner in which the details relevant for submission to the Madurai University for recognition were recorded. The said form, as the form itself showed had to be submitted through the Principal of the College where the applicant sought admission within 15 days of his admission with evidence of his having passed the examination sought to be recognised and other enclosures mentioned in the application. It is stated in the instructions appended to the said form that pending decision of the application the Principal may admit the applicant provisionally and at the applicant's risk. After more than a month following the submission of the said form to the Madurai University, the Controller of Examinations, Madurai University sent a telegram on 25-10-1976, to the Principal of the Scott Christian College, Nagarcoil, asking him to cancel the admission of the petitioner. The telegram was followed by a letter dated 28-10-1976 from the Controller of Examinations to the Principal. In the said letter after mentioning that the petitioner had obtained only 35 per cent in Mathematics as against 40 per cent required under the relevant rules and after referring to the earlier communications sent to the Principal, it was stated —

"Even then you have admitted the candidate M. K. Jacob to P U C who has not satisfied the above rule, (i. e., he has secured only 35 per cent instead of securing 40 per cent of marks in Mathematics). Hence I am by direction to request you to cancel the admission of the candidate M. K. Jacob to P U C., in your College during 1976-77 immediately under intimation to this office. I am also by direction to inform you that it is irregular on your part to admit candidates of this kind. You should avoid such irregularities in future."

On receipt of this letter, the Principal who is the second respondent in the writ petition sent a letter to the Controller of Examinations stating that the admission of the petitioner to the Pre-University class was cancelled. On 3-11-1976, the petitioner's father received a letter conveying the cancellation of the admission. Immediately the petitioner's father made representations to the Vice Chancellor of the Madurai University appealing to him to stay the operation of the cancellation of the admission and permit his son to continue his studies pending a decision on the representation made to the Syndicate. The petitioner's father got a letter dated 7-12-1976 in which it was stated that the rules of eligibility do not permit of any deviation. Apparently the authorities of the Madurai University had declined to consider the appeal made by the petitioner's

father. The further representation also proved unsuccessful.

3. Thereafter the petitioner filed the writ petition in this Court for issue of a writ of mandamus directing the Madurai University and the Principal, Scott Christian College, Nagarcoil, the first and second respondents to the petition, to permit the petitioner to continue his studies in the Pre-University Course in the Scott Christian College, Nagarcoil, and to complete the same and appear for the University examination. It is this writ petition which was dismissed in limine by Mohan J. Against the said judgment, an appeal was preferred and after admission of the appeal, at the instance of this court, the petitioner was granted the necessary card for appearing for the examination and he has passed the examination conducted by the Madurai University in the Pre University class in the second class. The writ appeal has now come before us for final disposal.

4. The learned counsel for the appellant submitted that the respondents were estopped from cancelling the admission which had been unconditionally given to the petitioner in June-July 1976. For the first respondent the submission was that there cannot be an estoppel against statute and the authorities of the Madurai University had acted perfectly bona fide in cancelling the admission as the said admission was contrary to the relevant provisions of the rules governing the admission.

5. The only statutory provision which was relied on for this purpose by the counsel for the University is S. 35 of the Madurai University Act (Madras Act 33 of 1965). That provision runs as follows—

"Admission to University courses: (1) No person shall be admitted to the Pre University course or other entrance courses of study in the University unless he — (i) has passed the Matriculation examination or (ii) holds the Secondary School Leaving Certificate and has been declared eligible by the Syndicate under conditions prescribed by the University authorities concerned for such course or courses of study; or (iii) has passed an examination of any other University or authority recognised by the Syndicate as equivalent to the examinations specified in cl. (i) or cl. (ii); and (iv) fulfils such other conditions as may be prescribed by the Syndicate".

6. In the list of examinations recognised as equivalent to the Matriculation Examination for purposes of admission to the Pre-University Course is included the examination now under consideration, and it has been stated as follows—

"The Indian Certificate of Secondary Education Examination (Class X) conducted by the Council for the Indian School Certificate Examinations, New Delhi, is accepted as equivalent to the Matriculation examination of this University subject to the condition that candidates should obtain 40 per cent of the marks in the subjects of (1) English language and Literature (2) Mathematics or Modern Mathematics, (3) Sciences (i.e. Physics, Chemistry and Biology) and 35 per cent in the other compulsory subjects and pass the whole examination at one sitting."

There is no dispute that in the present case, the petitioner has passed the whole examination in one sitting. The only shortcoming pointed out by the University authorities is that he had obtained only 35 per cent in Mathematics as against the minimum of 40 per cent required by the University. It is not in dispute that the regulations framed by the University themselves contemplate the University Authorities granting exemption from the operation of the above rule in appropriate cases. It was in this context that during the pendency of the writ appeal, the University authorities were asked by us to review the cancellation of admission. On the ground that the Vice Chancellor is away from the station, the University authorities have stated that it was not possible to consider the application before the end of August 1977. As the petitioner had already obtained an admission in another College in Nagarcoil subject to his succeeding in the present proceedings and as the said seat was to be kept vacant only till 31-7-1977, the petitioner prayed that the writ appeal itself could be disposed of and that the matter cannot wait till the arrival of the Vice-Chancellor as it is not known whether the authorities of the other college would keep the seat vacant till then. It is in these circumstances that we have to dispose of the writ appeal without waiting for the authorities of the Madurai University to reconsider the case in the light of what had been stated in the course of the hearing of these proceedings on an earlier occasion. We are not happy over the attitude adopted by the Madurai University. On an earlier occasion when the matter came up before this court, Ramaprasada

Rao J. sitting with Ratnavel Pandian J. observed —

"After hearing the counsel and without prejudice to the contention of both sides we are prima facie of the view that a condidate who was admitted by the University through its own officers and who stood the test of patience for one year and studied in one of the Colleges affiliated with the University and is appearing for the concerned examination should not now be told about the technicalities of law and the mistakes committed by its own officers so as to deprive the student of his legitimate year of education activity. It is for the University even now to consider whether it would not be equitable and in the interest of justice to regularise the admission as a special case."

7. It may be seen that the observations of Ramaprasada Rao J. were made at a time when the petitioner had not appeared for the examination and his result was also not known. Now, after the petitioner has appeared for the examination and after he had passed in second class, the University authorities are still taking their own time for the purpose of considering whether the petitioner should be given exemption or not. It is not as if the power of exemption has not been exercised in appropriate cases. It is not clear as to why the authorities do not want to exercise the power of exemption in this case.

8. We shall first consider the question as to whether the petitioner was actually admitted without any condition, the word 'provisionally' not being stated in the admission card issued to him, as contended by the counsel for the appellant. In other words, on behalf of the respondents the submission made was that the petitioner had only been provisionally admitted. However, the learned counsel for the appellant submitted that the petitioner had been granted an unqualified admission and that the plea that there was a provisional admission is only an afterthought. As far as this aspect is concerned, it is difficult to decide the question without the counter affidavit from the first and second respondents. Counter affidavits were not filed as the writ petition was dismissed in limine. We do not therefore propose to enter into the question as to how and when certain endorsements of the admission being provisional were made in the application and admission card, but, however we would prefer to rest our consideration on the basis of how the Controller of Examinations, the authority functioning under the University has himself understood the nature of the admission in the present case. We have already extracted the relevant paragraph from the communication of the Controller of Examinations dated 28-10-1976, sent to the Principal, Scott Christian College, Nagarcoil. In the said letter it had been stated that the second respondent had admitted a candidate who had not satisfied the relevant rules. This sentence goes to show that the admission was unqualified and not provisional. If it was a qualified admission and only a provisional admission, then the authorities would only have withdrawn the provisional admission. The fact that he had to cancel the admission clearly goes to show that the admission as originally made was not provisional. Further the petitioner could not be expected to have foregone a regular admission and joined an institution on the basis of a problematical and provisional one. The probabilities do not support the University's contention. We are thus satisfied that there was a regular admission of the petitioner in the second respondent College. In fact any provisional admission would ordinarily be made only pending the consideration of the application to be made to the Madurai University for recognition of the individual cases. In other words, the procedure in such cases was stated to be as follows — Whenever a student had appeared for an examination conducted by any other University other than the Madras, Madurai and Annamalai Universities the College to which an application was made was to forward the application for consideration by the University so as to recognise his admission. In the present case, as mentioned already the admission had been made before 1-7-1976 and the petitioner had paid his fees and had joined the classes on 1-7-1976. If any provisional admission had been made, then one would have expected the appropriate authorities to have taken immediately from him the requisite form for the purpose of recognition by the University authorities. This form, as mentioned already had been taken from the petitioner only on 13-9-1976. After the Principal forwarded this form the University authorities took more than a month for the purpose of considering the same and only after such a delay the University authorities had chosen to cancel the admission given to the petitioner,

These circumstances, in our opinion, go to show that the original admission was not a provisional one and that it was what can be called a pucca admission.

9. If the admission was a regular one as mentioned above, then the question that arises is whether the University authorities had any power to cancel the said admission. The question as to whether the University authorities, in similar cases, are estopped from cancelling the admission has been the subject of consideration in several decided cases. In the Registrar, University of Madras v. Soundara Shetti, 1956-1 Mad LJ 25: (AIR 1956 Mad 309) the candidate who applied for admission to the University course had not actually been declared eligible for such course. He lacked even the basic qualification. However, in the S S L C book that was given to him there was an endorsement that he had been declared eligible. On the strength of that endorsement he sought and obtained admission in a college. Then the University authorities discovered that there was a mistake in his admission and thereafter sought to cancel the said admission. It was the cancellation of the admission that brought the matter before this court in a writ petition. Rajagopalan J. who considered the writ petition made the rule absolute and ultimately an appeal was preferred by the University of Madras. The question that arose was whether the University was estopped from taking up the position that the particular candidate had been wrongly admitted for the University course. In the following passage, the question of estoppel was considered by the Bench thus (at p. 315 of AIR):—

"But he (counsel for the student) contended that in that particular case, having regard to what had happened, the University was estopped from saying that he could not continue his study and that he should leave the College. On the strength of a wrong endorsement made by the Secretary, Secondary Education Board, acting presumably on behalf of the University, the petitioner has expended time and money in pursuing a course of study in the College for nearly two years. He should not now be told that there was a mistake and all the two years of his study should go waste. We agree with him. We would prefer to rest our decision on the ground of equitable estoppel rather than on the ground of unreasonable exercise of power by the University, though ultimately the same result follows. Mr. Venkatasubramania Iyer met this plea of estoppel by the argument that the University was not responsible for what the Principal had done. But this is no answer. What the petitioner relied on is the endorsement of eligibility on the S S L C book which must be deemed to have been made on behalf of the University as a result of which the petitioner undertook a course of study involving the expenditure of time and money. In our opinion, this is an instance of something much more substantial than what Mr. Venkatasubramania Iyer characterised as sentimental estoppel. It is a case of legal or equitable estoppel which satisfied practically all the conditions embodied in S. 115 of the Evidence Act."

10. The learned counsel for the first respondent submitted that the main considerations which weighed with the court in upholding the plea of estoppel in that case was that there was a delay of more than a year and in the present case there is no such delay. However, what has to be remembered is that the petitioner had joined a course of short duration, namely less than a year and he has prosecuted his studies for more than 4 or 5 months before he got the notice of cancellation from the University authorities. Having regard to the duration of the course the delay was unreasonable. Therefore whatever considerations that persuaded the learned Judges in University of Madras v. Soundara Shetti, (1956) 1 Mad LJ 25 : (AIR 1956 Mad 309) to uphold the plea of estoppel are present in the instant case.

11. The learned counsel for the first respondent submitted that the University authorities cannot be made responsible for what had been done by the Principal in this particular case. The question as to whether any action of the Principal is binding on the University has been the subject of consideration by the Delhi High Court in University of Delhi v. Ashok Kumar Chopra, AIR 1968 Delhi 131, In that case the candidate who joined the College had completed an examination conducted by the Gujarat Secondary School Certificate Examination Board, Baroda. He applied for admission in Desabandhu College, New Delhi for studying in B. A. (Pass course) of the University of Delhi. In this case also he lacked the basic qualification, as the said examination of Baroda had been recognised for admission into the College course, and not for the degree course. The parti-

cular candidate had pursued his studies for some time in the degree course and a similar procedure for cancellation of his admission was gone through in the said case also.

12. It was that which brought the matter before the Delhi High Court. It was pointed out at page 137—

"Before discussing the decisions cited at the Bar, we may point out that there are two answers to the argument of Sri Avadh Behari that to these cases, the proposition that there can be no estoppel against a statute will apply. The first answer is, that as pointed out by the learned Judge (Tatachari J. as he then was), in view of the provisions contained in Ordinance X-A any admission made contrary to the terms of clause 1 of Ordinance I cannot be considered to be an ultra vires act, and therefore the proposition has no application. The second answer is that the doctrine will apply only with reference to the pleading of the University that it had not approved the provisional admission made by the principals. The reason is that once the University had kept quiet and had not sent any intimation to the students concerned that it had not confirmed the provisional admission made by the Principals of the Colleges that silence and inaction will amount to a representation that the University had approved the admission of the students concerned. It is the fact that the University had not approved the admission of the students in question that the University is estopped from denying."

13. Again at page 140 it was observed—

"The position is that if the terms of a statute are absolute and do not admit any of the relaxation or exemption, then anything done contrary to the terms of such a statute will be ultra vires and will be void and no person can be estopped from putting forward the contention that what he did was illegal or void. On the other hand, if a statute having prescribed certain conditions or qualifications for the doing of a certain thing itself provides for exemption therefrom under certain circumstances or authorises somebody to exercise the power of exemption then anything done not in terms of those conditions or qualifications will not be ultra vires and will be said to be merely irregular and to such an act, the proposition that there can be no estoppel against a statute will have no application."

14. The above passage completely covers the contention that there can be no estoppel against a statute raised on behalf of the University before us. At page 141 of the report, the question of agency has been considered and it was observed—

"When the applications were taken from the students by the Principals of the College for forwarding the same to the University, the Principals were acting as agents of the University and the University all along knew that on the strength of the provisional admission granted to them by the Principal, the students are continuing their studies in the college and if they are to be told that they were not eligible for admission, they should be told so at an early time."

The Principal would thus be the agent of the University. We consider that in the present case the candidate has not been told early enough that the admission that had been made by the Principal acting on behalf of the University was only a provisional one and was liable to be cancelled and had to be cancelled as it violated some rule, bye-law or regulation. The silence and delay justify the invocation of the doctrine of estoppel.

15. The learned counsel for the first respondent submitted that the petitioner could not be said to have acted to his prejudice in the present case because he had given up his studies in Trivandrum where he had to undergo a two year course while he could complete the Pre-University course which was one year. According to him by joining a shorter course he was not acting to his prejudice or detriment. The decided cases require that in order to uphold a plea of estoppel, the court should be satisfied that there was some detriment undergone as a result of the representation made by the particular authority. Even considered from this stand point, on the facts here, we are satisfied that the petitioner had undergone some detriment. The course that the petitioner had taken in Trivandrum was for about two years and he would have had to study only for two years in the degree course. By joining the shorter course the petitioner would have to study the degree course in Madurai University for a duration of three years. The total duration was four years in both cases. In the present case, the petitioner did not derive any advantage by joining the short course and having paid his fees in the Trivandrum College and having foregone the fees on the basis of the admission

given by the Scott Christian College, he had actually suffered detriment and we are satisfied that the detriment required for the application of the rule of estoppel is present in this case.

16. The learned counsel for the first respondent drew our attention to certain decisions of the Supreme Court but they do not lay down anything contrary to the conclusion drawn by us. However, we may briefly notice one of these decisions namely Asst. Custodian Evacuee Property v. Brijkishore, AIR 1974 SC 2325. In that case, the wife of a Police Officer of the then United Provinces, was in Teheran in 1947 along with her husband. She migrated to Pakistan in 1948. In 1962 she came to India and sold the property which she had in Lucknow. Before the transaction the purchasers had enquired from the Assistant Custodian whether it was an evacuee property and has received a reply in the negative. The property was declared on 25-3-1963 as evacuee property and on 7-3-1964, a Notification was issued acquiring it under S. 12 of the Displaced Persons (Compensation and Rehabilitation) Act. On the question whether there was estoppel operating, a Bench consisting of two learned Judges of the Supreme Court points out that the fact that the purchasers had made an enquiry and had been told that it was not an evacuee property did not make any difference and that the property was evacuee property. Before the Supreme Court, reliance has been placed on a decision of Lord Denning in Robertson v. Minister of Pensions, 1947 1-K B 227. In the case that was decided by the King's Bench, the question was whether the Minister of Pensions was bound by the letter that had been issued by the War Office. In other words, the question was whether one Ministry was bound by a representation made by another Ministry. Lord Denning pointed out—

"In my opinion if a Government department in its dealings with a subject takes it upon itself to assume authority upon a matter with which he is concerned, he is entitled to rely upon having the authority which it assumes. He does not know and cannot be expected to know the limits of its authority. The department itself is clearly bound and as it is but an agent for the Crown, it binds the Crown also; and as the Crown is bound, so are the other departments for they also are but agents of the Crown. The War Office letter therefore binds the Crown, and through the Crown, it binds the Minister of Pensions."

These observations of Lord Denning were disapproved in a later decision of the House of Lords in Powell v. Palmouth Road Construction Co. Ltd., 1951 A. C. 837. The Supreme Court considered that the observations of Lord Denning having been disapproved would not be relevant for consideration in the case before their Lordships. However, these very observations of Lord Denning had been accepted as laying down the correct law by a larger Bench of the Supreme Court on at least two earlier occasions and had become the law of the land. In Union of India v. M/s. Anglo Afghan Agencies, AIR 1968 SC 718, the passage from Lord Denning's judgment was quoted with approval in dealing with a case of estoppel. Again in Century Spinning and Manfacturing Co. Ltd. v. Ulhasnagar Municipal Council, AIR 1971 SC 1021, the Supreme Court reiterated its approval of the passage from the judgment of Lord Denning. Thus the plea of estoppel is available against the Government and other authorities. In fact in the case last cited it was pointed out at page 1025—

"If our nascent democracy is to thrive different standards of conduct for the people and the public bodies cannot ordinarily be permitted. A public body is in our judgment not exempt from liability to carry out its obligation arising out of representations made by it relying upon which a citizen has altered his position to his prejudice."

In the case of Asst. Custodian, Evacuee Property v. Brij Kisore Agarwala, AIR 1974 SC 2325 these earlier decisions of the Supreme Court had not been brought to the notice of their Lordships. Therefore, we consider that the plea of estoppel has to succeed as against the respondents. We consider that the writ petitioner having succeeded on the plea of estoppel, the cancellation of his admission has to be quashed and it is accordingly quashed. The appeal is allowed. There will be no order as to costs.

Appeal allowed.

AIR 1978 MADRAS 322
= 1978 TAX. L. R. 2176

FULL BENCH

P. GOVINDAN NAIR, C. J.,
V. RAMASWAMI AND
SETHURAMAN JJ.

Tvl. Kathiresan Yarn Stores, Salem, Petitioner v. The State of Tamil Nadu, Respondent.

T. C. No. 329 of 1975 (Rev. 47), D/- 11-4-1978.

(A) T. N. General Sales Tax Act (1 of 1959), S. 12 (3) (Prior to amendment by Act 31 of 1972) — Power to impose penalty — To be exercised with proper judicial discretion — Can be exercised only in cases of wilful non-disclosure intended to evade tax. 1971 Tax LR 535 (Mad), (1977) 39 STC 124 (Mad), 1973 TLR 2359 (Mad), Overruled.

It cannot be said that the process of imposition of penalty is almost an automatic one whenever an estimate is made when it is found that no return has been filed or that the return filed did not indicate the turnover to the extent fixed on the basis of the best judgment basis. All the circumstances of the case will have to be carefully scrutinised and the question whether penalty should be imposed must be considered on the basis of the judicial determination of the question whether grounds exist for the imposition of such penalty. In order that penalty may be imposed, it must be possible first to come to the conclusion that there was actually turnover and further that turnover was not disclosed. The mere fact of a best judgment assessment, particularly when the assessment is based on the inference flowing from the inability of the assessee to establish the case pleaded by him, will not be sufficient for the purpose of imposition of penalty, for the degree of proof required for the imposition of penalty is quite different from and is of a much higher order than that required for the purpose of making a best judgment assessment. 1971 TLR 535 (Mad), (1977) 39 STC 124 (Mad), 1973 TLR 2359 (Mad) Overruled; AIR 1969 Mad 284, T. C. Nos. 451 to 455 of 1969 (Mad), Approved, AIR 1970 SC 1782, Rel. on. (Paras 8, 12)

(B) T. N. General Sales Tax Act (1 of 1959), Ss. 12 (2) and 16 (1) (a) — Assessment made under S. 12 (2) — No question of limitation arises. (Para 2)

(C) T. N. General Sales Tax Act (1 of 1959), S. 12 (2) — Assessment under — Validity.

Assessee was carrying on business in handloom cloth and art silk yarn in Madras. He had no branch at Bombay. He had imported art silk through Bombay. There was no proof that assessee sold it at Bombay without bringing it to Madras.

Held that as assessee failed to prove that sales of art silk were outside sales presumption could be drawn that sales had taken place at Madras and the turnover in respect of those sales was liable to tax under the Act. (1973) 32 STC 179 (Mad), Rel. on. (Para 3)

Cases Referred: Chronological Paras

(1977) 39 STC 124 (Mad) 6, 8, 11
1973 Tax LR 2359 : 31 STC 566 (Mad) 6, 7, 12
(1973) 32 STC 179 (Mad) 3, 9
1971 Tax LR 535 : 27 STC 439 (Mad) 6, 12
AIR 1970 SC 1782 : 76 ITR 696 9, 12
AIR 1969 Mad 284 : 20 STC 115 8, 10, 12
(1969) T. C. Nos. 451 to 455 of 1969 (Mad) 9

C. Natarajan, for Petitioner; K. Venkataswami, Addl. Govt. Pleader, for Respondent.

P. GOVINDAN NAIR, C. J.:— Thvl Kathiresan Yarn Stores, registered dealers under the Tamil Nadu General Sales Tax Act, are the revision petitioners. They were carrying on business in handloom cloth and art silk yarn. The department came to know that the revision petitioners had imported art silk to the value of Rupees 4,25,243, through the Port of Bombay. The assessing authority, on estimate basis, fixed the petitioner's taxable turnover at Rs. 4,67,767-30 by adding 10 per cent of Rs. 4,25,243 to that amount. This addition was towards gross profit to the purchase turnover. The amount so fixed, Rs. 4,67,767-30, was assessed at 2 per cent under Sec-

tion 12 (2) of the Act, and a penalty of Rs. 14033 was also imposed on the petitioners under S. 12 (3) of the Act. The appeal taken by the petitioners to the Appellate Assistant Commissioner and the Tribunal failed. Before the Tribunal three points were raised by the petitioners:

1. The assessment was barred by time, as the assessment was beyond the period of five years from the expiry of the year to which the tax related. (The assessment year was 1964-65);

2. The turnover was not liable to tax; and

3. The imposition of penalty was unjustified.

2. The point of limitation was raised on the basis of S. 16 (1) (a) of the Act. The Tribunal found that this was not a case of escaped turnover being assessed under S. 16 of the Act. It referred to the initiation of proceedings under S. 12 of the Act to assess the petitioners on a total turnover of Rs. 11,59,309-05 for the year 1964-65 by a notice dated 18-7-1966 and the reply of the petitioners to the notice, dated 1-9-1966. On subsequent occasions the petitioners had also asked for time to produce the accounts before the assessing authority. A further notice was issued on 15-12-1969 by proposing the assessment now in dispute. Later the assessment was confirmed on that basis by an order dated 30-11-1972. No question of limitation can arise where action has been taken under S. 12 (2) of the Act. The Tribunal therefore rightly negatived the plea of limitation.

3. The second point raised before the Tribunal was based on the contention that, though the art silk was admittedly imported through the port of Bombay, the art silk was never brought to the State of Tamil Nadu, that it was never converted into handloom cloth and that it was never sold in Tamil Nadu. The dealers also contended that the art silk itself was sold in Bombay. But there was no proof of such sale of the art silk in Bombay. In those circumstances, the Tribunal took the view that, the dealers not having established the case pleaded by them, an inference could be drawn that the goods were brought to Madras, converted into handloom cloth and sold in Madras. This view was supported by the decision in State of Madras v. Mohamed Samiulla Sahib and Co., (1973) 32 STC 179 (Mad) relied on also by the Tribunal. We see no reason to interfere with the view taken by the Tribunal on this point.

4. The only other point remaining to be considered is whether the imposition of penalty, in the circumstances of the case, was justified. Penalty was imposed under S. 12 (3) of the Act. Sub-s. (3) of S. 12, as it stood at the relevant time, was in these terms:

"When making any assessment under sub-s. (2), the assessing authority may also direct the dealer to pay, in addition to the tax assessed, a penalty not exceeding one and a half times the amount of tax due on the turnover that was not disclosed by the dealer in his return, or, in the case of failure to submit a return one and half times the tax assessed, as the case may be."

5. The sub-section has been amended by Act 31 of 1972, and the words 'not wilfully disclosed', were substituted for the words, 'not disclosed.'

6. On the wording of sub-s. (3) it was contended that the sub-section did not require any conscious violation of any provision of the Act and that no mental element to constitute a guilty mind had to be established in order that penalty might be imposed. In cases where a return has been filed, and an estimate had to be made applying S. 12, the difference in the turnover returned and the turnover fixed will be the turnover that was not disclosed and penalty can be imposed to the extent of one and a half times the tax due on that difference. It was further pointed out that in cases, where no return had been filed, penalty could be imposed at one and a half times the tax assessed. When this part of the section comes into operation, there can be no question of any turnover not being disclosed. Dealing with this last submission, we would like to point out that, when no return has been filed, there will be no turnover disclosed, and therefore the turnover fixed can be taken to be the turnover not disclosed. So we see no difference between the first part of

sub-s. (3) of S. 12 and the latter part of that sub-section. The question then is whether, in all cases of an estimate under S. 12 (2) of the Act, the authority would be justified in imposing penalty under S. 12 (3) of the Act. Counsel for the petitioners relied on a number of decisions of this Court in support of the submission that, when an estimate is made on the amount of turnover not disclosed, no penalty could be imposed. The wording of S. 12 (3) was compared with the wording of S. 16 (2). Sec. 16 (2) provided that the assessing authority may, if it is satisfied that the escape from assessment is due to wilful non-disclosure of assessable turnover by the dealer, direct the dealer to pay, in addition to the tax assessed, a penalty not exceeding one and a half times the tax so assessed. It was stressed that the words 'wilful non-disclosure' occurring in S. 16 (2) were significantly absent in S. 12 (3), which only talks of turnover not disclosed. Reliance was placed on the decisions of this court in Oveekee Textiles v. Dy. Commercial Tax Officer, 27 STC 439: (1971 Tax LR 535) (Mad); Madras Metal Works v. State of Madras, 31 STC 566: (1973 Tax LR 2359) (Mad) and Rajam Textiles v. State of Tamil Nadu (1977) 39 STC 124 (Mad). In Oveekee Textiles v. Dy. Commercial Tax Officer, 27 STC 439: (1971 Tax LR 535) (Mad) it has been held that the levy of penalty under S. 16 (2) is conditional upon the satisfaction of the authority that the escapement of turnover was the result of an overt culpable act on the part of the assessee, that though such a satisfaction referred to the mental satisfaction of the assessing authority, yet a finding to that effect is the sine qua non for the imposition of penalty under S. 16, that therefore, a penalty levied in the purported exercise of jurisdiction under S. 16, but without such a finding, is unsustainable and that, on the other hand, if the penalty is levied while the assessment is made under S. 12, then it is valid and has to be sustained.

7. In Madras Metal Works v. State of Madras, 31 STC 566: (1973 Tax LR 2359) (Mad) a similar view has been taken (at pp. 2360-61)—

"The learned counsel for the assessee also contends that there is no justification for the levy of penalty in this case and that, in any event, the quantum of penalty is excessive. It is seen that the penalty originally levied by the assessing authority was Rupees 2230, and this has been reduced by the Tribunal to Rs. 750, having regard to the circumstances of the case. The contention advanced on behalf of the assessee in this regard is that mere suppression of turnover for a particular period during the assessment year will not show that there was a wilful suppression of turnover throughout the year and that, unless the assessee is shown to have had sufficient mens rea leading to the inference of wilful suppression of turnover, there could be no levy of penalty. We are not able to accept this contention, for, if there was non-disclosure of a portion of the turnover from the regular account books and the turnover has actually been suppressed from the regular account books, it could easily be inferred that the assessee had the necessary mens rea to exclude such turnover from his regular accounts, with a view to evade payment of tax on such turnover. As a matter of fact, Section 12 (3) of the Tamil Nadu General Sales Tax Act which empowers the assessing authority to levy penalty in cases of this kind, does not make it a condition that the assessee should have the necessary mens rea before he is found guilty of making certain suppressions. In our view, the imposition of penalty in this case cannot legally be taken exception to."

8. The matter was again dealt with by this court in Rajam Textiles v. State of Tamil Nadu (1977) 39 STC 124 (Mad). There is a more exhaustive review of the case law and the view has been taken that wilful non-disclosure is not essential for invoking the power of imposition of penalty under S. 12 (3). The assessee in that case relied on the decision in A. V. Meyyappan v. Commr. of Commercial Taxes 20 STC 115: (AIR 1969 Mad 284) where it had been held that, though a power to impose penalty for non-disclosure was conferred on the assessing authority, it should not be imposed as a routine matter and that it should be exercised with proper judicial discretion. The Court, however, observed that this decision could not

be taken as an authority for the position that a factual wilful non-disclosure was essential for invoking Section 12 (3).

9. In T. C. Nos. 451 to 455 of 1969 Ponnusami Asari v. State of Tamil Nadu this court dealing with a similar question, observed—

"The next question is whether the orders levying penalty can be upheld in these cases. As already stated, there is no positive material to show that the assessee in fact built the lorry bodies for a lump sum. As a matter of fact, the assessments are based on the fact that the assessee has not established his case that the customers did not supply the material. In such cases, where there is no positive evidence to show that the assessee sold the lorry bodies as such, it cannot be said that the levy of penalty under S. 12 (3) is justified. The Tribunal has not separately discussed this aspect of the case. It has merely confirmed the penalty after giving some reduction. We therefore set aside the orders of penalty in these cases, while upholding the assessments on merits."

The above view expressed by this court opens up a line of thinking, which will have to be examined before the justifiability or otherwise of an order imposing penalty under S. 12 (3) can be decided. An estimate of turnover can be made under various circumstances. More often an estimate or best judgment assessment, whether it be for the purpose of imposing sales tax or for the purpose of imposing income-tax under the Income-tax Act, can be based on nothing more than an honest guess. This is permissible in law and no one at this distance of time can contend that the assessment to tax on such guesses is unsustainable. But the question then arises whether by virtue of the mere fact that on the basis of best judgment, the extent of the turnover has been fixed or the income has been fixed, it automatically follows that the assessee had that income or had really sold the goods for the amount of the turnover. In all cases this result would not follow. Though for the purpose of assessment the estimate can stand, we consider that for the purpose of imposing penalty something more concrete is required which would enable the judicial mind to reach the conclusion that the dealer actually had the turnover, which was fixed, or had earned the income which was fixed by the best judgment method. This is because in all cases of imposition of penalty, a greater degree of proof is insisted upon than in the case of assessments. It is unnecessary to labour this point further, because the matter has been dealt with in detail by the Supreme Court in Commr. of Income-tax West Bengal v. Anwar Ali, 76 ITR 696: (AIR 1970 SC 1782). The Supreme Court ruled that the mere fact that the assessing authority in assessing a person, was satisfied that the return filed by the assessee did not disclose his correct income, and proceeded to make a best judgment assessment, and assessed him on that basis, would not by itself lead to the conclusion that the assessee had concealed the particulars of his income or had furnished inaccurate particulars thereof, in order to attract S. 271 (1) (c) of the Income tax Act, 1961. Though the word 'concealed' is not used in S. 12 (3), nor the words 'furnished inaccurate particulars thereof', it would not materially alter the situation. Penalty is for not disclosing. In order that it may be said that there was non-disclosure, it has first to be found that there was turnover or income to disclose. If the existence of the turnover or income is based on the fact that the assessee has not been able to establish the case that he pleaded, that by itself would not prove the positive that there was income or turnover. But the inability to prove the case pleaded would be sufficient to assess the dealer or the person liable to pay tax. In this case itself, the decision to assess has been founded on the principle of the decision in State of Madras v. Mohamed Samiulla and Co., (1973) 32 STC 179. The dealer therein, who was in Madras, had admitted that he had sold goods, but claimed that the situs of the sale was at Bombay where he had no branch. It was held that it was for him to show that the sales, being outside sales, were not taxable under the Tamil Nadu General Sales Tax Act, 1959. It was further held that, if the assessee failed to establish that the sales were outside

sales, a presumption could be drawn that the sales had taken place in Madras where the assessee normally carried on business. This inference is possible for the purpose of assessment. But the question is whether such an inference can be drawn for the purpose of imposition of penalty. We do not think so, because it was the inability of the dealer to prove the case pleaded by him that resulted in the assessment. In such circumstances, we consider that the view expressed in the judgment in TC Nos. 451 to 455 of 1969 (Mad) viz., 'where there is no positive evidence to show that the assessee sold the lorry bodies as such, it cannot be said that the levy of penalty under S. 12 (3) is justified' is the correct view to take.

10. In this connection, it will be useful to refer to the observation in the judgment in A. V. Meiyappan v. Commr. of Commercial Taxes, 20 STC 115 : (AIR 1969 Mad 284). Considering Ss. 12 (3) and 16 (2) of the Act, it was observed in that case (at p. 298)—

"Sub-sec. (2) of S. 16 provides for the imposition of a penalty and a penalty not exceeding 1½ times the tax so assessed is leviable in case the assessing authority is satisfied that the escape from assessment is due to wilful non-disclosure of assessable turnover by the dealer. The mere fact that the turnover has escaped assessment does not invite the imposition of the penalty. Under this provision, the assessing authority has to find that there has been an evasion of the tax due to wilful non-disclosure of turnover which should have been disclosed. Section 12 (3), on the other hand, does not appear to require any such finding of wilful non-disclosure in the return. The mere fact that some item of turnover has failed to be included in the return would appear to confer upon the assessing authority the jurisdiction to impose a penalty. It seems to us that even in the case covered by S. 12 (3) of the Act, a deliberate non-disclosure is really contemplated. The section refers to the imposition as a penalty and a penal provision of this nature cannot have been intended to apply to cases other than where a deliberate concealment by non-disclosure is involved. But, on the question, whether such a provision is unconstitutional, we are unable to agree with the learned counsel. It is well recognised that a power to penalise evasion of tax which is lawfully due is ancillary to the taxing power and the provision cannot therefore be struck down. On the further part of the argument of the learned counsel that mere non-disclosure cannot invite the levy of penalty, we agree. Having regard to the underlying intent of the section, it is still necessary for the assessing authority to be satisfied that the non-disclosure is wilful and is designed to evade the tax. It can hardly be that the Legislature thought that an innocent omission by oversight or some such reason should still invite penal consequences."

11. The above passage was referred to by this court in Rajam Textiles v. State of Tamil Nadu, (1977) 39 STC 124 (Mad), but it was not accepted, apparently because it was felt that the reasoning in the paragraph that followed the one that we have extracted above was the real reason for relieving the assessee of the liability for penalty. That passage runs thus—

"But it is a point worthy of note that between 1956 when the Sales Tax Appellate Tribunal rendered its decision and the date on which these impugned orders were passed, everyone concerned, including the department, was under the view that turnovers of this description were not liable to be included in the turnover of the dealer. It is in that context that we have to examine whether the levy of the penalty for non-disclosure of the alleged turnover in the return is justified."

12. We do not think that it will be a correct approach to belittle the importance of the observations in the earlier paragraph in the judgment, by referring to the subsequent paragraph. Both the passages contain very valid reasons for holding that the imposition of penalty was not justified, and they are to have cumulative effect. This does not mean that the earlier reasoning is less important. The observations in the judgment in TC Nos. 451 to 455 of 1969 (Mad) appeal to us. So also the reasoning in A. V. Meiyappan v. Commr. of Commercial Taxes, 20 STC 115 : (AIR 1969 Mad 284). These observations are in consonance with what the Supreme Court has held in

Commr. of Income-tax West Bengal v. Anwar Ali, 76 ITR 696 : (AIR 1970 SC 1782). We therefore prefer to rest our decision on such reasoning. With great respect, we are not able to agree with the views expressed in Oveekee Textiles v. Dy. Commercial Tax Officer, 27 STC 439 : (1971 Tax LR 535) (Mad), Madras Metal Works v. State of Madras, 31 STC 566 : (1973 Tax LR 2359) (Mad) and Rajam Textiles v. State of Tamil Nadu, (1977) 39 STC 124 (Mad), when it is said that the process of imposition of penalty is almost an automatic one whenever an estimate is made when it is found that no return has been filed or that the return filed did not indicate the turnover to the extent fixed on the basis of the best judgment basis. All the circumstances of the case will have to be carefully scrutinised and the question whether penalty should be imposed must be considered on the basis of the judicial determination of the question whether grounds exist for the imposition of such penalty. In order that penalty may be imposed, it must be possible first to come to the conclusion that there was actually turnover and further that that turnover was not disclosed. The mere fact of a best judgment assessment, particularly when the assessment is based on the inference flowing from the inability of the assessee to establish the case pleaded by him, will not be sufficient for the purpose of imposition of penalty, for the degree of proof required for the imposition of penalty is quite different from and is of a much higher order than that required for the purpose of making a best judgment assessment.

13. In the light of the above, we set aside the order of the Tribunal, in so far as it has imposed penalty on the revision petitioners. We allow the revision petition to this extent and dismiss it in other respects. We direct the parties to bear their respective costs.

Order accordingly.

AIR 1978 MADRAS 327
= 1978 TAX. L. R. 895

FULL BENCH

RAMANUJAM, MOHAN AND BALASUBRAHMANYAN, JJ.

M. Gulam Mohideen, Petitioner v. The Commissioner of Agricultural Income-tax, Board of Revenue, Madras and another, Respondents.

W. P. Nos. 4632 to 4639 of 1975, D/- 6-1-1978.

(A) Tamil Nadu Agricultural Income-tax Act (5 of 1955), S. 34 (2) (c) — Revisional powers of Commissioner — Exercise of — Time limit as to, in cl. (c) — Nature. (1968) 69 ITR 420 (Mad), Overruled.

If the assessee has invoked the revisional power within the period of three years as provided for in S. 34 (2) (c) or if the revisional authority has exercised his suo motu revisional power by calling for the records of the proceedings within the said period, final order in the revision can be passed at any time thereafter. (1968) 69 ITR 420 (Mad), Overruled; (1962) 46 ITR 251 (Mad) and (1963) 14 STC 839 (Mad), Approved. (Case law discussed). (Para 15)

Revision is a legal process and does not denote the final act of passing an order terminating the legal process. The legal process consists of various steps such as calling for the records of the proceedings, making an enquiry by the revisional authority or causing an enquiry to be made thereon, and passing final orders thereon as the revisional authority thinks fit. Therefore, the entire process commencing from the calling of the records and ending with the passing of the final order has been termed as revision in S. 34 (2). Each one of the steps in the process is a revisional process. Therefore, if any one of the steps in the process has been initiated within the period of limitation, there is no further limitation on the exercise of the power. (Para 15)

(B) Interpretation of Statutes — Taxing statutes — Interpretation of a section — Rule as to.

It is well established that in interpreting a section of a taxing Act, which deals merely with the machinery of assessment and does not impose a charge on the subject, that construction should be preferred which makes the machinery workable. It is also well established that a construction so unreasonable

ought not to be preferred when another construction is open and that an interpretation to be placed on the words of the section must be one which harmonises with the context and promotes in the fullest manner the policy and object of the Legislature. (Para 14)

Cases Referred: Chronological	Paras
(1974) 33 STC 353 (Guj)	13
AIR 1970 SC 311 : 25 STC 252	11
(1968) 21 STC 29 (SC)	11, 12
(1968) 69 ITR 420 (Mad)	1, 6, 11, 14
AIR 1967 SC 1408 : 19 STC 493	11
(1967) 19 STC 257 (Mys)	9
(1963) 14 STC 839 (Mad)	8, 14
(1962) 46 ITR 251 (Mad)	1, 6, 8, 11, 13, 14
AIR 1951 Mad 204 : 19 ITR 402	11

S. V. Subramaniam for Subbaraya Iyer, Padmanabhan, Ramamani and K. J. Chandran, for Petitioner; K. Govindarajan for Addl. Govt. Pleader, for Respondents.

ORDER: — This matter has come before the Full Bench in view of the conflicting views expressed by two Division Benches of this Court. Kadirvel Nadar v. State of Madras, (1962) 46 ITR 251 and P. C. Ramaswami Naicker v. State of Madras, (1968) 69 ITR 420, as to the interpretation of S. 34 (2) of the Tamil Nadu Agricultural Income-tax Act, 1955 hereinafter referred to as the Act.

2. The petitioner, who is the same in all these writ petitions, is an assessee under the said Act on the file of the second respondent. For the 8 assessment years 1959-60 to 1966-67 the second respondent assessed him to tax on 30-9-1971 in respect of his income from certain lands, overruling his objection that some of the lands ought not to have been included in his holding and assessed in his hand as those lands belonged to a Madrasa. Aggrieved by the said assessments, the petitioner filed revision petitions before the first respondent under S. 34 of the Act on 24-9-1974. Those revision petitions were, however, returned by the first respondent with an endorsement dated 3-10-1974, that as there was no time for him to pass orders on the revision petitions within the period of three years prescribed under S. 34 (2) (c) he was obliged to return the revision petitions. The said action of the first respondent returning the revision petitions has been challenged in these writ petitions on the ground that it is patently wrong, illegal and unsustainable in law.

3. The petitioner's contention is that once an application for revision is filed under S. 34 within three years from the date of the orders sought to be revised, the revisional authority has to entertain the revision petition and deal with it on merits, that the view taken by the first respondent that final orders in the revision petitions have to be passed within three years is erroneous, and that the said section merely prescribes the time limit for invoking the revisional jurisdiction and not for passing final orders in the revision petitions.

4. The respondents, however, submit that the limitation of three years set out in S. 34 (2) (c) is for passing final orders in the revision petition and not for initiation of revisional proceedings as contended for by the petitioners and that the language of cl. (c) of S. 34 (2) is clear and unambiguous and does not admit of any doubt on this question.

5. The question, therefore, is which of the rival contentions is to be accepted. Section 34 so far as it is relevant is set out below —

"Section 34 (1). The Commissioner may, of his own motion or on application by an assessee, call for the record of any proceeding under this Act which has been taken by any authority subordinate to him and may make such enquiry or cause such enquiry to be made and, subject to the provisions of this Act, may pass such orders thereon as he thinks fit;

Provided that he shall not pass any order prejudicial to an assessee without hearing him or giving him a reasonable opportunity of being heard;

Provided further that an order passed declining to interfere shall not be deemed to be an order prejudicial to the assessee.

(2) The Commissioner shall not revise any order under sub-s. (1) if...(a) ...(b)...(c) the order has been made more than three years previously."

6. Sub-section (1) empowers the Commissioner to revise either on his own motion or on an application by an assessee an order of an authority subordinate to him after making such enquiry or causing such enquiry to be made. Sub-section (2) however, says that an order shall not be revised by the Commissioner acting under this section where the order has been made more than 3 years previously. The revision petitions in these cases have been filed before the first respondent by the peti-

tioner within three years from the date of the orders of assessment and that is not in dispute. The revision petitions have been returned on the ground that as it is not possible for the first respondent to pass final orders within three years from the date of the order, he cannot entertain the same. The first respondent has taken the view that the three year period mentioned in cl. (c) of S. 34 (2) is a limitation on the exercise of the revisional power and that therefore no order in revision could be passed in exercise of the revisional power after the three year period. This view of the first respondent appears to be based on a decision of this Court in M. V. P. C. Ramaswami Naicker v. State of Madras, (1968) 69 ITR 420. The petitioner challenges the correctness of the said view in these writ petitions on the basis of the decision of an earlier Division Bench in Kadirvel Nadar v. State of Madras, (1962) 46 ITR 251, which has held that the period of limitation provided for in cl. (c) of S. 34 (2) is only for initiating or setting in motion the revisional proceedings and not for the termination of the said proceedings. Therefore, we have to see which of the conflicting views is the correct one.

7. It cannot be disputed that the power of revision under S. 34 (1) can be exercised by the Commissioner himself suo motu or on an application by the assessee and the period of limitation provided in cl. (c) of sub-s. (2) is the same for both. Therefore the said clause has to be construed in such a manner as to give full amplitude to the power of revision contained in sub-s. (1) and whatever be the construction it must apply to both kinds of revisions. The nature of the limitation contained in cl. (c) of sub-s. (2) whether it is limitation for the exercise of the revisional power by the Commissioner or for the initiation of revisional proceedings before him by the assessee should be the same in respect of suo motu revision and revision at the instance of the assessee.

8. In Kadirvel Nadar v. State of Madras, (1962) 46 ITR 251 (Mad), an assessee had filed an application for revision under S. 34 before the Commissioner just at the close of the period mentioned in S. 34 (2) (c). That revision petition was dismissed by the Commissioner on the ground that he had hardly any time to call for the records, examine the case and pass orders within the time limit allowed. The order of the Commissioner was challenged before this Court. Jagadisan and Srinivasan, JJ. took the view that it cannot be said that the Commissioner's revisional powers became extinct after the expiry of the period mentioned in S. 34 (2) (c) and that if the proceedings had been initiated by the Commissioner suo motu or commenced at the instance of the assessee within the period prescribed under the Act, the power of revision subsists till the proceedings are properly terminated. According to them it would be anomalous to hold that the revisional power of the Commissioner becomes extinct after the period fixed, as it may happen that the Commissioner may not deal with the matter for various reasons, either because he had other work to do or because the assessee wanted time to place further materials before the Commissioner or for other causes and therefore the criterion is not the point of time when the application is disposed of or the proceedings are terminated, but the point of time when the proceedings are initiated or the Commissioner's jurisdiction is invoked.

The learned Judges referred to the analogus provision in S. 33-A (1) under the Income-tax Act, 1922. and pointed out that the difference in language between S. 33-A (1) and 33-A (2) of the Income-tax Act indicated that while the Commissioner's powers of suo motu revision became extinct if the power is not exercised within the period fixed, his powers of revision on an application by an assessee were not so limited, that the provisions of the Agricultural Income-tax Act did not make such a distinction between cases where the Commissioner exercises his power suo motu and where he exercises revisional powers on an application by an assessee, that therefore, S. 34 of the Act which fixes 3 years as period of limitation applies both to the Commissioner as well as to the assessee, that therefore, so long as the proceedings have commenced within the period fixed, the power of the Commissioner can be exercised at any time thereafter, and that it is not necessary that the power should be exercised within the period. The learned Judges appears to have contemplated a situation where even though an assessee may file an application for revision sufficiently early, the revisional authority may so delay the disposal of the revision petition for a period of three years and then reject the application on the

ground that no order in revision could be passed after the expiry of the said period and with reference to such a situation they observed that the right of the assessee to obtain relief by applying for revision should not depend on the hazard of the revising authority disposing of the matter within a particular period and cannot be defeated by the failure of the authority to discharge the statutory functions. Thus in this decision the time limit prescribed in cl. (c) of sub-s. (2) has been taken as the period of limitation for initiating revisional proceedings under S. 34.

The same learned Judges in a later decision in Alagappa Chettiar v. State of Madras, (1963) 14 STC 839 (Mad) had to consider the scope of S. 34 of the Madras General Sales-tax Act which said — "The Board of Revenue shall not pass any order under sub-s. (1) if more than four years have expired after the passing of the order." The learned Judges referred to the difference in the phraseology used in the General Sales-tax Act, and the Agricultural Income-tax Act, and stated that the expressions 'shall not pass any order' and 'shall not revise any order' have different connotations, that the words 'pass an order' referred to the conclusion of the proceedings while the word 'revise' contemplates the process of revision and that, therefore, the earlier decision in Kadirvel Nadar v. State of Madras, (1962) 46 ITR 251 (Mad) rendered under the Agricultural Income-tax Act cannot apply to a case arising under the Sales Tax Act. Dealing with the scope of S. 34 of the Agricultural Income-tax Act, the Court pointed out—

"It seems to us that, having regard to the scheme of the Madras Agricultural Income-tax Act, and that of the Madras General Sales-tax Act, there is a notable difference between the word 'revise' used in the Agricultural Income-tax Act and the words 'pass any order' in the General Sales Tax Act. The word 'revise' is certainly of wide amplitude; and it does not denote only the actual passing of the order in revision. It includes the initiation of revision proceedings either by the exercise of suo motu powers of the Commissioner or at the instance of the assessee by an appropriate application. In what sense the word 'revise' has been used in the Agricultural Income-tax Act would certainly depend upon the terms of that section and the context in which the said expression occurs. We have pointed out in our decision in Kadirvel Nadar v. State of Madras, (1962) 46 ITR 251 (Mad) that S. 34 of the Agricultural Income-tax Act compendiously includes both suo motu powers of the Commissioner and the right of the assessee to invoke the Commissioner's jurisdiction by way of revision. We have pointed out the anomaly that would result if it were to be held that the revising authority became functus officio after the lapse of the period; that is to say, the assessee's application preferred in time would be easily defeated by mere inaction on the part of the revising authority. In our opinion, such a result would not merely be anomalous but would really be calculated to prejudice the assessee's rights quite unjustly."

9. A similar view has been expressed by a Division Bench of the Mysore High Court in Subba Rao v. Commr. of Commercial Taxes, (1967) 19 STC 257. In that case the scope of S. 21 (2) and (3) of the Mysore Sales Tax Act. 1957 came up for consideration. Section 21 (2) said—

"The Commissioner suo motu may call for and examine record of any order passed or proceeding recorded under the provisions of this Act by any officer subordinate to him for the purpose of satisfying himself as to the legality or propriety of such order, or as to the regularity of such proceeding, and may pass such order with respect thereto as he thinks fit."

Section 21 (3) said —

"that the power of revision provided for in sub-s. (2) shall be exercisable only within a period of four years from the date of order....."

10. Construing the said section, Hegde, J. (as he then was) speaking for the Bench observed —

"The power conferred on the Commissioner under S. 21 (2) as could be gathered from its language includes three different facets viz., (1) calling for the records mentioned therein, (2) examination of those records and (3) passing such orders, with respect thereto as he thinks fit. The Commissioner begins to exercise his power under S. 21 (2) as soon as he calls for the records in question and the exercise of that power comes to an end when he passes an order in respect thereto. All that S. 21 (3) says is that the power conferred under S. 21 (2) is exercisable within four years from the date of the order of assessment, that is proposed to

be revised. As mentioned earlier, the exercise of the power under S. 21 (2) commences as soon as the records mentioned therein are called for. If that act is done within the period mentioned in Sec. 21 (3), then no question of limitation arises".

According to the learned Judges the revisional power consists of different facets and it is enough if one of the facets of the power has been invoked within the period mentioned in Sec. 21 (3) and that the expression 'shall be exercisable' found in Sec. 21 (3) refers to the commencement of the exercise of the power and not its completion and that like all periods of limitation, S. 21 (3) also refers to initiation of the proceedings and not its completion.

11. In M. V. P. C. Ramaswami Naicker v. State of Madras, (1968) 69 ITR 420 (Mad) however, a different view has been expressed by another Division Bench of this court. In that case, construing the scope of Sec. 34 (2) (c) of the Agricultural Income-tax Act, the learned Judges expressed the view that Sec. 34 (2) (c) placed a restriction by way of time limit for the exercise of the revisional powers by the Commissioner, that from the language employed the plain meaning is that the Commissioner cannot make an order in revision beyond three years of the date of the order of his subordinate, that the language makes no distinction between exercise of power on application and suo motu and that in either case the Commissioner must pass his orders before the expiry of the three years period. According to the learned Judges, clause (c) provides for limitation for the Commissioner's exercise of his powers rather than for initiating action under Sec. 34 by an application. In support of the view that clause (c) provides for a limitation for the Commissioner's exercise of his revisional powers, the following observations in Muthiah Chettiar v. Commr. of Income-tax, 19 ITR 402 : (AIR 1951 Mad 204) have been referred to (at p. 205 of AIR):—

"Plausible though this argument may be, so far as sub-sec. (1) of S. 33-A is concerned, we are of opinion that it is not sound so far as the right given to the party aggrieved under sub-sec. (2) is concerned. In a case falling under sub-sec. (1) the Commissioner acts of his own motion. There is no question of the aggrieved party invoking his jurisdiction ..... It may be said that the Commissioner's power to call for the record ceases with the lapse of one year from the date of the order by the subordinate authority. But in a case falling under sub-sec. (2) the party aggrieved has got to take the step of applying for revision and he is allowed one year from the date of the order. The provision is, therefore, certainly in the nature of a time limit for the application of revision."

Referring to the decision of the earlier Bench in Kadirvel Nadar v. State of Madras, (1962) 46 ITR 251, (Mad) the Bench observed:—

"In its opinion, the criterion for purposes of S. 34 (2) (c) of the Madras Agricultural Income-tax Act was not the point of time when the application was disposed of or the proceedings were terminated but the point of time when the proceedings were initiated or the Commissioner's jurisdiction was invoked. The Court was apparently persuaded to take that view, because as the Bench considered the right of the assessee to apply for revision should not depend upon the hazard of the revising authority disposing of the matter within a particular period and could not be defeated by the failure of the authority to discharge the statutory functions. With due respect, we are not able to share that view and would wish that, if a case like that invoking the revisional power by an application arose, the question will have to be reconsidered."

In Sale-tax Officer v. Sudarsanam Iyengar and Sons, 25 STC 252 : (AIR 1970 SC 311), the Supreme Court had to consider the scope of rule 33 (1) of the Travancore Cochin General Sales-tax Rules 1950 which was as follows:

"If for any reason the whole or any part of the turnover of business of a dealer or licencee has escaped assessment to tax in any year or if the licence fee has escaped levy in any year, the assessing authority or licensing authority, as the case may be, subject to the provisions of sub-rule (2) may at any time within three years next succeeding that to which the tax of licence fee relates determine to the best of his judgment the turnover which has escaped assessment and assess the tax payable or levy the licence fee in such turnover after issuing a notice to the dealer or licencee and after making such enquiry as he considers necessary".

It was contended on behalf of the assessee in that case that the language employed in the said rule is such as to lead to only one conclusion that the final determination of turnover which has escaped assessment and the assessment of the tax have to be done within three years, that the words 'determine' and 'assess' have been used with a definite intention to set the limit within which the final order in the matter of assessment should be made. The Supreme Court rejected the said contention holding that the words 'determine' and 'assess' must be accorded their due signification, that the assessment is a comprehensive word denoting the entirety of the proceedings, and that therefore, despite the phraseology employed in rule 33, the principle which has been laid in other cases relating to analogous provisions in Sales-tax statutes must be followed as otherwise the purpose of a provision like rule 33 can be completely defeated by taking certain collateral proceedings and obtaining a stay order or by unduly delaying assessment proceedings beyond a period of three years. The Supreme Court referred to its earlier decisions in State of Punjab v. Tarachand Lajpat Rai, 19 STC 493 : (AIR 1967 SC 1408) and State of Punjab v. Muralidhar Mahabir Parshad (1968) 21 STC 29, as laying down the correct principle while dealing with analogous provisions.

12. In State of Punjab v. Tarachand Lajpat Rai, 19 STC 493 : (AIR 1967 SC 1408), the court was considering the scope of sub-secs. (4) and (5) of Sec. 11 of the Punjab General Sales-tax Act 1948. It was held in that case that if a dealer furnishes a return under sub-sec. (1) or when a notice is issued to him under S. 11 (2) by the assessing authority within the prescribed period, the assessment can be finalised subsequently even after the expiry of the period and no question of limitation would arise. In State of Punjab v. Muralidhar Mahabir Parshad, (1968) 21 STC 29, it was again reiterated that the period of limitation of three years for making the assessment under sub-secs. (4) and (5) of S. 11 of the Punjab General Sales-tax Act was only for initiating assessment proceedings and that if the proceedings had been initiated within the period prescribed in the said section the proceedings whenever completed will be valid.

13. The decision in Kadirvel Nadar v. State of Madras, (1962) 46 ITR 251 (Mad) has been referred to with approval in a decision of the Gujarat High Court in State of Gujarat v. Jamnagar Motor Service, (1974) 33 STC 353. In that case, the interpretation of Sec. 57 of the Bombay Sales-tax Act came up for consideration. That section enabled the Commissioner of Sales-tax of his own motion within five years from the date of any order passed by any officer appointed under Sec. 20 to assist him, may call for and examine the record of any such order and pass such order thereon as he thinks fit and proper. In that case the final orders in revision were passed by the Commissioner after a period of five years, though he had invoked his revisional powers by calling for the records within the said time limit. When the revisional order was questioned on the ground that it has been made beyond time, the court expressed that as the period of five years referred to in Sec. 57 refers to the initiation of revisional proceedings it is not necessary that the entire process of revision must be completed within the said period, that as the revisional power under Sec. 57 can be exercised in favour of the State or in favour of the assessee the argument that the entire process of revision including the passing of the final order must be completed within the period of five years, if accepted, would lead to many anomalies and defeat the very purpose for which the section had been enacted, that it will result in injustice to the assessee because the order of assessment which is apparently erroneous so far as he is concerned cannot be revised and that it is anomalous to hold that the revisional power becomes ineffective after the period of five years as it may happen that the Commissioner may not deal with the matter for various reasons.

14. We are inclined to agree with the view expressed in N. V. S. Kadirvel Nadar v. State of Madras, (1962) 46 ITR 251 (Mad), and Alagappa Chettiar v. State of Madras, (1963) 14 STC 839 (Mad), in preference to view expressed in M. V. P. C. Ramaswami Naicker v. State of Madras, (1968) 69 ITR 420, which in our view is not correct. As already stated, S. 34 (1) provides for revision at the instance of both the Revenue and the assessee. Though the phraseology used in S. 34 (2) (c) can be interpreted to provide a time limit for

finalisation of the assessment by the Commissioner in exercise of his power of suo motu revision, such interpretation fails in the matter of revision at the instance of the assessee. Take a case where the assessee files a revision on the next day after the order sought to be revised was passed. The revisional authority for some reason or other keeps the matter pending for a period of three years and thereafter he dismisses the revision on the ground that the period of three years has expired. The revisional authority can thus easily defeat the assessee's remedy by way of revision by delaying the matter till the three years period expires. Here, for reasons beyond the control of the assessee, the remedy by way of revision is lost to him by the revisional process getting delayed or prolonged. Perhaps, it is for this very reason the statutes dealing with Income-tax and General Sales-tax make two separate provisions for limitation, one for suo motu revision and another for revision at the instance of the assessee and the suo motu revision has to be completed within a certain time from the date of the order, and a revision by an assessee has to be initiated within a particular period. The difficulty in this case has arisen because a composite provision has been made applicable both to the suo motu revision as well as revision at the instance of the assessee. Though similar words occurring in Sec. 33-A (1) of the Income-tax Act has been construed as providing a limitation for the exercise of the revisional power and not for initiation of the proceedings by calling for records etc., it is not possible to give the same interpretation to Sec. 34 (2) (c) of the Agricultural Income-tax Act having regard to the different scheme adopted in this Act. Unlike the Income-tax Act, Agricultural Income-tax Act provides a period of limitation both in relation to suo motu revision as well as a revision at the instance of the assessee. Therefore, any interpretation given must be consistent with this scheme of the Act. If the similar interpretation as has been given to Sec. 33-A (1) of the Income-tax Act is given to Sec. 34 (2) (c) of the Agricultural Income-tax Act, the section will be unworkable and work hardship on the assessees who have to be at the mercy of the revisional authority for an effective disposal of their revision petitions, for the revisional authority can always defeat the assessee's remedy of revision by postponing its disposal beyond three years. It is well established that in interpreting a section of a taxing Act, which deals merely with the machinery of assessment and does not impose a charge on the subject, that construction should be preferred which makes the machinery workable ut res valeat potius quam pereat. It is also well established that a construction so unreasonable ought not to be preferred when another construction is open and that an interpretation to be placed on the words of the section must be one which harmonises with the context and promotes in the fullest manner the policy and object of the Legislature. Therefore, without giving proper effect to the scheme of the Act, we cannot construe S. 34 (2) (c) in the context of the provisions of the Income-tax Act which provides for a different scheme of revision.

15. Further the word 'revise' in Sec. 34 (2) is a comprehensive expression and it does not merely denote the passing of the order in revision. The word 'revise' cannot be understood to mean 'pass an order in revision'. Revision is a legal process and does not denote the final act of passing an order terminating the legal process. The legal process consists of various steps such as calling for the records of the proceedings, making an enquiry by the revisional authority or causing an enquiry to be made thereon, and passing final orders thereon as the revisional authority thinks fit. Therefore, the entire process commencing from the calling of the records and ending with the passing of the final order has been termed as revision in the said section. Each one of the steps in the process is a revisional process. Therefore, if any one of the steps in the process has been initiated within the period of limitation, there is no further limitation on the exercise of the power. Therefore, if the assessee has invoked the revisional power within the period of three years as provided for in Sec. 34 (2) (c) or if the revisional authority has exercised his suo motu revisional power by calling for the records of the proceedings within the said period, final order in the revision can be passed at any time thereafter. In this view, the orders impugned in these writ petitions returning the revision petitions filed by the petitioners cannot be sustained and hence the writ petitions are allowed. The respondent is directed to entertain the revision petitions and dispose of

them according to law. The petitioner is given two week's time from today for representing the revision petitions returned to him. The assessee will have his costs. Counsel's fee Rs. 250 — one set.

Writ petitions allowed.

AIR 1978 MADRAS 334

RAMAPRASADA RAO AND SURYAMURTHY, JJ.

G. V. Gopalacharya, Power of Attorney Agent, Uttaradhi Mutt, Madras 5, Appellant v. State of Tamil Nadu, Respondent.

Appl. No. 812 of 1975, D/- 23-12-1977.

Land Acquisition Act (1 of 1894), S. 23 — Composite property consisting of land with buildings — Compensation — Determination of — Capitalisation of net annual rental value — Procedure.

No hard and fast rule could be laid down in the matter of arrival of the multiple for purpose of capitalisation of the net annual rental value of a composite property subjected to compulsory acquisition. The situation of the property, the age of the building, its potential and all other surrounding circumstances have to be borne in mind before a multiple is thought of for capitalisation. A mechanical adoption of the rate per cent on gilt edged securities as the guide for fixing the multiple or an adherence to the conversion value of such gilt edged securities for purposes of arriving again at the years of purchase is not always safe. Each case has to be decided on its own merits. In the instant case it was noticed that in the year 1964 on gilt edged securities 3 per cent interest was payable and that the conversion value of the same was Rs. 65-80. In the absence of any other evidence the same could be taken as a base for calculation of the number of years purchase. The fact that the building was pretty old with cracks was taken into consideration and the multiple fixed at 27½ per cent instead of 33⅓ per cent. Case law discussed. (Para 5)

Anno: AIR Manual (3rd Edn.), Land Acquisition Act, S. 23, N. 13.

Cases Referred: Chronological Paras

(1975) 88 Mad LW 747	4
AIR 1974 SC 2247	4
AIR 1968 SC 1201	4
AIR 1938 Mad 33	4

EV/EV/B815/78/JDD/DVT

A. Kamala Devi and C. Hanumantha Rao, for Appellant; Miss Vimala, Govt. Pleader, for Respondent.

RAMAPRASADA RAO, J.:— In this appeal the claimant in L. A. C. No. 34 of 1973 on the file of the City Civil Court, Madras, is the appellant. An extent of 6 grounds and 66 sq. ft. in S. Nos. 1916 and 1917 of Triplicane, Madras with a pucca superstructure thereon was acquired by the Government for the public purpose of providing additional space to the National High School for boys, Triplicane. The process of acquisition was challenged under Art. 226 of the Constitution of India. But finally in W. A. No. 272 of 1968, a Division Bench of this court upheld the process and dismissed the writ petition filed by the claimant questioning the right of the State to acquire its property. Originally the notification for acquisition under S. 4 (1) of the Land Acquisition Act was dated 11-2-1964. The Land Acquisition Officer himself described the property as being one in the midst of a pucca residential area and is completely built up and was also occupied by the National High School for Boys, Triplicane. Apparently the funds for acquisition were provided by the Institution for whose benefit the compulsory process was undertaken. The Land Acquisition Officer issued due notices under Sections 9 and 10 of the Act in the year 1965. But those proceedings were stayed till the writ proceedings above referred to concluded in 1968. The Land Acquisition Officer rightly held the view that the value of the property had to be arrived at by capitalising the annual net rental income at a certain number of years with reference to the market quotation of the gilt edged securities and found that such three per cent securities had a conversion value of Rs. 65-80 during the relevant time. He therefore adopted the multiple of 22 and multiplied the net annual rental yield for the property with the said multiple and arrived at the value of the acquired property at Rs. 1,09,733-80. He would not agree with the claimant that the land and the superstructure thereon have to be valued independently. He gave a nominal value of Rs. 90 for the trees in the land and after providing for solatium granted the requisite compensation. After observing that the administrators of Satyapromoddha Theertha Shripadargalvaru of Uttaradhi Mutt were not empowered to alienate the property.

he directed that the entire compensation be deposited in the City Civil Court, Madras, under S. 31 (2) of the Land Acquisition Act with a reference to that court under S. 30.

2. The claimant not being satisfied with the quantum of compensation awarded, sought for a reference under S. 18 of the Land Acquisition Act. The learned trial Judge, who enquired into the matter, after noticing the fair rent which was fixed for the property under the Madras Buildings (Lease and Rent Control) Act and after making the necessary deductions, adopted the multiple of 25 years' purchase and fixed the compensation accordingly. It is as against this, the present appeal has been filed.

3. We may at once state that as regards reference under S. 30 of the Land Acquisition Act made by the Land Acquisition Officer, no orders have been made, nor any such orders have been brought to our notice and we are not therefore called upon to decide on it.

4. In this appeal, we are concerned only with the valuation of the acquired property. It is common ground that a fair rent of Rs. 694 per month has been fixed as the fair rent payable by the tenants in occupation as is seen from Ex. C-6 dated 29-7-1964. This order, as to the fixing of fair rent, it is common ground, has become final. Learned counsel for the appellant raised two contentions. One is that as the award enquiry was really taken up for consideration only in the year 1968 because of the pendency of the writ proceedings, the date of the final order made by the Division Bench in W. A. No. 272 of 1968 is the relevant date for valuation. Secondly it is said that the multiple adopted by the court below is incorrect and as the Land Acquisition Officer himself took the value of 3 per cent gilt edged securities for valuation, the multiple should automatically be 33-1/3 times. Miss Vimala, the learned counsel for the Government pointed out that such an adoption of the multiple is not automatic, but would depend upon the circumstances of each case. She would point out that the building is 60 years old and that there are several cracks in it and therefore the mechanical adoption of multiplying the net annual value by 33-1/3 years of purchase is not possible. The only question for consideration in this case is whether the learned trial Judge was right in having adopted the multiple of 25 in arriving at the capitalised value of the building. We may at once point out that there is no dispute in this case regarding the net annual rental value which was arrived at by the learned trial Judge as Rs. 4,987-90. The question is with what should this figure be multiplied to arrive at the capital value. Mrs. A. Kamala Devi appearing for the appellant relied upon the decision in Collector of Kistna v. Sivarama Prasad, AIR 1938 Mad 33. After ascertaining the net annual revenue of the zamindar from the land acquired, the Division Bench in the above case went on to observe that the said net annual rent must be capitalised by computing the number of years' purchase. 20 times the net revenue from property has in the past been commonly taken to be the capital value of any property or interest in property, and the true justification for this was that approximately 5 per cent was the prevalent rate of interest. Thus it is clear that the number of years' purchase must depend on the rate of interest prevailing on gilt edged securities at the time of the acquisition i. e., on the date of the notification under S. 4 of the Land Acquisition Act. The higher the rate of interest on that date, the fewer will be the number of years' purchase. Relying on this, it is stated that the net annual value should be multiplied by by 33-1/3 as the rate of interest on the gilt edged securities at or about that time was admitted by the Land Acquisition Officer as 3 per cent. Even in the Land Acquisition Manual, a similar procedure for capitalisation is indicated. The Supreme Court in State of Kerala v. P. P. Hassan Koya, AIR 1968 SC 1201, while deprecating the practice of determining the compensation payable to composite properties consisting of land with building by assessing the value of the land and the break-up value of the building observed that the land and the building constitute one unit and the value of the acquired unit must be determined with all its advantages and its potentialities. They also said that the method of capitalisation of the return actually received or which might reasonably be received from the land is the general method which is resorted to in valuing composite properties. But it should be noted as pointed out by the learned Judges of the Supreme Court in that case, that it cannot be laid down as a universal rule applicable to all situations and circumstances that a multiple approximately

equal to the return from gilt edged securities prevailing at the relevant time forms an adequate basis for finding out the market value of the land. In M. N. Khan v. Collector, AIR 1974 SC 2247, it would appear that the Supreme Court would refer only to the rate per cent of the interest allowed on gilt edged securities at the relevant time and not to the conversion rate of such securities for purposes of arriving at the multiple. But the counsel for the Government would refer to a decision of a Division Bench of this court in Manicka Chetti v. Collector of Madras, (1975) 88 Mad LW 747, in which a reference was made by this court to the market quotations given by the Reserve Bank of India in connection with gilt edged securities. Ultimately, in that case to which one of us was a party, the Bench had to take judicial notice of the fact that the interest rate on satisfactory investments in the year 1961 could easily be 5 per cent and the multiple of 20 was adopted having regard to the nature of the property acquired and its situation.

5. On a review of the authorities, we are satisfied that no hard and fast rule could be laid down in the matter of arrival of the multiple for purpose of capitalisation of the net annual rental value of a composite property subjected to compulsory acquisition. The situation of the property, the age of the building, its potential and all other surrounding circumstances have to be borne in mind before a multiple is thought of for capitalisation. A mechanical adoption of the rate per cent on gilt edged securities as the guide for fixing the multiple or an adherence to the conversion value of such gilt edged securities for purposes of arriving again at the years of purchase is not always safe. Each case has to be decided on its own merits. The court below noticed that in the year 1964 on gilt edged securities 3 per cent interest was payable and that the conversion value of the same was Rs. 65-80. In the absence of any other evidence regarding the rate per cent of interest referred to can be taken as a base for calculation of the number of years' purchase. The lower court adopted the multiple of 25. The learned counsel for the appellant expects that the multiple should be 33-1/3. Having regard to the age of the building and the cracks found thereon, we are unable to accept that the net annual yield should be multiplied by 33-1/3. We agree with Miss Vimala the learned counsel for the Government that a deduction has to be made towards the location of the property, its age etc. We fix this multiple at 27½ times the net yield. We are constrained to fix this multiple because the Land Acquisition Officer himself thought that the multiple of 22 was reasonable basing his conclusion on the conversion value of the securities in 1964. But as we are of the view that the conversion value of such securities can only furnish additional hypothesis to arrive at the number of years of purchase and ought not to form the sole guide for evaluation and as the method of valuation in all such cases is not totally bereft of guess work, we adopt the multiple of 27½ times having regard to the circumstances of the case. The net annual rental yield of Rs. 4967-90 would be multiplied by 27½ times and that amount shall be awarded to the claimant. The claimant would also be entitled to 15 per cent solatium on the additional compensation given by us. The claimant is also entitled to interest at 4 per cent on the additional compensation awarded from the date of possession i.e. 18-6-1973 till the date of deposit. The compensation shall be worked out as stated above. The excess compensation shall be deposited in court to the credit of the land acquisition case. The appeal is allowed to the extent indicated above. There will be no order as to costs.

Appeal partly allowed.

AIR 1978 MADRAS 336

BALASUBRAHMANYAN, J.

Nestle's Products (India) Ltd., Appellant v. P. Thankaraja and another, Respondents.

Appeal against Order No. 367 of 1976 in C. M. P. No. 2948 of 1977, D/- 29-4-1977.*

(A) Trade and Merchandise Marks Act (43 of 1958), S. 9 (1) (c) — Invented word — Test — 'Instea' is not invented word.

To be an invented word an expression must not give any inkling as to the type of goods to which the word relates, whether apparently or in a disguised form.

*(Against order of Asstt. Registrar of Trade Marks, Madras, D/- 3-3-1976.)

The invention may be in the adoption of a foreign word; it may consist in an abbreviation; it may be an anagram; it may be formed out of a combination of two or more words, as they are, or in any clipped or altered form; it may introduce one or two meaningless syllables or letters in between words. Whatever be the mode of contrivance, if to the eye or to the ear the resultant expression conveys the same idea as would be conveyed by any recognizable expression in the common vocabulary, then the word would not be regarded by the trade mark law as an invented word. In short, an invented word must be different from any word in common speech, and the difference must be substantial and not skin-deep, merely. In judging whether a word is invented or not, in the sense aforesaid, the Registrar and the court must take in the word as a whole in order to form a totality of impression both of sight and of sound. Case law discussed. (Para 11)

The expression 'INSTEA' does not satisfy the test of an invented word. The two words viz., 'instant' and 'tea' out of which ths word combination is made are quite ordinary words, and their connotations, both in the market place as well as in the kitchen, are unmistakable. They denote the particular kind of ready-made tea, which is so much ready-made that people can make a drink out of it in a jiffy. There can be no mistaking about the character of the goods which is denoted by the expression "INSTEA" which is a condensation of the expression "instant tea". (Paras 16, 21)

Anno: AIR Manual (3rd Edn.), Tr. and Mec. Marks Act, S. 9, N. 3.

(B) Trade and Merchandise Marks Act, (43 of 1958), S. 18 — Evidence and proof.

In proceedings for registration of trade marks, affidavits are receivable not so much as evidence of what they speak about, but as providing information which may be found useful and relevant for rendering the Registrar's determination. (Para 13)

Anno: AIR Manual (3rd Edn.), Tr. and Mec. Marks Act, S. 18, N. 3.

(C) Trade and Merchandise Marks Act, (43 of 1958), S. 109 — Appeal — Power to admit additional evidence.

In an appeal under S. 109 the High Court can admit additional evidence especially when such evidence was not available when the enquiry for registration of the trade marks was conducted. (Para 18)

Anno: AIR Manual (3rd Edn.), Tr. and Mec. Marks Act, S. 109, N. 1.

Cases Referred: Chronological Paras

AIR 1970 SC 2062 10

(1951) 68 RPC 103 (PC), De Cardova v. Vick Chemical Co. 10

(1908) 2 Ch 274 : 99 LT 291, Diabolo Case, Philippart v. William Whiteley Ltd. 9, 10

(1898) AC 571 : 79 LT 195, Eastman Photographic Materials Co. v. Comptroller General of Patents 8

P. K. Kurian for M/s. King & Partridge, for Appellants; M. A. Rajagopalan, for Respondents.

JUDGMENT:— In this appeal under S. 109 of the Trade and Merchandise Marks Act, 1958, M/s. Nestle's Products (India) Limited object to the grant of registration to the trade mark "INSTEA" in favour of M/s. Alvitone Laboratories. Alvitone applied for registration of this trade mark under item No. 3 of the Fourth Schedule to the Trade Mark Rules 1959 which, inter alia, included "tea". The application was made on the footing that the trade mark was "proposed to be used" by Alvitone. The Assistant Registrar accepted Alvitone's application and granted registration to "INSTEA" (word per se) under Part A of the Register.

2. Nestles filed an opposition before the Assistant Registrar objecting to the grant of registration to Alvitone's trade mark. Nestles contended that "INSTEA" was not an invented word. According to them, it was easily recognizable as a portmanteau word to denote "instant tea", an expression descriptive of the character of the commodity in ordinary trade parlance. To grant registration for that word-mark in Alvitone's favour would, according to Nestles, tend to give monopoly advantages to Alvitone and rob others in the same line of trade of their right to employ the very same descriptive expression to denote their products. In support of their contentions, Nestles filed a number of affidavits from third parties who stated that Alvitone's trade mark immediately conveyed to them the suggestion that it related to instant tea.

3. The Assistant Registrar rejected all the grounds of objection put forward by Nestles. He held that "INSTEA" was eminently qualified for registration in

Part-A of the Register under S. 9 (1) (c) of the Trade and Merchandise Marks Act, 1958. He was of the view that it was an invented word. He relied on parallel cases in the books in which registration was granted to trade marks involving words similarly couched. He refuted the contention put forward by Nestles that the word INSTEA would not (sic) tend to embarrass either the trade in tea or the public which consumed it. He rejected the affidavits obtained by Nestles from third parties. He remarked that they were all in stereotyped form and came from the English educated elite who formed only a minority of tea drinkers. According to the Assistant Registrar, the mass of the people who consumed tea in the country were uneducated and they would not gain the impression that INSTEA stood for instant tea—an impression which could only be formed by an intelligent process of subjecting the word to fragmentation.

4. Mr. Kurian appearing for Nestle's in this appeal submitted that the Assistant Registrar's reasonings and findings were untenable. He said that the Assistant Registrar had not properly instructed himself in the law before proceeding to decide the question of registration in this case.

5. In the first place, Mr. Kurian submitted that "INSTEA" is a combination of two concepts, "instant" and "tea". The expression was not an invented word in the true sense. It was quite a commonplace portmanteau word, obtained by clipping the latter part of the expression "instant" and joining what was left of it to the other expression "tea". Learned counsel pointed out that "INSTEA" must suggest to everyone the idea of "instant tea". He explained that the word "instant", when used as an adjective, referred to anything which is made immediately soluble in water such, for instance, instant coffee, instant tea etc. According to him, instant tea which is the idea conveyed by the expression INSTEA, was a common trade description familiar to traders and consumers. The impression which this word created in the people's minds might tend to confuse them if the trade mark were used indiscriminately for all types of tea, such as green tea, blended tea, tea dust and instant tea. On the other hand, it may also deceive them if it was used for non-instant tea of every kind.

6. These submissions of Mr. Kurian were, however, vigorously countered by Mr. M. A. Rajagopalan, appearing for Alvitone Laboratories. He said that "INSTEA" was quite an invented word within the meaning of the statute. He accepted that the expression was capable of being sundered, with INS on the one side and TEA on the other. But he maintained that the word "INS" was by no means a conventional abbreviation of the expression "instant" or "instantaneous". He said that the abbreviation "ins" must mean many things to many men. It may mean 'Insurance' or 'Insured parcel'. Quoting Webster, he gave further examples of what "ins" might stand for. He referred to "inscribed"; "inside"; "inspected"; "inspector"; "insular" etc. To this list, learned counsel added his own contribution, "insolvent". According to him, the usual and well-accepted shortened form for "instant" was not "ins", but "inst". If Alvitone really intended its trade mark to denote instant tea, the word, according to Mr. Rajagopalan, would have been "INST TEA" and not "INSTEA". He also hazarded the argument, addressed apparently for the first time in this appeal, that the portmanteau word "INSTEA" might well be regarded as a mis-spelling of the expression "INNS TEA", meaning thereby 'tea served at inns'. Another argument inspired by the word combination and addressed by learned counsel, again, for the first time before me, was to the effect that INSTEA stood for "Alvins tea", Sans the first three letters, "Alv".

7. In the course of their respective arguments, learned counsel on both sides cited, and made me read through, several reported cases both Indian and foreign on the question of what an 'invented word' is. In every one of those decisions, as I had occasion to observe, the discussion of this conception was clearly directed to the particular trade mark in question before the court at the moment. I found it difficult to draw from them any synthesis of principle. Nor could I regard any of those cases as affording a parallel for the decision in this case. Nevertheless, a study of the law reports did help me form a clear idea in my own mind of the requirements of S. 9 (1) (c) of our Trade and Merchandise Marks Act in relation to invented words.

8. Section 9 (1) (c) enacts that a trade mark shall not be registered in Part-A unless it contains one or more invented

words. The Act provides no definition for what an "invented word" is. But this omission is compensated for by the discussion we find in one or two leading decisions. The view most often quoted in this connection is that of the House of Lords in the celebrated "Solio Case" The Eastman Photographic Materials Company Limited v. The Comptroller General of Patents, Designs, and Trademarks, (1898) AC 571. I quote the following observations of Lord Shand and Lord Herschell as laying down the proper guideline and approach as under:—

Lord Shand: "I agree with your Lordships, and particularly with what has been said by my noble and learned friend Lord Macnaghten, in thinking, that the Comptroller-General will be fully warranted in taking care that there shall not be admitted, under the guise or cover of words called "invented" by the applicant, words really in ordinary use, which might, in a disguished form, have reference to the character or quality of the goods. There must be invention, and not the appearance of invention only. It is not possible to define the extent of invention required; but the words, I think, should be clearly and substantially different from any word in ordinary and common use. The employment of a word in such use, with a diminutive or a short and meaningless syllable added to it, or a mere combination of two known words, would not be an invented word; and a word would not be "invented" which with some trifling addition or very trifling variation, still leaves the word one which is well known or in ordinary use, and which would be quite understood as intended to convey the meaning of such a word."

Lord Herschell:— "I do not think that the combination of two English words is an invented word, even although the combination may not have been in use before; nor do I think that a mere variation of the orthography or termination of a word would be sufficient to constitute an invented word, if to the eye or ear the same idea would be conveyed as by the word in its ordinary form."

9. Parker, J., in a subsequent case called the Diabolo Case, Phillippart v. William Whiteley Limited (1908) 2 Ch 274, put the matter neatly in the following passage:—

"To be an invented word within the meaning of the Act a word must not only be newly coined, in the sense of not being already current in the English language, but must be such as not to convey any meaning, or, at any rate, any obvious meaning, to ordinary Englishmen. It must be a word having no meaning or no obvious meaning until one has been assigned to it. I use the expression "obvious meaning" and refer to "ordinary Englishmen" because, to prevent a newly-coined word from being an invented word, it is not enough that it might suggest some meaning to a few scholars."

10. The two English cases, from which I have quoted, have been adopted by courts in our country for construing the expression "invented word" occurring in S. 9 (1) (c) of our Trade and Merchandise Marks Act. In Hoffimann-La Roche and Co. Ltd. v. Geoffrey Manners and Co. Private Ltd., (AIR 1970 SC 2062), the question arose before the Supreme Court as to whether "Dropovit" was or was not an invented word within the meaning of S. 9 (1) (c) of the Act. In discussing the subject, the Supreme Court adopted the views expressed by Parker, J., in the Diabolo Case (1908) 2 Ch 274. The Supreme Court referred, in passing, to the observation of Lord Radcliffe in De Cordova v. Vick Chemical Coy., (1951) 68 RPC 103 in which the noble Lord described the interpretation of Parker, J., as "the best standing definition of an invented word."

11. These decisions show that to be an invented word an expression must not only have been newly-coined; it must, standing by itself, convey no sense or meaning. It is, in any case, essential that the word must not give any inkling as to the type of goods to which the word relates, whether apparently or in a disguised form. The invention may be in the adoption of a foreign word; it may consist in an abbreviation; it may be an anagram; it may be formed out of a combination of two or more words, as they are, or in any clipped or altered form; it may introduce one or two meaningless syllables or letters in between words. Whatever be the mode of contrivance, if to the eye or to the ear the resultant expression conveys the same idea as would be conveyed by any recognizable expression in the common vocabulary, then the word would not be regarded by the trade mark law as an invented word. In short, an invented word must be different from any word in common speech, and the difference must be substantial and not skin-deep,

merely. In judging whether a word is invented or not, in the sense aforesaid, the Registrar and the court must take in the word as a whole in order to form a totality of impression both of sight and of sound. Too minute an analysis of the word and its components can easily lead us astray, get the subject out of focus and reduce the inquiry to a mere word-game or spelling-bee an exercise which can have little or no relevance to the purpose of statutory registration of trade marks. For gaining a correct impression about the trade mark as an invented word it is, I think permissible for the Registrar as well as the court to rely on every material that is available to them, having relevance to the inquiry. It, however, seems to me that the matter will not get decided satisfactorily by merely consulting the dictionaries or drawing upon other people's reactions. It is essentially and ultimately for the court to form a right impression about, bringing to bear its experience of life and language and trusting to its faculty of judgment.

12. As earlier mentioned, Nestles has brought on the record of this case a number of affidavits sworn to by individuals who are said to represent a cross-section of the public. All of them, to a man have sworn that "INSTEA" at once brought to their mind the idea of instant tea. I do not think there is any reason to disbelieve their statements. The Assistant Registrar rejected the affidavits for another reason; he remarked that all of them said the same thing in the same words. He characterized the affidavits as stereotyped. I do not, however, think this criticism, repeated before me by learned counsel for Alvitone, is to the point. The affidavits were quite obviously intended as so many samples of broad public reaction on the subject of the trade mark under inquiry. It was, accordingly, quite in keeping with this function that they should all have adopted some kind of pro forma language. In this sense I feel that they could not help being stereotyped. Indeed, they might have sounded quite artificial if each of them had striven for individuality of style.

13. Another contention put forward before me on these affidavits is that they do not constitute legal evidence and are not worth consideration. This objection, again, is based on a view of the trade mark law which, in my opinion, is not quite well-informed. The Trade Marks Act confers jurisdiction on the Registrar and the court to render their determination in respect of various matters arising in proceedings taken under it. Registration of trade marks is one; action for infringement of trade marks is another; and so on. Cases in the books show that these proceedings have not to follow, as their model, the procedure prescribed for trial of suits before the law courts. Even in actions for infringement, where there is clearly a lis between adversaries which the court having jurisdiction has to adjudicate upon, decided authorities show that the evidence of witnesses can play only a subordinate role in the formation of the court's final determination. For instance, a question that often arises in infringement cases is, whether a trade mark possesses deceptive similarity to a registered trade mark. There are high precedents for the view that the court is not to be swayed by the testimony of witnesses for deciding whether the trade mark under dispute is deceptively similar. It is said that the court should not surrender its prerogative and yield it to the opinions of witnesses. As has been observed, the real function of evidence of witnesses in such cases is to act as so many pieces of information which the court may usefuly refer to, for enabling it to arrive at the right conclusion. This position, which obtains in infringement proceedings, must equally apply, in my opinion, to proceedings for registration of trade marks. Affidavits are receivable in such inquiries not so much as evidence of what they speak about, but as providing information which may be found useful and relevant for rendering the court's determination. In this view, the Evidence Act does not come into the discussion at all.

14. Mr. Rajagopalan characterized the affidavits as mere opinion evidence. I do not think this is quite an apt description, for they record the deponents' mental reactions to the trade mark, which are essentially to be regarded as states of mind. It is wise law that states of mind are states of facts, and, as facts, they are provable by evidence. Even otherwise, their relevance in the context of the inquiry before the Registrar and the court cannot be gainsaid. All that can be urged is that the affidavits are not to be regarded as the last word on the subject of whether INSTEA or any other word-mark is an invented word.

15. Mr. Rajagopalan urged one last argument on the subject of the affidavits. He said that they have all been obtained from persons knowing the English language. Their impressions about an invented word in that language cannot, it was urged, truly reflect the common reactions of ordinary men and women who gather around tea-shops, people who do not know English and whose reflexes are not English-oriented. I must say that this argument, if accepted, would shake the very linguistic foundations of our legal system. Whether we like it or not, English in our country is the language of the law. The Trade and Merchandise Marks Act is in English. The business of the Trade Marks Registry is transacted in English. The court expresses itself in English. And so on and so forth. In this milieu, I cannot see how the fact that English is not the language of the people can be accepted as a sound argument for rejecting the affidavits.

16. I do not, therefore, reject the affidavits as of no importance. At the same time, I do not completely rely on them either. For I have to address the crucial questions to myself in order to get the right answers. When the arguments opened and when, for the first time, I came across the expression "INSTEA", my first impression was that the word had something to do with tea and had something to do with instant. This first impression, I must confess, has outlasted all the learned arguments and explanations I happened to listen to subsequently in the course of the hearing of the appeal. It seemed to me that this is a fine example of a telescoped expression such as we find in "artsilk" for artificial silk, "Comintern" for communist international, and "Consembly" as a newspaper equivalent of constituent assembly. One instantly assimilates these word-combinations and knows them for what they stand for even where they drop some vowels and consonants in between. It is the association of ideas that the word produces and which the inventor of the word aims at producing. I do not minimise the resourcefulness of the person who hit upon the expression INSTEA, but I have hardly any doubt about what he was driving at. The two words out of which he fashioned his invention are quite ordinary words, and their connotations, both in the market place as well as in the kitchen, are unmistakable. They denote the particular kind of ready-made tea, which is so much ready-made that people can make a drink out of it in jiffy. In my opinion, there can be no mistaking about the character of the goods which is denoted by the expression "INSTEA" which is a condensation of the expression "instant tea."

17. The paramount consideration in a matter of this kind is not open to discussion. Whenever a trade mark offered for registration is claimed to be an invented word, registration of it can only be allowed if that word does not have the tendency to monopolise a part of the general vocabulary of the trade or restrict the use of words which traders in the line or elsewhere would be likely to need to describe their own goods. From this point of view, it seems to me that "INSTEA" has the tendency to monopolise all manufactured tea which goes by the generic description of 'instant tea' or 'instantaneous tea'. To grant registration to this word-mark, would therefore make Alvitone as its owner a monopolist of a part of the ordinary vocabulary in which traders transact business with themselves and their customers.

18. Alvitone had claimed before the Assistant Registrar that it was not associating the mark "INSTEA" purely with reference to instant tea, but it wished to avail it for all kinds of tea and tea preparations. This was accepted by the Assistant Registrar. Mr. Kurian, learned counsel for Nestles, however, controverted this claim of Alvitone by reference to how that concern had since set about the job. Mr. Kurian sought to place before me an advertisement put forth by Alvitone and published in "The Times of India" bearing the date 29-5-1976. The advertisement appeared after the grant of registration by the Assistant Registrar. The advertisement copy announced "INSTEA" as the first Indian instant soluble tea from the "House of Alvitone". To this declaration was appended a catchphrase or slogan: "Instea — The incredible instant tea." Learned counsel for Nestle's filed an application in C.M.P. No. 2948 of 1977, in this regard requesting me to take in this advertisement as additional evidence in the appeal. The application was resisted by the learned counsel for the Alvitone. He said that the advertisement, occurring, as it did, after the grant of registration after full inquiry, should not be admitted in evid-

ence at this stage. I am not able to sustain this objection to reception of this evidence. The rationale behind the provision giving the appellate court a discretion in the matter of allowing additional evidence at the stage of the appeal is that such evidence was not available at the time of trial in the court of first instance. Admittedly, this advertisement was not there at the time when the Assistant Registrar had conducted the inquiry. In any case, the law allows an appellate court to take note of subsequent events, especially when the appellate court is convinced that such evidence is not only pertinent to the case, but will aid the decision in the appeal. I, accordingly allow C.M.P. No. 2948 of 1977.

19. The advertisement itself, is in my view, a clear demonstration of the earlier apprehension voiced by Nestles that "INSTEA" stands for instant tea. In the context of this advertisement, the original claim of Alvitone that the trade mark was asked for not merely for 'instant tea' but also for other varieties of tea, such as, 'green tea', or 'black tea', etc., must lose its validity. Besides, in so far as the expression "INSTEA" is intended to refer to tea other than, 'instant tea', Alvitone must face the further criticism that, if so used, it is likely to mislead people into thinking that what is offered under this trade mark is, 'instant tea' and not any other kind of tea.

20. As to the last proposition, Mr. Rajagopalan argued, as I have already mentioned, that this point had not been taken before the Assistant Registrar and even in the grounds of appeal. The argument is really based on S. 11 which, it was pointed out, did not figure in the discussion before the Assistant Registrar. Mr. Kurien, however, referred to the counter statement filed by his client before the Assistant Registrar. In para 4 of that statement or notice of opposition, Nestle's Products said that the granting of monopoly rights to the mark, "INSTEA" will embarrass the trade and the public in using the expression 'instant tea'. In the enquiry before the Registrar, it seems to have been argued that 'instea' is not adopted to distinguish the applicant's goods, as the word will be purely descriptive in respect of 'instant tea' while it will be deceptive in respect of any other tea. The contentions aforesaid are found narrated in the order of the Assistant Registrar, although he rejected them as untenable. Mr. Kurien submits that all that the pleadings and arguments before the Assistant Registrar lacked was a specific reference to S. 11. This provision enacts that "a mark the use of which would be likely to deceive or cause confusion shall not be registered as a trade mark." It is the contention of Mr. Kurien that "INSTEA" is likely to deceive or cause confusion if it is used for tea other than, 'instant tea'. It is also likely to cause confusion if the same expression "INSTEA" were to be used for all kinds of manufactured tea whether green tea or black tea or dust tea or instant tea.

21. I do not propose to resolve this preliminary controversy between the parties on the contention based on S. 11. The applicant may or may not have raised this plea in the first instance before the Assistant Registrar. In either case, there is scope for allowing the matter to be argued purely as a question of law on the basis of the materials on record. I, however, do not propose to enter into the discussion to find out how far S. 11 can apply, in the view I have earlier taken as to the failure of the expression "INSTEA" to satisfy the test of its being an invented word under S. 9 (1) (c) of the Act.

22. The result is that I allow the appeal and set aside the order of the Assistant Registrar granting registration. There will, however, be no order as to costs.

Appeal allowed.

AIR 1978 MADRAS 342

V. RAMASWAMI, J.

G. Vasantha Pai, Petitioner v. C. K. Ramaswamy and another, Respondents.

Writ Petn. No. 1574 of 1978, D/- 5-7-1978.

(A) Constitution of India, Arts. 188 and 367 — Jurisdiction of Governor under Art. 188 — Concurrent with persons appointed by him under Art. 188 — Option to choose between them vests in the member. (General Clauses Act (1897), Ss. 14, 15 and 16).

When the Governor in exercise of his powers under Art. 188 of the Constitution appoints some person or persons before whom the members may make

and subscribe their oath/or affirmation, he does not thereby abdicate his own power under the Article but the jurisdiction of both is concurrent and the option lies with the member in Council to choose between the two before whom he would like to make the oath or affirmation. (Para 11)

This conclusion follows both from the construction of the constitutional provisions of Arts. 188 and 367 read with Ss. 14 to 16 of the General Clauses Act, 1897 and the general accepted theory that an authority which delegates its powers does not divest itself of its powers and can resume them in full or in part. The mere fact that the Governor is the constitutional head of the State does not make any difference on this question as the Constitution itself envisages the very making and subscribing of the obligation before the Governor. (1890) 25 Q B D 391 and 1951-2 KB 393 and AIR 1950 Mad 100 and AIR 1964 Andh Pra 357, Rel. on. (Paras 12 13)

Anno: AIR Comm., Constn. of India, (2nd (1971) Edn.), Art. 188, N. 1; Art. 367, N. 1.

(B) Constitution of India, Art. 188 — Words 'in that behalf' — Interpretation of — Notification of Governor under Art. 188 appointing persons before whom Oath or affirmation may be subscribed by member — Validity.

The words 'in that behalf' in Art. 188 are intended both to acknowledge the making and subscribing the oath and for certifying that it was done in the form that is required. The purpose of appointment being thus to enable the members generally to take the oath before such authority and get a certificate or compliance with Art. 188, the words 'in that behalf' could not be given a restricted meaning as referring to the persons who are to make the oath and not the authority to witness and give declaration of compliance. If the notification is clear that it is the members of the Assembly or the Council who may make and subscribe the oath before them, it conforms to the specificity even if any specificity is required and the notification itself could not be invalidated merely on the ground that the individual names of the persons who are to take the oath had not been mentioned while appointing the person. Further, the words 'in that behalf' cannot be given a narrow meaning as relating to the names of the members who are to take their obligation to be mentioned there. It may be that if a specific officer is appointed under Art. 188 for the specific purpose of enabling a specified member or members to take their oath, that notification also will be valid and within Art. 188. But that does not mean that if an appointment is made with a specific direction generally that every member of the Council may make and subscribe his oath or affirmation before him and the appointment is for an unlimited period, it lacks any specificity and for that reason it is invalid. (Para 15)

The use of the words 'in that behalf' in no way restricts the power of the Governor to appoint one or more persons either by name by designation for a particular period or for an indefinite period, provided it specifies that they are appointed in exercise of the powers under Art. 188 and for the purpose of any and every member of the Assembly or the Council, as the case may be, to make and subscribe their oath or affirmation. AIR 1965 All 97, Dissented from. (Para 17)

Anno: AIR Comm., Constn. of India, (2nd (1971) Edn.), Art. 188. N. 1.

(C) Constitution of India, Arts. 163, 188, 226 and 361 — Immunity of Governor against answerability to any Court — Extent of — Writ petition challenging action of Secretary of Legislative Council — Maintainability — Arts. 163 and 361 no bar to going into question of compliance of Art. 188 by member and his insistence to take oath before the Governor.

The contention, that the function of the Governor under Art. 188 is also one of the functions to be exercised by the Governor on the 'aid and advice' of the Council of Ministers or at least one to be done on his own discretion and, therefore, by virtue of Arts. 163 and 361 the exercise of the discretion by directing the petitioner to go before the person appointed by him under Art. 188 could not be questioned in a Court of law either directly or indirectly, cannot be accepted. (Para 17)

A combined reading of Arts. 154, 163 and 316 (1) would show that the immunity against answerability to any Court is in respect of the functions exercised by the Governor/qua-Governor and those functions in respect of which he is bound to act on the aid and advice of the Council of Ministers, or a function which he could exercise in his discretion. (Para 17)

The Governor, so far as Art. 188 is concerned, is in the same position as some person appointed by him in that behalf. In legal parlance, he may be called as a persona designata. He does not even administer the oath or affirmation as in the case of Arts. 75 (4) and 164 (3). He is merely a witness to the making and subscribing of the oath. Therefore the witnessing of the oath-taking under that Article by the Governor, is not and could not be held as one of the functions in respect of which the Governor is required either to act on the aid and advice of the Council of Ministers or even as a constitutional function to be discharged by him at his discretion. Consequently, the provisions of Arts. 163 and 363 are no bar to going into the question as to whether the petitioner had complied with the provisions of Art. 188 of the Constitution or whether he could insist on taking the oath before the Governor. AIR 1952 Trav-Co 166, Foll. (Paras 18, -8A)

Where the petitioner's grievance throughout had been that the Secretary had been standing in the way of his taking the obligation under Art. 188 and functioning as a legislator contending that substantial compliance with Art. 188 is enough and in fact, there was substantial compliance with Art. 188 and the relief to be given is only against the Secretary, Legislature, so that the petitioner could be permitted to sign the roll of members, take a seat in the Legislative Council, and enter duties as such legislator.

Held that in the circumstances of the case, the question of maintainability of the writ petition on the basis of Arts. 163 and 361 did not arise at all. (Para 19)

Anno: AIR Comm., Constn. of India, 2nd (1971), Edn., Art. 361, Notes 3 and 6.

(D) Constitution of India, Art. 226 — Writ challenging order of Secretary of Legislative Council — Additional ground if can be given in support of the validity.

When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons as mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. AIR 1978 SC 851, Foll. (Para 19)

Anno: AIR Comm., Constn. of India, 2nd (1971) Edn., Art. 226, N. 42.

(E) Constitution of India, Art. 226 — Discretion of High Court — Jurisdiction of High Court to grant appropriate relief — Prayer for relief of declaration of petitioner's title to Office of a member of Legislative Council — If can be granted — Existence of remedy by way of suit if a bar to maintainability of petition. (Civil P. C. (1908), S. 9) — (Specific Relief Act (1963), S. 34).

It is true that normally declaratory reliefs are associated or consequential to the declaration of the invalidity of a statutory provision or rule or an illegal action taken on the assumption of the jurisdiction which is not vested in the authority. But Art. 226 of the Constitution gives the High Court very wide discretion in the matter of framing of the writs to suit the exigencies of particular cases and the application of a petitioner cannot be thrown out simply on the ground that either none of the well-known prerogative writs can afford an adequate or appropriate remedy to the person nor on the ground that the proper writ or declaration has not been prayed for. (Para 20)

If in a quo warranto proceeding, the validity of appointment of a third party could be questioned and a declaration obtained, there is no reason why the petitioner himself cannot ask for a declaration of his title to the office. AIR 1959 SC 725 and AIR 1965 SC 491, Rel. on. (Para 22)

Moreover, it is very doubtful whether there is any other remedy available to the petitioner at all in this case apart from the remedy under Art. 226. Certainly the relief which he had asked for in this proceedings could not be asked for in a suit under S. 9, C. P. Code or S. 42 of the Specific Relief Act, as the validity of the appointment under Art. 188 of the second respondent as well as that of the Chairman and Deputy Chairman of the Tamil Nadu Legislative Council is not questioned as ultra vires of the Constitution. Important questions as to the interpretation of the Constitution as also the scope of the immunity of the Governor under Arts. 163 and 361 are involved. In those circumstances, the petitioner was certainly within his right in invoking the jurisdiction of this Court to determine those important questions even if there was any such right to file a suit. Therefore the argument of non-maintainability of the writ petition is untenable. (Para 23)

Anno: AIR Comm., Constn. of India, 2nd (1971) Edn., Art. 226, Notes 17, 18, 48.

(F) Constitution of India, Art. 188 — Essential requirements for compliance of provisions of Art. 188 — 'Subscribe' — Meaning of — Whether strict compliance of provisions of Art. 188 is necessary or substantial compliance is enough in particular circumstances of a case.

Article 188 requires (1) that the writing of the oath or affirmation shall be according to the form set out for the purpose of the III Schedule; (2) that the Member shall make and subscribe the oath or affirmation which, means, that he should read the declaration and sign under the writing as a token of acceptance, and (3) that the requirement that making and subscribing shall be before the Governor or some person appointed in that behalf by him shows that somebody should witness the oath being made and subscribed by the member. AIR 1965 All 97, Rel. on. (Paras 24 to 26)

On an analysis of the form set out in the III Schedule, it may be seen that the oath or affirmation shall contain words to the effect (i) that the member shall bear true faith and allegiance to the Constitution of India as by law established; (ii) that he shall uphold the sovereignty and integrity of India; and (iii) that he will faithfully discharge the duty upon which he was about to enter. The inclusion of these three declarations in the oath or affirmation and the signing of the same in acceptance thereof is the most important and substantial part of the requirement of Art. 188. Subscribing to the oath before the Governor or a particular person is required only for the purpose of witnessing the oath being made, so that it could be put as a record and put the question as to whether a Member did take the oath or not beyond the purview of any dispute. (Para 27)

Though the oath or affirmation should be made and subscribed as a solemn declaration without belittling the importance of the promise made through the oath and affirmation, merely by adopting simplicity and making the proceedings informal, the provisions of Art. 188 could not be said to have been not strictly followed. What is more important is the understanding by the Member of what he is subscribing to, and his sincerity in making the declaration and signing the same. If there are unimpeachable evidence and circumstances which show that the Member in spite of his best efforts could not comply strictly with the letter of Art. 188, but had with a full understanding and implications of the contents of the oath or affirmation signed the same and sent it to the authorities concerned and there was no dispute about his making the oath or subscribing to the same or his understanding of the contents of the oath, it should certainly be considered that the Member shall be deemed to have complied with the provisions of the Art. 188. This does not mean that the making and subscribing the oath before a particular authority is an empty formality. But at the same time a possible situation may arise where he could not take that obligation before a particular authority, though he had done all that he could do. In that sense, if the Member had consciously made and subscribed fully, understanding the implications thereof, and there was no dispute about the factum of his signing the declaration in the form prescribed, it is just and reasonable to hold that the Member substantially complied with the provisions of Art. 188. AIR 1970 SC 765, Foll. (Paras 27, 30)

Held on the facts of the case, the petitioner shall be deemed to have substantially complied with the provisions in Art. 188 and he is entitled to sign the roll of Members of the Council and take the seat in the Tamil Nadu Legislative Council as a duly elected Member from the Madras District Graduates' Constituency without any further obligation on his part. (Paras 31, 32)

Anno: AIR Comm., Constn. of India, 1971 (2nd Edn.), Art. 188, N. 1.

Cases Referred: Chronological	**Paras**
AIR 1978 SC 851	19
AIR 1970 SC 765	28
AIR 1965 SC 491	22
AIR 1965 All 97	16, 24, 27
AIR 1964 Andh Pra 357	12
AIR 1959 SC 725	21
AIR 1952 Trav-Co 166	18
(1951) 2 KB 393 : (1951) 2 All ER 101, Manton v. Brighton Corpn.	12
AIR 1950 Mad 100	12
AIR 1947 PC 90	21
(1890) 25 QBD 391 : 63 LT 348, Huth v. Clarke	12

The Petitioner in Person; The Advocate-General assisted by the Govt. Pleader, for Respondents.

ORDER: — The petitioner had been a Member of the Tamil Nadu Legislative Council from June 1969 to April 1976. In the biennial election held on 9-4-1978, he was by a Notification dated 11-4-1978,

made by the Returning Officer, declared to have been duly elected to fill one of the seats from Madras District Graduates Constituency for the Legislative Council of Tamil Nadu. In pursuance of S. 74 of the Representation of the People Act, 1951, the election of the petitioner was notified in the Tamil Nadu Government Gazette Extraordinary dated 21-4-1978. On such notification under S. 74, the petitioner had become a Member of the Legislative Council and his term of office as such Member began on and from 21-4-1978, as contained in the provision of S. 157 of the Representation of the People Act. Though he had thus become a Member by virtue of the declaration and notification of the result under S. 74, Art. 188 of the Constitution required that he shall before taking his seat in the Council make and subscribe before the Governor or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule to the Constitution. Certain penalties and consequences are provided in Art. 193 if a Member takes a seat in the Council or votes before he has complied with the requirements of Art. 188. The Council's rules require the member to sign the roll of members kept by the Council's Secretary before he takes his seat and enters on his duties as a Legislator in the Council.

2. On the 12th April 1978, after he was declared elected, the petitioner contacted the first respondent who is the Secretary of the Legislative Council and informed him that he would like to take his oath. Later, the first respondent informed the petitioner that the Notification as to the report of the result of the election was expected to be made in the Official Gazette and that he could take the oath after such notification made under S. 74 of the Representation of the People Act. Though there are certain allegations made in the affidavit filed in support of the writ petition about the telephonic conversations between the petitioner and the first respondent during the period from 12-4-1978 to 21-4-1978, it is not necessary for me to take note of those statements as they are not relevant except to note two factors. One is that the petitioner was insisting on his being sworn to and his right to be sworn arose only on 21-4-1978, when he had become a member by reason of the Notification under S. 74. The other factor is that by a D. O. letter dated 17-4-1978, the first respondent informed the petitioner that before the petitioner could take his seat in the Legislative Council, he will have to make and subscribe an oath or affirmation as required under Art. 188 of the Constitution and that "the Tamil Nadu Legislative Council will meet at 4 p.m. on Monday the 24th April 1978 for the administration of oath or affirmation to the newly elected or nominated members of the Legislative Council." In this letter, the first respondent further requested the petitioner to be present in the Legislative Council Chamber before 4 p.m. on Monday the 24th April 1978, with the certificate of election issued by the Returning Officer, as it had to be deposited with the Secretary, Legislative Council, before taking the oath or affirmation.

3. By one notification dated 20-4-1978, published in the Gazette Extraordinary, on the same date, the Governor of Tamil Nadu notified that as the Office of the Chairman, Tamil Nadu Legislative Council was vacant, in exercise of the powers conferred by cl. (1) of Art. 184 of the Constitution, he had appointed the second respondent who is a Member of the Legislative Council to perform the duties of the Chairman from the forenoon of 21st April 1978, until a Chairman is chosen by the Council under Art. 182 of the Constitution. By another Notification of the same date published in the Gazette, in exercise of the powers conferred by Art. 188 of the Constitution, the Governor of Tamil Nadu appointed the second respondent "as the person before whom the oath or affirmation may be made by the members of the Legislative Council under the said Article."

4. The petitioner met the Governor on 22-4-1978 at 10-45 a.m. and apprised the Governor that he would like to take his oath before him only. After some discussions, when asked what objection was there for the petitioner to take oath before the second respondent, the petitioner explained to the Governor that the second respondent's speech in the Council on State Autonomy wherein he urged the then Chief Minister to follow the example of Mujibur Rahman in the event of the Centre not conceding his demands, was very shocking to him and he had registered his protest immediately in his speech made in the Council then and he (petitioner) felt that the second respondent had violated the spirit and

letter of oath he had taken under the Constitution to uphold sovereignty and integrity of India and that he would not like to be sworn in by him. He had also mentioned certain other objections for swearing before the second respondent though the second respondent has been nominated by the Governor under Article 188. In the affidavit the petitioner further States —

".....the Governor then told me that I was sentimental but if I insist I could contact the first respondent herein and ask him to place the papers before him and arrange for the swearing in by him as he pointed out there was the necessity of the Legislature staff being present and my signing the register before him. I thereupon immediately went to the first respondent and informed him of my interview with the Governor and gave him a letter to that effect. The first respondent received the orignial of the said letter at 12-55 p.m. on 22-4-1978 and also took from me the original declaration of result for the purpose of being forwarded along with my papers to the Governor....."

5. In the letter dated 22-4-1978, referred to in the above passage, the petitioner's presenting himself before the Governor with the declaration of the result informing him of his desire to take the oath before the Governor and his unwillingness to take the oath before the pro tem Chairman and what the Governor informed him on that representation were all referred to. In this letter, he had made a request to the first respondent to make arrangements to enable him to take the oath before the Governor by 23rd April 1978, so that he could vote in the house for the election of the Chairman on the 25th. An interim reply was sent by the first respondent to the petitioner to the effect that his letter was under consideration. On 22-4-1978, the petitioner sent a wire to the Governor which read as follows—

"Presented myself twenty second for taking oath under Art. 188. As directed moved Secretary, Council place papers before you. No intimation. Please administer oath before 10 a.m. 24th. Lest I be disqualified under Articl 193.

Vasantha Pai, M. L. C."

This was followed by a letter on the 24th to the Governor. After inviting the Governor's attention to the telegram and his objections for taking oath before the second respondent, and the first respondent's inaction, he requested the Governor that the oath be administered to him immediately, so that he could perform the functions as a Legislator and take part in the election of the Chairman. He also requested to be informed of the date and hour immediately so that he could present himself for such swearing.

6. It is seen from the counter affidavit filed on behalf of the respondents that a copy of the petitioner's letter dated 22-4-1978 was submitted to the Governor immediately on the same date. The counter affidavit further stated—

"The matter was then examined by Government; and orders of the Governor obtained on 23-4-1978. The communication in this regard was served on the petitioner at 8-30 a. m. on 28-4-1978, as 23-4-1978 was a holiday".

The communication referred to in this paragraph was written by the first respondent to the petitioner on the 24th and it stated that the first respondent was directed to inform the petitioner that 'as you have got sufficient opportunity to take the oath or affirmation before the Chairman pro tem appointed for the purpose under Art. 188 of the Constitution of India either in his Chamber or at the meeting of the Council specially convened for the purpose at 4 p.m. on Monday the 24th April 1978, it is not possible to comply with your request". It is not necessary to note in detail the contents of the letter dated 24-4-1978 written by the petitioner to the first respondent in response to his letter except to state that the petitioner had been reiterating his stand and that he had not been sworn in spite of his best efforts.

7. On 27-4-1978 the petitioner sent his oath in the form prescribed in the Sch. III duly signed by him in duplicate to the Governor along with a covering letter in which he stated that he is sending the oath in duplicate duly signed by him in view of the great delay in administering the oath under Art. 188. He referred to Art. 188 as the sacred Constitutional duty of the Governor to administer the oath to the members who call upon him for the purpose and stated that no red tape or bureaucracy should be permitted to obstruct it. He also stated that he has been deprived of his right to to take part in the election of the Chairman and Deputy Chairman of the Council and to be present at the two sittings of the Legislative Council held on 24th and 26th April 1978, 'despite my calling

upon you on the 22nd and despite my further letter of the same date to the Secretary, Legislative Council, requesting him to send papers to you as advised by you. No papers were sent to you and no oath has been affirmed to me. I had stated my objections to taking oath before the pro tem Chairman, Mr. K. S. Abdul Wahab, and I was within my rights to request you to administer the oath to me, as you are the person envisaged by the Constitution to administer the same, I request you kindly therefore to accept this as my oath and send me a certificate that the same has been duly taken before you. Should you, however, desire that I should call on you in person and read out my oath before you, I shall be happy to do so, if I am intimated the time and place for the purpose."

8. In the meantime, the Governor had fixed 26-4-1978, as the date for holding the election of the Chairman and the Deputy Chairman stating that nominations would be received by the Secretary till 12 noon on Tuesday the 25th April and that nomination forms can be had from the Secretary. On 26-4-1978, there being only one nomination of the Chairman and the Deputy Chairman respectively, Thiru, M. P. Sivagnanam was declared elected as the Chairman of the Legislative Council and Thiru G. Swaminathan was declared elected as the Deputy Chairman. In the Gazette Extraordinary dated 26-4-1978, the election of the Chairman and the Deputy Chairman was notified and in the Notification in G. O. Ms. No. 27 Legislative Council, dated 26-4-1978, published in the same Gazette, it was notified that in exercise of the powers conferred by Art. 188 of the Constitution, the Governor had appointed Thiru M. P. Sivagnanam, Chairman, Tamil Nadu Legislative Council and Thiru G. Swaminathan, Deputy Chairman, Tamil Nadu Legislative Council 'as the persons before any of whom the oath or affirmation may be made by the Members of the Legislative Council under the said Article". After this appointment and Notification, the first respondent wrote a letter on 28-4-1978 to the petitioner informing him that now that the Chairman and the Deputy Chairman of the Legislative Council have been appointed under Art. 188, as the persons before any of whom oath or affirmation may be made by the members, he may be informed as to whether he (petitioner) would like to take the oath or affirmation as a member before the Chairman, so that he can fix a time for the purpose. But the petitioner had taken up the stand that he had performed all that was required of him under the Constitution and the law and that he was entitled to sign the roll of members of the House and take part in the conduct of the business of the Council. Accordingly, he filed this writ petition praying for issue of a writ in the nature of declaration declaring that he (petitioner) having performed his obligations by presenting himself before the Governor on 22-4-1978 to subscribe to the oath as required by Art. 188 of the Constitution of India and having further informed the Secretary, Legislative Council, by his letter of 22-4-1978 to make the necessary arrangements for the making of the oath and subscription thereof before the Governor and having further on 27-4-1978 subscribed in writing to the oath as prescribed in Schedule III of the Constitution and sent the same in duplicate to the Governor offering to follow it up, if necessary by taking the oath in person, has performed all his obligations under Art. 188 of the Constitution and is entitled to take his seat in the Legislative Council as a duly elected Member from the Madras District Graduates Constituency without any further obligations on his part.

9. The learned counsel for the petitioner contended that under Art. 188, the Governor is the primary authority before whom every member shall, before taking his seat, make and subscribe an oath in accordance with the form set out for the purpose. It is true the Constitution also authorises the Governor to appoint 'some person in that behalf' but an exercise of that power to appoint 'some person' in that behalf should not be construed as amounting to an abdication of his authority under the Article. When in exercise of the power the Governor appoints some authority as the person before whom any member may make and subscribe the oath or affirmation, it would only mean that such person appointed would exercise a concurrent jurisdiction along with the Governor. If there are two authorities with concurrent jurisdiction before whom the members can make and subscribe the oath or affirmation, necessarily the option is vested on the members to take their oath or affirmation before either of them. Conversely, a member cannot be compelled in such circumstances, to take the oath before one of the authorities and not the

other. Per contra, the learned Advocate General contended that the Governor can discharge the 'Constitutional function' under Art. 188 in one of two ways. He can either allow the members to make and subscribe their oath or affirmation before him or delegate the function to some other authority and direct the members to take their obligations before such other delegated authority. While making such appointment in exercise of the powers under Art. 188, the learned Advocate General also concedes that the Governor does not abdicate his function or duty enjoined under that Article. But according to the learned counsel, if the Governor had chosen to appoint a person in that behalf, the power retained by him to allow any member to make and subscribe the oath before him is dormant or latent and it could be exercised only at his discretion either resuming the delegated authority in entirety by cancelling the delegation or resuming it with regard to any particular occasion or person. In this connection, he also wanted to contend that whatever might have happened on 22-4-1978, when the petitioner presented himself before the Governor and wanted to take the obligation before him, in view of the statement in the counter affidavit, it may be taken that the Governor on the advice of the Government had expressed a desire at least after 22nd April that the petitioner should take his obligation before the second respondent. The further contention of the learned Advocate General is that the function of the Governor under Art. 188 is in the nature of an executive function and as such, under Art. 163 he is to be aided and advised by the Council of Ministers in exercise of that function, and if such is the nature of the function Art. 361 of the Constitution will be a bar for the court to either directly or indirectly question the decision. Even if it were to be taken as not an executive function but one of those functions required to be exercised in his discreton, the discretion of the Governor in this regard shall be final and the validity of any act done by him shall not be called in question on any ground under Art. 163 (2) read with Art. 361.

10. It is the constitutional mandate that every member of the Legislative Assembly or Lagislative Council of the State shall before taking the seat make and subscribe an oath or affirmation before the Governor or some person appointed in that behalf by him. Correspondingly, therefore, we have to take it that there was an obligation on the part of the Governor or some person appointed in that behalf by him to permit every such member to make and subscribe an oath or affirmation before him.

11. The first point, therefore, to be considered is that when the Governor had chosen to appoint, in exercise of his powers under Art. 188, some person before whom the members may make and subscribe their oath or affirmation, either he abdicates his power under the Article or ceases to be obliged to permit every member to make and subscribe his oath and affirmation. It is the common case of both the petitioner and the learned counsel for the respondents that by appointing a person before whom any member may make and subscribe his oath or affirmation, the Governor does not abdicate his power. The only thing that is put in issue between the parties is that whereas the learned Advocate General would contend that the power is not to be exercised concurrently and the power retained by the Governor is dormant or latent to be exercised at his option either by way of the resumption of the power delegated in its entirety or in a particular instance, the petitioner would contend that the Governor and the person appointed by him have concurrent jurisdiction or obligation and having regard to the penal provision contained in Art. 193 and the right of the elected member to enter on his duties as a Legislator as early as possible, the option to take the obligation before any of them is vested in the member and not in the Governor or his nominee. Having given my careful and anxious consideration, I consider that the more just and reasonable view to take would be to treat the jurisdiction as concurrent and the option being vested in the member of the Council. I had reached this conclusion on the cumulative reasonings set out hereunder.

12. Under Art. 367, unless the context otherwise requires, the General Clauses Act 1897 shall apply for the interpretation of the Constitution as it applies for the interpretation of any Act of the Legislature of the Dominion of India. S. 14 of the General Clauses Act provides that when any Act or Regulation confers any power, that power may be exercised from time to time as occasion requires. Under S. 15, where a power to appoint any person to fill an office or

execute any function is conferred, then, unless it is expressly provided, any such appointment could be made either by name or by virtue of office. Under S. 16, the authority having power to make the appointment shall have power to suspend or dismiss any person appointed in exercise of that power. It is also a rule of construction that unless the context otherwise requires, singular includes plural. Under Art. 188, the Governor could appoint 'some person' in that behalf. The word 'person' will include 'persons'. Accordingly, the Governor could appoint more than one person before any of whom the members may make or subscribe their oath or affirmation. Before a member had made and subscribed such oath or affirmation, the Governor could also revoke the appointment and appoint another person in that behalf. In fact, it had been the practice in this country for the President in exercising his powers under Art. 99 corresponding to Art. 188, and for the Governors in the various States under Art. 188 to appoint more than one person as authorities before any of whom the members may make and subscribe their obligation. It is not in dispute that by the very terms of the notifications, when the Governor appoints more than one person, the option is given to the members to make and subscribe their oath or obligation before any of them at their choice. The language used in the notification in the instant case both at the time when the second respondent was appointed and also at the time when the Chairman and the Deputy Chairman elected on 26-4-1978, were appointed shows that the oath 'may be made' before any one of those persons, thereby showing that it is not obligatory on their part to take the oath before them only and not before the Governor. In fact, in the context of Art. 188 and the language used in Arts. 60 and 159, the Constitution itself contemplates a concurrent jurisdiction being vested in the Governor and the person appointed by him in that behalf. Wherever the Constitution required the making and subscribing of the oath or affirmation to be done only in the presence of a particular specified authority, it specifically mentions so as in the case of President of India and the Governor of a State under Arts. 60 and 159 respectively. In all other cases, for instance, in Arts. 69, 99, 124 (6), 148 (2) and 219, more than one authority were contemplated as persons before any of whom a member may make and subscribe his oath or affirmation. Some similar statutory provisions also have come up for consideration before courts. The general accepted theory was that an authority which delegates its powers does not divest itself of them and can resume them in full or in part. A similar question came up for consideration in the decision in Huth v. Clarke, (1890) 25 Q. B. D. 391. In that case, under schedule 6, clauses 5 and 6 of the Contagious Diseases (Animals) Act 1878, a local authority may appoint an executive committee, which is to have all the powers of the local authority, except rating powers and the executive committee may appoint sub-committees and delegate to them all or any of the powers of the executive committee with or without restrictions, and may from time to time revoke or alter any such delegation. The executive committee of a county council delegated its powers under the Rabies Order, 1887, to a sub-committee. Subsequently to each delegation, the executive committee, without expressly revoking the delegation, issued certain regulations under the Rabies Order as to the muzzling of dogs and keeping them under control. The validity of the executive committee's regulation was in question on the ground that they have already delegated their power to the local sub-committee. While upholding these Regulations made by the Executive Committee, Lord Coleridge C. J. observed thus—

".....But delegation does not imply a denudation of power and authority; the 6th schedule of the Act provides that the delegation may be revoked or altered and the powers resumed by the executive committee. The word 'delegation' implies that powers are committed to another person or body which are as a rule always subject to resumption by the power delegating and many examples of this might be given. Unless, therefore, it is controlled by statute, the delegating power can at any time resume its authority. Here the executive committee has exercised the power which the sub-committee might have exercised — but did not — and no question of conflict of jurisdiction arises. I think, therefore, that the justices came to a perfectly right conclusion, and the conviction must be upheld".

Wills J. on the other hand, while upholding the conviction, gave different reasonings. In the words of the learned Judge—

"Delegation, as the word is generally used, does not imply a parting with powers by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself. The best illustration of the use of the word is afforded by the maxim, Delegatus non potest delegare, as to the meaning of which it is significant that it is dealt with in Broom's Legal Maxims under the law of contracts; it is never used by legal writers, so far as I am aware, as implying that the delegating person parts with his power in such a manner as to denude himself of his rights. If it is correct to use the word in the way in which it is used in the maxim, as generally understood, the word 'delegate' means little more than an agent. The notion, therefore, that the use of the word 'delegate' implies that the executive committee parted with their own authority is misconceived".

It is seen from this judgment that the regulations were upheld but on inconsistent grounds, one Judge holding that the executive committee had resumed its powers and the other, that it had never parted with them. But, in my view, the reasoning could be reconciled. If the delegated authority had already exercised that power, the question of the delegating authority's power would not arise because in such a case, whether the exercise by the delegated authority was right and within his jurisdiction would be the only question and it could not have been the subject matter of the authority who delegated that power. So long as the authority delegated had not been exercised by the delegated authority, the power still remains with the original authority and no question of the jurisdiction of the original authority could arise at all. This decision was followed in the later decision in Manton v. Brighton Corporation 1951-2 KB 393. A similar case came up for consideration before this court also in the decision reported in P. Ramiah v. Chief Secretary, AIR 1950 Mad 100. In that case, under S. 15 of the Madras Maintenance of Public Order Act 1947 (Madras Act 1 of 1947), the Governor directed that the powers conferred on the Provincial Government by Sec. 2 (1) (a) of the said Act shall be exercised also by all the District Magistrates and the Commissioner of Police, Madras, within their respective jurisdictions. Some persons who landed in Madras from Malaysia were arrested by the police at Madras on their arrival on 19-11-1948. On 30-11-1948, orders of detention under Madras Act 1 of 1947, were passed by His Excellency the Governor of Madras, under S. 2 (1) of the Act directing the detention of those persons in the Central Jail, Vellore. It was contended in that case that since in exercise of the powers under Sec. 15 of that Act, the powers conferred under S. 2 (1) (a) on the Provincial Government had already been delegated to all the District Magistrates or the Commissioner of Police, within their respective jurisdictions, the Governor had no power to pass an order of detention under Sec. 2 (1). Rejecting this contention, the Division Bench held following the decision in Huth v. Clarke (1890) 25 QBD 391, that such delegation of authority to the Commissoner of Police did not deprive the Government of its power under Sec. 2 (1) in making the order of detention. A single Judge of the Andhra Pradesh High Court in the decision in Anakapalli Municipality v. Commissioner, AIR 1964 An Pra 357 following the decision in Huth v. Clarke (1890) 25 QBD 391 and the Madras decision had also taken a similar view.

13. Thus, both on the construction of the constitutional provisions and the authorities cited, it would follow that the jurisdiction of the Governor under Art. 188 is concurrent along with the person who was appointed by him in exercise of the powers under Art. 188. If once it is agreed that it is a concurrent power, there could be no doubt that the option is vested on the member who wants to make or subscribe his oath or affirmation and not on the authority concerned. In fact, the learned Advocate General did not dispute that except for the case of the Governor, in the case of other persons who were nominated, the choice was on the member. I do not find any distinction. The mere fact that the Governor is the constitutional head of the State does not make any difference on this question as the Constitution itself envisages the very making and subscribing of the obligation before the Governor.

14. The petitioner also contended that in fact there was no alternative authority before whom he could take the oath on the ground that the notification relating to the appointment of the second respondent and the notification relating to the appointment of the Chairman and Deputy Chairman of the Council under

Art. 188 are not in accordance with the provisions in Art. 188. In respect of the first respondent's letter dated 28-4-1978, informing the petitioner that the Governor has appointed the Chairman and the Deputy Chairman of the Legislative Council as persons before any of whom the oath or affirmation under Art. 188 may be made by the members and that if the petitioner could intimate him expressing his desire to take the oath or make the affirmation as a member, he would place the letter before the Chairman and a time will be fixed, the petitioner in his affidavit contended that the notification itself was not in accordance with the Constitution. A general delegation of power by the Governor without specifying the persons who are to make and subscribe their oath before them and without giving the reasons for the non-exercise of the power by the Governor himself, will be illegal and ultra vires of the Constitution. In the reply statement the petitioner had also questioned the constitutional validity of the appointment of the second respondent as the person before whom the members can make and subscribe their oath under Art. 188 on the ground that the appointment even in that case lacks specificity. I would not have considered the validity of the notification appointing the Chairman and the Deputy Chairman as persons before whom a member can make his oath or affirmation under Art. 188, as the petitioner's case was that even before they were appointed, he had complied with the provisions of Art. 188. Since the validity of the appointment of the second respondent under Art. 188 itself is questioned on the ground of lack of specificity I have to consider and give an answer. In Sec. 67 of the Government of India Act, 1935, corresponding to Art. 188 of the Constitution, the making and subscribing of the oath is required to be done 'before the Governor or some person appointed by him.' Under Art. 188, as we have already seen, it should be done 'before the Governor or some person appointed in that behalf by him.' According to the learned counsel, the words 'in that behalf' have been introduced in Art. 188 and also in the corresponding provisions in Arts. 69, 99, 124(6) 164 and 219 in order to make it clear that there could be no general appointment under that Article without reference to the persons who are to take the oath before them. Even here he wanted to say that specificity should be by naming the persons who are to take and subscribe the oath before the authority appointed and not merely as members elected or nominated. In this connection, he also stated that the fact that the practice had been ever since the inception of the Constitution to make general orders, will not be of any avail against the specific language used in Art. 188.

15. The words 'some person appointed by him' used in the Government of India Act, 1935,' do warrant a wide interpretation that the appointment could be general in nature and for an indefinite period. It may also be interpreted as any person appointed by the Governor, whether for the purpose of S. 67 of the Government of India Act or otherwise. Thus, the words 'some person appointed by him' could be construed as so wide to include every authority appointed by the Governor irrespective of whether it is for the purpose of making and subscribing the oath before them or for doing any other job. But in the context in which it is used, one would clearly interpret those words as referring only to the person appointed for the purpose of enabling a member to make and subscribe his oath before him. In other words, he would be a person appointed in that behalf. The Constitution-makers have made that position clear by inserting the words 'in that behalf' in Art. 188 itself. 'In that behalf' in the context only means that he is appointed as the person before whom the making and subscribing of the oath could be done. That is, it refers to the function of witnessing the making and subscribing for the purposes of Art. 188 and not with reference to any particular individual's making and subscribing the oath. The same conclusion could be reached from a different reasoning. The object or purpose of requiring the member to make and subscribe the oath or affirmation before the Governor or some other authority, is, in my opinion, to evidence or acknowledge that the member had made and subscribed the oath or affirmation before he took a seat in the Assembly or Council as the case may be. In fact, a certificate given by the person before whom the member made and subscribed the oath or affirmation and the decision of the authority that the oath or affirmation has been properly made or not had been considered to be final, as may be seen from the Rajasthan Assembly Debate, dated 13-12-1956 and the Madhya Pradesh

Legislative Assembly Debate dated 8-7-1957 which are referred to at page 271 of the book 'Practice and Procedure of Parliament' by M. N. Kaul and S. L. Shakdher. The words 'in that behalf' are thus intended both to acknowledge the making and subscribing the oath and for certifying that it was done in the form that is required. The purpose of appointment being thus to enable the members generally to take the oath before such authority and get a certificate of compliance with Art. 188, the words 'in that behalf' could not be given a restricted meaning as referring to the persons who are to make the oath and not the authority to witness and give declaration of compliance. If the Governor had not exercised his power of appointing another, certainly every member would be entitled to make the oath before him. By reason of not mentioning the names, the witnessing and certification by the Governor could not be invalidated. Thus 'in that behalf' refers only to the duty of witnessing and certifying for purpose of Art. 188. If the notification is clear that it is the members of the Assembly or the Council who may make and subscribe the oath before them, in my opinion, it conforms to the specificity even if any specificity is required and the notification itself could not be invalidated merely on the ground that the individual names of the persons who are to take the oath had not been mentioned while appointing the person. Further, the words 'in that behalf' cannot be given a narrow meaning as relating to the names of the members who are to take their obligation to be mentioned there. It may be that if a specific officer is appointed under Art. 188 for the specific purpose of enabling a specified member or members to take their oath, that notification also will be valid and within Art. 188. But that does not mean that if an appointment is made with a specific direction generally that every member of the Council may make and subscribe his oath or affirmation before him and the appointment is for an unlimited period, it lacks any specificity and for that reason it is invalid. In this connection, we must also keep in mind that in construing a Constitutional document, the widest possible interpretation should be given to the words used and it shall not be construed in a restricted, narrow and pedantic sense.

16. In Shabbir v. State, AIR 1965 All 97, the words 'in that behalf' occurring in Art. 219 of the Constitution were construed by the Division Bench of the Allahabad High Court as meaning 'for that specific purpose' or 'on that particular occasion'. In the words of the learned Judges (at p. 105):

"Though Art. 219 of the Constitution does not say so expressly it is obvious that departure from the normal rule of the Governor himself being present can be made only for good reasons. Any general order for an indefinite period or a routine practice requiring oath being made and subscribed before someone else and not the Governor can only result in defeating the provisions of the Constitution. Consequently, every time that an appointment is announced and the question of making and subscribing of oath arises the Governor has to apply his mind and decide whether he would like the oath to be made and subscribed before himself or would appoint someone else to do so. He is the best judge to decide which course he would adopt but the matter should receive his attention on every occasion. We have already said above that the expression 'in that behalf' in the context in which it is used means 'for that sake' or for the purpose of witnessing the oath being made and subscribed by the particular person who is appointed to be a Judge. For these reasons we are of the opinion that the Governor should not have made a general authorisation as he did by means of the letter addressed to the Chief Justice dated 25-8-1963."

With great respect to the learned Judges, I could not subscribe to this view. For one thing, it proceeds on the assumption that once a person is appointed by the Governor in exercise of his powers under Art. 219 which is similar to Art. 188, the Governor abdicates his powers, which assumption, as I have already held, is not correct and the Governor still retains his powers. The question of deciding on each occasion as to whether he would do it himself or have it done by others, does not arise at all. Secondly, the learned Judges themselves have interpreted the words 'in that behalf' as meaning 'for that sake' or for the purpose of witnessing the oath being made and subscribed. But, however, the learned Judges arrived at the conclusion that these words also imply the witnessing of oath of a particular person or persons. I have no doubt that the use of the words 'in that behalf' in no way restricts the power of the Governor to appoint one or more

persons either by name or by designation for a particular period or for an indefinite period, provided it specifies that they are appointed in exercise of the powers under Art. 188 and for the purpose of any and every member of the Assembly or the Council, as the case may be, to make and subscribe their oath or affirmation. The contention of the petitioner in this regard is, therefore, not acceptable.

17. I am also unable to agree with the contention of the learned Advocate-General that the function of the Governor under Art. 188 is also one of the functions to be exercised by the Governor on the 'aid and advice' of the Council of Ministers or at least one to be done on his own discretion and, therefore, by virtue of Arts. 163 and 361 the exercise of the discretion by directing the petitioner to go before the person appointed by him under Art. 188 could not be questioned in a Court of law either directly or indirectly.

18. The executive power of the State is under Art. 154 vested in the Governor. Article 163 states that —

"There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion."

Whether any and if so what advice was tendered by the Ministers to the Governor, is not a matter which could be enquired into by any Court. So far as the discretionary matters are concerned, on the question whether any matter is or is not one in respect of which the Governor is required under the Constitution to act in his discretion, the decision of the Governor in that regard is final and the validity of anything done by the Governor on the basis of his decision shall not be called in question on the ground that he ought or ought not to have acted in his discretion. This has been so provided under Art. 163. The immunity given to the Governor under Art. 361 against answerability to any Court is in respect of 'the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties.' A combined reading of Arts. 154, 163 and 316 (1) in my opinion, would show that the immunity against answerability to any Court is in respect of the functions exercised by the Governor/qua-Governor and those functions in respect of which he is bound to act on the aid and advice of the Council of Ministers, or a function which he could exercise in his discretion. I am not to be understood from the above statement that anything done by the Governor which we may call it as not provided or authorised under the Constitution or acting in excess of the powers conferred under the Constitution, will not be actions of the Governor. Nor any actions of the Governor which may be considered even as contrary to the provisions of the Constitution, could be considered as one which could be questioned in a Court of law.

18A. Under Art. 188, a duty is cast on every member of the Legislative Assembly or Legislative Council of the State, on pain of penalties provided under Art. 193, before taking his seat, to make and subscribe an oath or affirmation according to the form set out for the purpose in the III Schedule before the Governor or some person appointed in that behalf by him. The performance of this duty by the member, though required to be done before the Governor or some persons appointed in that behalf by him, the witnessing of the oath taking under that Article by the Governor, in my opinion, is not and could not be held as one of the functions in respect of which the Governor was required either to act on the aid and advice of the Council of Ministers or even as a constitutional function to be discharged by him at his discretion. In fact, there may be occasions when there is no Council of Ministers to aid and advice as in the case of the first Constitution of the State Assembly or when the State Ministry is dismissed or dissolved and the President's rule imposed. When new house is formed, the members have to take and subscribe the oath under Art. 188. The Constitution therefore requires the member to make and subscribe an oath or affirmation before an individual authority nominated by it. While referring to that authority, the Constitution has referred to it by reference to the designation or office of the authority instead of naming a person. The effect, however, is the same. The making and subscribing of the oath or affirmation is to be before the individual gentleman concerned who for the time being is holding that office and not the Governor as such. For instance,

under Art. 60 and Art. 159, the President and the Governor respectively are required to make and subscribe an oath or affirmation in the presence of the Chief Justice of India or the Chief Justice of the State, as the case may be. In my opinion, the Chief Justice by being present there could not be considered as discharging any of the functions as Chief Justice. Thus, the Governor, so far as Art. 188 is concerned, is in the same position as some person appointed by him in that behalf. In legal parlance, we may call him a persona designata. He does not even administer the oath or affirmation as in the case of Arts. 75 (4) and 164 (3). He is merely a witness to the making and subscribing of the oath. In fact, a somewhat similar question came up for consideration in a different way in the decision reported in Thankamma v. Speaker, T. C. Assembly, AIR 1952 Trav-Co 166. The Speaker of the Travancore-Cochin Legislative Assembly was appointed by the Governor as the authority before whom any member may make and subscribe the oath of affirmation. The Speaker refused to permit a member to take an oath before him. When the member filed a writ petition under Art. 226 against the Speaker for a direction to the Speaker to allow her to take the oath before him so as to enable her to take a seat in the Assembly, the Speaker took up an objection to the maintainability of a writ petition relying on Art. 212 of the Constitution. It may be recalled that Art. 212 prohibits the Courts from enquiring into the validity of any proceedings in the Legislature of a State on the ground of any alleged irregularity of procedure and it also provides that —

"An Officer or Member of the Legislature of a State in whom powers are vested by or under the Constitution for regulating procedure or the conduct of business, or for maintaining order in the Legislature shall be subject to the jurisdiction of any Court in respect of the exercise by him of those powers."

The learned Judge who decided the case overruled this objection holding that in allowing or not allowing a person to take the oath, the Speaker is not discharging any constitutional function as a Speaker, and he was not acting in his official capacity and that, therefore, he will not be immune from proceedings in Civil Court. I am in entire agreement with this view of the learned Judge. The analogy of the Speaker is very apposite. as the immunity provided to the Speaker in respect of the conduct of the business of the Assembly is also similar to the immunity provided to the Governor under Arts. 163 and 361 of the Constitution. I am, therefore, unable to agree that Arts. 163 and 361, are a bar to going into the question as to whether the petitioner had complied with the provisions of Art. 188 of the Constitution or whether he could insist on taking the oath before the Governor.

19. Further, the petitioner's grievance is that on the 22nd April when he met the Governor and expressed his desire to make and subscribe his oath before him, the Governor was not unwilling to allow him to take the obligation before him. It is only the first respondent who would not carry the necessary papers before the Governor in order to enable him to take the oath before the Governor. The burden of the song of the petitioner throughout had been that the Secretary had been standing in the way of his taking the obligation and functioning as a legislator. He further contended that even the executive could not prevent him from functioning as a legislator either directly or indirectly. By the letter dated 24-4-1978, the first respondent informed the petitioner that he had sufficient opportunity to take the oath or affirmation before the Chairman pro tem either in his chamber or at the meeting of the Council on 24-4-1978 and it was not possible to comply with his request to make arrangements enabling him to take oath before the Governor. This letter did not purport to be a Government Order so as to enable the learned Advocate-General even to invoke the provisions of Arts. 163 and 361. It is simply a D. O. letter written by the Secretary of the Legislative Council department to the petitioner informing him that the request in the petitioner's letter dated 22-4-1978 could not be complied with. The words 'I am directed' in the context in which they occur in this letter could only be understood as a direction from some authority superior to him as Secretary of the Council and could not be interpreted as a direction either by the Governor or by the Government. The letter itself does not mention as to why it is not possible to comply with the request of the petitioner except stating that he has got sufficient opportunity to take the oath or affirmation before the Chairman pro tem appointed for the purpose under Art. 188

of the Constitution. It did not mention that either the Governor on the advice of the Government or in exercise of his own discretion had expressed his unwillingness to permit the petitioner to make and subscribe his oath before the Governor. Having not done so in that letter it is now not possible for the respondents to bring an additional ground so to say to the effect that the petitioner's letter was submitted to the Governor, the matter was then examined by the Government and the orders of the Governor were obtained on 23-4-1978. The Supreme Court in Mohinder Singh v. Chief Election Commr., AIR 1978 SC 851 had in fact deprecated this procedure and held that (at p. 858) —

"When a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons as mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise."

Apart from this, the Legislature is entitled to function untrammelled by any interference by any person or authority. Neither the Secretary nor even the Chairman pro tem can interfere or obstruct or even delay a member taking the oath as required by the Constitution and discharging his functions as a Legislator. In fact, the petitioner spent a large portion of his argument on the bureaucratic attitude of the first respondent and those whom he is said to have consulted; but I could not refer to this part of the argument in detail as that would lead nowhere. The petitioner's contention is that substantial compliance with Art. 188 is enough and in fact, there was substantial compliance with Art. 188 and the relief to be given is only against the Secretary, Legislature, so that the petitioner could be permitted to sign the roll of members, take a seat in the Legislative Council, and enter duties as such legislator. In those circumstances, he had neither questioned the authority, of the Governor in the matter of his appointing somebody in exercise of the powers under Art. 188 nor his discretion, if any, to allow a Member to take the obligation before him. The question of maintainability of the writ petition on the basis of Arts. 163 and 361 therefore, does not even arise for consideration at all.

20. The learned Advocate-General also took objection to the maintainability of the writ petition in the form in which the relief is prayed for. The argument was that in effect, the prayer in the writ petition was for a declaration of the petitioner's title to an office, namely, a Member of the Tamil Nadu Legislative Council and such a declaration where the validity of a statute or a statutory provision or a rule is not involved and where it is not also one which is consequential to that of the normal, known as prerogative writs of certiorari, mandamus, prohibition and quo warranto, could not be granted in proceedings under Art. 226 of the Constitution. In other words, the argument was that these writ proceedings could not be converted into or equated to a declaratory suit. It is true that normally such declarations are associated or consequential to the declaration of the invalidity of a statutory provision or rule or an illegal action taken on the assumption of the jurisdiction which is not vested in the authority. But the Supreme Court had been repeatedly holding that Art. 226 of the Constitution gives this Court very wide discretion in the matter of framing of the writs to suit the exigencies of particular cases and the application of a petitioner cannot be thrown out simply on the ground that either none of the well-known prerogative writs can afford an adequate or appropriate remedy to the person nor on the ground that the proper writ or declaration has not been prayed for.

21. The Supreme Court in the decision in K. K. Kochunni v. State of Madras, AIR 1959 SC 725 had held that in exercise of the powers under Art. 32 or 226 the Courts are not fettered by the procedure and technicalities of the writs in English law and that the jurisdiction of our Courts is wide enough even to make a declaratory order where that is the proper relief to be given to the aggrieved party. That the Article itself contemplates such a declaratory relief is clear from the fact that even the well-known proceeding of quo warranto is available under Art. 226. Quo warranto is laid against a person who claimed or usurped an office, franchise or liberty, to enquire by what authority he supported his claim, in order that the right to the office or franchise might be determined. In effect, it is a remedy which is used to try the civil right to a public office, as has been held by the Privy Council in Hamid Kasan v. Banwarilal Roy, AIR 1947 PC 90. The procedure of quo warranto is converse of the

type of the writ petition filed in this case. The petitioner had claimed a declaration against deprivation of his office to which he has a right.

22. In the decision of University of Mysore v. Govinda Rao, AIR 1965 SC 491, a petition for a writ of quo warranto was filed by one Govinda Rao calling upon one Anniah Gowda to show cause as to under what authority he was holding the post of a Research Reader in English in the Central College, Bangalore. In the same writ petition, he also prayed for a writ of mandamus or other appropriate writ or direction calling up the University of Mysore to appoint him Research Reader. He succeeded in getting a declaration that the appointment of the respondent was not valid and that he was entitled to be appointed. That decision would show that when a person is deprived of his office to which he may have a right, he could file a writ petition in the form of a quo warranto if any person had already been appointed in that place and if not, for a declaration that he was entitled to it. If in a quo warranto proceeding, the validity of appointment of a third party could be questioned and a declaration obtained, I do not see why the petitioner himself cannot ask for a declaration of his title to the office.

23. I doubt very much whether there is any other remedy available to the petitioner at all in this case apart from the remedy under Art. 226. Certainly, the relief which he had asked for in this proceeding could not be asked for in a suit under S. 9. C. P. Code or S. 42 of the Specific Relief Act, as the validity of the appointment under Art. 188 of the second respondent as well as that of the Chairman and Dy. Chairman of the Tamil Nadu Legislative Council is (sic-not?) questioned as ultra vires of the Constitution. Important questions as to the interpretation of the Constitution as also the scope of the immunity of the Governor under Arts. 163 and 361 are involved. In those circumstances, the petitioner was certainly within his right in invoking the jurisdiction of this Court to determine those important questions even if there was any such right to file a suit. I am, therefore, of the opinion that the argument of non-maintainability of the writ petition is untenable.

24. This leads us to the question as to whether the mandate of making and subscribing to the obligation or affirmation before the Governor or some person appointed by him should be strictly, formally and in terms of the Article complied with, or under some justifiable circumstances, a substantial compliance with the provisions of the same may be taken as a compliance with the requirements. The word 'oath' means and is normally understood in legal parlance as meaning an oral declaration of a statement in the name of God. The purpose of the Article read with the language used and the form prescribed in the III Schedule also would show that this word has been used in the Constitution in the same sense. The word 'affirmation' also has the same meaning except that the statement or declaration is made in such a case as the solemn affirmation and not in the name of God. The Article further requires that the oath or affirmation should be made and subscribed. The words 'make' and 'subscribe' in the Article indicate that the declaration of the oath shall be reduced to writing and signed in token of acceptance of the same. The word 'subscribe' itself means, to write under something or to give consent to something written by signing one's name underneath. In the decision in Shabbir v. State, AIR 1965 All 97, these words used in the context in Art. 319 were understood as meaning —

".....In the Concise Oxford Dictionary the following meanings, amongst others, have been given to the word 'subscribe'—

'Write one's name or rarely other inscription at foot of document etc. Write one's name at foot of, sign (document, picture etc.).

2. Express one's adhesion to an information or resolution."

The use of the word 'subscribe' would show that the oath repeated orally should be reduced to writing and be signed by the person taking it in token of his adhesion to what is written. The word 'subscribed' is not correlated with the particular form but with what is said in the oath and what is reproduced in writing. Even if a wrong oath is taken and its reproduction is signed by the person making it, it would still be an act of subscribing though not a correct oath. Consequently, in our judgment, this submission of the learned counsel is unfounded.

25. Thus, the Article requires the declaration to be in the form set out in the III Schedule and should be read before the Governor or some person ap-

pointed by him in that behalf. It is enough if the declaration is read by the Member and it was not necessary to administer the oath by any authority to the Member. Wherever the Constitution required that the oath or affirmation has to be administered, it specfically mentions; for instance Art. 75 (4) requires the oath of office and of secrecy to be administered by the President to a Minister before he enters upon his office. Similarly, Art. 164 (3) requires the Governor to administer the oath of office and of secrecy in the form set out to every Minister of the State before he enters upon his office. Such requirement of administration of oath is not necessary where a person makes or subscribes to the oath or affirmation under Art. 188.

26. The learned Advocate-General contended that the mandate under the Constitution to read the declaration in the form prescribed before the Governor or some person appointed by him, cannot be said to have been complied with by a deemed compliance or substantial compliance, under no circumstances. In any case, it was his case that on the facts of the present case, the petitioner could not be said to have substantially complied with the provision in Art. 188. If we analyse the provisions, Art. 188 requires (1) that the writing of the oath or affirmation shall be according to the form set out for the purpose of the III Schedule; (2) that the Member shall make and subscribe the oath or affirmation which, as I have already stated. means, that he should read the declaration and sign under the writing as a token of acceptance, and (3) that the requirement that making and subscribing shall be before the Governor or some person appointed in that behalf by him shows that somebody should witness the oath being made and subscribed by the member.

27. If we analyse the form set out in the III Schedule, it may be seen that the oath or affirmation shall contain words to the effect (i) that the member shall bear true faith and allegiance to the Constitution of India as by law established; (ii) that he shall uphold the sovereignty and integrity of India; and (iii) that he will faithfully discharge the duty upon which he was about to enter. In my opinion, the inclusion of these three declarations in the oath or affirmation and the signing of the same in acceptance thereof is the most important and substantial part of the requirement of Art. 188. Subscribing to the oath before the Governor or a particular person is, in my opinion, required only for the purpose of witnessing the oath being made, so that it could be put as a record and put the question as to whether a Member did take the oath or not beyond the purview of any dispute. In fact, the Rajasthan Legislative Assembly Debates dated 13-12-1956 and the Madhya Pradesh Assembly debate dated 8-7-1957, which are referred to in the book 'Practice and Procedure of Parliament" by M. N. Kaul and the passage at page 271 of that book wherein it is stated that the decision of the person before whom as to whether oath or affirmation is properly made or not is final, clearly show the intention and purpose of the requirement of making and subscribing the oath before the authority. Even with reference to the contents of the form, in cases where the oath or affirmation is made and subscribed in some language other than English we find there are certain modifications. In Gujarati, Bengali, Punjabi, Malayalam, Tamil and Telugu, the form follows versions different from those given in the translations of the Constitution in the respective languages — vide Kaul's Practice and Procedure of Parliament, page 270. Even when the oaths or affirmations are made and subscribed in these forms, it was taken as substantial compliance. The Article in terms does not require the oath and affirmation to be made and subscribed in the house itself. It could be done outside and there is no prohibition of the same being done outside. In fact, the practice and procedure adopted in Parliament and in the Assemblies, as noted by Kaul in the book above referred to show that there were many occasions when it was done outside the House. Further, the Representation of the People Act does not prescribe any educational qualification for being a Member of Parliament or a member of the State Assembly or Council. In fact. it does not appear that even a dumb person is prohibited from becoming a Member of Parliament or State Assembly. In such a case where a Member could not read the oath or affirmation and the Constitution is silent as to how the oath is to be taken, the practice appears to be in such cases for an authority to read the oath and require the person to sign the affirmation in token of acceptance. The requirement that the oath shall be made and signed before a

particular authority is also found even in the case of a candidate when he files his nomination. The witnessing of making the oath and certifying the same is thus clearly for the purpose of proof that the oath or affirmation was made and signed by the Member and it does not attach any more sanctity to the declaration. It is sometimes said, as in the decision in Shabbir v. State, AIR 1965 All 97, that the gravity and solemnity of the oath are enhanced if it is made and subscribed before the highest officer of the State, and its value is reduced if the person before whom it is made does not enjoy the highest status. I am unable to agree with this proposition. While I certainly agree that the oath or affirmation should be made and subscribed as a solemn declaration without belittling the importance of the promise made through the oath and affirmation, merely by adopting simplicity and making the proceedings informal, the provisions of Art. 188 could not be said to have been not strictly followed. What is more important is the understanding by the Member of what he is subscribing to, and his sincerity in making the declaration and signing the same. If there are unimpeachable evidence and circumstances which show that the Member in spite of his best efforts could not comply strictly with the letter of Art. 188, but had with a full understanding and implications of the contents of the oath or affirmation signed the same and sent it to the authorities concerned and there was no dispute about his making the oath or subscribing to the same or his understanding of the contents of the oath, I should certainly consider that the Member shall be deemed to have complied with the provisions of the Article 188. I am not to be understood as belittling the importance of making and subscribing before a particular authority or making the provision in Art. 188 as an empty formality. The declaration of faith and allegiance to the Constitution, the undertaking to uphold the sovereignty and integrity of India and the obligation taken that he will faithfully discharge the duty upon which he is about to enter are great acts or declarations of the Members and one could certainly desire such acts and declarations to be done in the open and before some authority. But at the same time we cannot shut our minds to a possible situation, where he could not take that obligation before a particular authority, though he had done all that he could do. In that sense, if the Member had consciously made and subscribed fully, understanding the implications thereof, and there was no dispute about the factum of his signing the declaration in the form prescribed, I consider it just and reasonable to hold that the Member had substantially complied with the provisions of Art. 188.

28. In fact, a somewhat similar question came up for consideration in the decision in V. R. Sutarjia v. N. P. Bhanvadia, AIR 1970 SC 765. There, a returned candidate had filed three nomination papers with three different proposers. Each of the three nomination papers clearly mentioned that he was a candidate for election to fill a seat in the Vidhan Sabha for the Gujarat State i.e., the Legislative Assembly of the State. The nomination papers of the returned candidate contained a form of oath or affirmation which was both in Gujarati as well as in English. The English form followed word for word form No. VII as set out in the III Schedule to the Constitution and the Gujarati form, however, purported to set out the Gujarati translation of the form of oath or affirmation but with the difference that instead of using the words 'Legislative Assembly' the translated words in Gujarati form as 'Rajya Sabha' were used. The evidence of the candidate that he had taken the oath not according to the words in Gujarati form but according to the translation of the words in English was not accepted, so that, it is to be taken that the candidate took the oath or affirmation in the Gujarati form, but the contents of the form did not conform to the real translation of the English form but mentioned the House as Rajya Sabha, which means Legislative Council and not Legislative Assembly. On the question whether this was enough compliance with the requirements of Art. 173 (a) of the Constitution which required the making and subscribing before some person authorised in that behalf by the Election Commission an oath or affirmation according to the form set out for the purpose in the III Schedule, the Supreme Court held that the real purpose of the oath is that the person concerned must give an undertaking to bear true faith and allegiance to the Constitution and uphold the sovereignty and integrity of India. Since the essential requirements of the oath given in the form in the III Schedule were not deviat-

ed from the Gujarati form used in the case, the Supreme Court further observed that it could not be held that the oath subscribed in the case was not in compliance with Art. 173, merely because of the popular meaning of the expression 'Rajya Sabha'.

29. The learned Advocate-General argued that the case will have to be understood with reference to the facts in that case. In Gujarat, there was no Legislative Council. When the oath was taken in Gujarati with the words 'Rajya Sabha', it could refer only to the Legislative Assembly and in other respects, the form complied with the form prescribed under the Constitution. There was also no dispute about the reading of the form before the person authorised in that behalf by the Election Commission. It is in those circumstances, the Supreme Court held that it was substantial compliance. But I am unable to agree with this line of reasoning of the learned Advocate-General. As already stated, the Supreme Court definitely stated that the real purpose of the oath is that the person concerned must give an undertaking to bear true faith and allegiance to the Constitution and uphold sovereignty and integrity of India. That was contained in the Gujarati form of the oath taken. Thereafter the Supreme Court as a general proposition stated (at p. 768) —

".....There have been many instances where this Court has held that a substantial compliance with the statute or with the rules framed thereunder is enough even if there be no literal compliance and in our view, there is no reason to adopt a different line of reasoning in the construction and interpretation of the Constitution. In all such cases, one must consider the real purpose of the provision whether statutory or constitutional, to find out whether notwithstanding the apparently mandatory form of the words used any deviation therefrom was to be struck down."

30. The passage quoted above is very apposite and is a clear authority for the position that even in the case of Art. 188, a substantial compliance should be considered as sufficient to enable a member to take the seat in the Assembly or the Council as the case may be.

31. In the instant case, the facts show: (1) The petitioner had presented himself in person before the Governor on 22-4-1978 and offered to take and subscribe the oath in the form prescribed before the Governor. (2) The Governor was not unwilling on that day to permit the petitioner to make and subscribe to the oath before him if necessary arrangements could be made. (3) The Secretary to the Tamil Nadu Legislative Council, the first respondent herein, by a letter of the petitioner dated 22-4-1978, was informed about the petitioner meeting the Governor, and his willingness to allow the petitioner to make his obligation before him, and he was requested to make the necessary arrangements enabling the petitioner to take the oath before the Governor 'by tomorrow the latest.' (4) The Secretary failed to make the necessary arrangements and was taking an obstructive attitude in consultation with the authorities that be and the petitioner was prevented from taking and subscribing to the oath before the Governor. (5) The petitioner has already deposited the originals of the declaration of his election as a Member of the Tamil Nadu Legislative Council from the Madras District Graduates' Constituency with the Secretary of the Council on 22-4-1978 and even if there is any dispute on the fact of such deposit of declaration, there was no dispute that he was a duly elected Member from the Madras District Graduates' Constituency in the election held on 9-4-1978. (6) The petitioner was previously a Member of the Legislative Council for a long time and is a senior Member of the Bar. He has with full knowledge and understanding of the obligation, undertaking and implications of the oath and the consequences of the breach thereof, made and subscribed, to the oath in the form prescribed in the III Schedule to the Constitution and sent the same to the Governor who is one of the authorities before whom the making and subscribing to the oath could be done. (7) There was no dispute that the oath sent to the Governor in duplicate was factually made and subscribed by the petitioner. (8) In his letter dated 27-4-1978 enclosing the oath duly signed in duplicate to the Governor, he had referred to the circumstances under which he had to make and subscribe to the oath, not before any particular authority, but by himself and had stated: 'Should you, however, desire that I should call on you in person and read out my oath before you, I shall be happy to do so if I am intimated the time and place for the purpose." (9) The petitioner had not received any requisition from the Governor calling upon him to appear in person and read out

the oath before him. (10) In the affidavit filed in this court and even in his arguments, the petitioner had accepted that he had signed the oath in the form prescribed in compliance with Art. 188 and sent the same in duplicate to the Governor which would amount to an admission and conclusive proof of making and subscribing the oath in the form prescribed in the III Schedule to the Constitution.

32. I am of the view that on the above facts, the petitioner shall be deemed to have substantially complied with the provisions in Art. 188 and he is entitled to sign the roll of Members of the Council and take the seat in the Tamil Nadu Legislative Council as a duly elected Member from the Madras District Graduates' Constituency without any further obligation on his part.

33. In the result, for the foregoing reasons, the writ petition is allowed as prayed for and the Rule Nisi is made absolute. No order as to costs.

Rule made absolute.

AIR 1978 MADRAS 361

RAMAPRASADA RAO AND RATNAVEL PANDIAN, JJ.

P. Saraswathi Ammal, Appellant v. Lakshmi Ammal alias Lakshmi Kantam, Respondent.

Appeals Nos. 84 of 1972 and 102 of 1973, D/- 4-3-1977.*

(A) Evidence Act (1 of 1872), Ss. 3, 115 — Appreciation of evidence — Domestic litigations — Suit to set aside sale against mother and sister — Plaintiff changing her stand and bolstering up theories according to convenience — Court should be slow in accepting her case.

It is fundamental that in a case where a plaintiff abandons her case at any stage of the conduct of her own suit and practically accepts the opponent's case, since it is more convenient and suitable to her, then it would be unjust and indeed unusual to allow the plaintiff to choose a different plane of action and practically claim the relief on the facts pleaded and proved by the opponent. She cannot approbate and reprobate and compel the Court to accept her case after an open exhibition of her inconsistence. It is not open to the plaintiff as a party to the litigation to allege one set of facts as against the other side and after being confronted with a denial of such facts by the opponent make a volte-face and attempt to sustain the case of the plaintiff on the facts alleged by the opponent and seek for relief on such an inconsistent stand. (Para 10)

Anno: AIR Man. (3rd Edn.), Evidence Act, S. 3, N. 29; S. 115, N. 67.

(B) Contract Act (9 of 1872), S. 16 — Undue influence — Relationship — Presumption — Mere proof of relationship however near it may be, not sufficient for court to assume that one relation was in a position to dominate the will of the other.

Such bonds of kinship which are universally felt should not be mistaken as equivalent to saying that one kinsman could unduly influence the other in the circuit of bondage. Even if any advice is given it may be influence but not undue influence. (Para 11)

Anno: AIR Manual (3rd Edn.), Contract Act, S. 16, N. 3.

(C) Contract Act (9 of 1872), S. 16 — Undue influence — Pleading — Burden of proof — (Civil P. C. (1908), O. 6, R. 4).

It should be established on materials pleaded and acts established that the 'bargain is tainted by undue influence' and it is unconscionable that it could reasonably be said that the person sought to obtain unfair advantage for himself and so as to cause injury to the person relying upon his authority or aid. It is only after such particulars are made available and a reasonable proof thereof has been given, the onus would shift on the so-called 'person of domination'. Until then the burden is on the complainant to establish it is so. (Para 11)

It is essential that in a case where fraud, undue influence or coercion is put at the forefront the complaining party should set forth the facts in full and give such essential particulars instead of making general allegations. The Court must scrutinize the pleadings to find out that a plea has been made out and that full particulars thereof have been given before examining whether undue influence was exercised or not. In the light of this, the pleadings and the evidence let in should be scrutinized. AIR 1967 SC 878, Foll. (Para 12)

Anno: AIR Manual (3rd Edn.), Contract Act, S. 16, Notes 10 and 11.

*(Against decree of 2nd Addl. Sub. J. Coimbatore, D/- 22-4-1971.)

BV/CV/A505/78/VSS

(D) Contract Act (9 of 1872), S. 16 — Undue influence — Proof — Mental incapacity.

In cases where a person suffers from an infirmity or backwardness, then the standards of proof regarding undue influence or coercion may be slightly different. In a case where the challenging litigant is capable and literate and the parties are parent and child, the Courts, must be doubly careful and would certainly demand strict proof of the misuse of confidence and influence said to have been exercised by the other party when the other party is none else than the mother. But each case has to depend upon its facts. The normal circumstance of securing competent and independent advice would not enter for consideration in a case where it was all arranged in a family council in which there was no distrust or mistrust as between the one and the other. (Para 13)

Anno: AIR Manual (3rd Edn.), Contract Act, S. 16, Notes 4 and 11.

(E) Contract Act (9 of 1872), S. 16 — Undue influence — Inadequacy of consideration — Factors to be taken into account.

The entirety of the transaction must be taken into consideration and the necessity for the sale, are all factors which should necessarily be borne in mind before a transaction could be set aside on the ground that the price paid therefor is so low that it could be said to have been tainted by undue influence. (Para 14)

The impugned sale to plaintiff's sister executed by plaintiff's mother and plaintiff was for a price of Rs. 10,000/-. Evidence in the suit for setting aside sale showed that the annual yield ranged between 3000 to 4000. The sale comprised of both the life interest of the mother as well as ultimate remainder vested in plaintiff. It was not the plaintiff alone who was entitled to the property on date of sale.

Held that the consideration for sale was not inadequate, as the mother parted with her life-interest which was considerable. (Paras 14, 16)

Anno: AIR Manual (3rd Edn.), Contract Act, S. 16, N. 6.

(F) Limitation Act (36 of 1963), S. 59 — Suit to set aside sale deed dated 29-6-1964 filed on 22-2-1970 — Evidence as to plaintiff coming to know of it in 1969 disbelieved — At the time she executed sale deed she was 19 years old — Suit, held time barred. (Para 15)

Anno: AIR Comm., Lim. Act (5th Edn.), Art. 59, N. 3.

Cases Referred: Chronological Paras

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1934-1 KB 380 : 150 LT 304—C. A., Lancashire Loans Ltd. v. Black 13

The Advocate General, for the Appellant; Thiagarajan, for the Respondent.

RAMAPRASADA RAO, J.:— These two appeals arise out of the common judgment rendered by the learned Subordinate Judge of Coimbatore in O. S. No. 114 of 1970 on his file. S. P. Veerbadra Chettiar, the common ancestor, died on 22-2-1951 leaving behind him, his wife, the second defendant and three daughters. Maragathammal, is his eldest daughter, who is not a party to this litigation, who married an advocate by name P. Rajappan. The first defendant P. Saraswathi Ammal married the brother of P. Rajappan and he is Dr. Punnaivanam, Rajappan was examined as D. W. 7 in the case. The plaintiff Latchmi Ammal alias Lakshmi Kantam, is the third daughter. Veerabadra Chettiar's wife Nagalakshmi Ammal, is the mother of the plaintiff, the first defendant and Maragathammal and is the second defendant in the suit. The plaintiff came to Court to set aside the sale deed Ex. B-2 dated 29-6-1964 executed by her mother (second defendant) and herself in respect of the suit properties which sale was in favour of her own sister, the first defendant. Veerabadra Chettiar left a will Ex. B-6 dated 22-1-1950. He left considerable properties. Under the said will, a life-estate was created in favour of the second defendant and a vested remainder was created in favour of his three daughters in equal moieties. The second defendant was also given the power to distribute the properties equally amongst her children. A family arrangement (which was styled as a partition deed) was entered into under Ex. B-7 dated 27-2-1952. In that partition deed the second defendant retained for herself a life estate in all the immovable properties and acting as the mother and natural guardian of the first defendant, and the

plaintiff, she partitioned the suit properties equally amongst her children. To this deed Maragathammal was also a party. There were no disputes between the mother and her daughters till about 1964 when it became necessary for the mother to perform the marriage of the plaintiff. The plaintiff's case is that the two sons-in-law (the husband of Maragathammal and the husband of the first defendant) engrafted themselves in the family and were completely influencing the affairs of the family. The plaintiff would touch upon the bickerings in the family about the sharing of the properties and would allege that her mother always made out that she would have her marriage duly performed with the funds left by Veerabadra Chettiar without recourse to the properties which the plaintiff should ultimately take as the remainderman and she also made it open that in case she were to die before the marriage of the plaintiff, the elder sister will arrange to perform the marriage of the plaintiff with such funds. She would also vaguely allege that the 2nd defendant did not give out existence of the will Ex. B-6 and attacks the partition deed as an unfair transaction. Her specific case is that she was only five years old at the time of her father's death, and therefore, she was completely under the influence of her mother and her sisters and her brothers-in-law. She would say that she was inexperienced and unaccustomed to the ways of the world and she was completely a tool in their hands and it was in this atmosphere that she had to accept the brother of D. W. 7 as her husband. The marriage was performed on 10-6-1965. But on 29-6-1964 her mother and her brothers-in-law dominated her, exercised undue influence and coerced her to be a party to a so-called sale deed Ex. B-2 dated 29-6-1964, the contents of which and purport of which she could not understand till 1969, when she came to know that it was a pucca sale of one of her properties allotted to her in the partition deed Ex. B-7 and that she was unjustly deprived of the same. She complains that Ex. B-2 is a sham sale and that the properties which were worth more than Rs. 40.000/- were sold for a sum of Rs. 10,000/- and this ridiculous low price said to have been paid as consideration by the first defendant for the purchase of the suit properties is by itself an indication that the plaintiff was unduly influenced by her mother and sisters in the transaction. There was no need to sell the properties at all, as the family was possessed of considerable sums and in fact, the money left by Veerbadra Chettiar as also the income from the properties would be sufficient to celebrate her marriage without recourse to a sale of the suit properties as was done. She pleads ignorance about the sale and asserts that she is entitled to ignore the document. In those circumstances, she filed the present suit for a cancellation of the sale deed Ex. B-2. Her alternative case is that if the Court comes to the conclusion that any amount was justifiably paid under Ex. B-2 that amount should be treated as a debt and the debt should be deemed to have been wiped out on account of the first defendant as purchaser being in possession of the properties from 29-6-1964. In this sense the plaintiff claims that she would be entitled to redeem the property without any further payments. Ex. A-1 dated 9-8-1969 is the suit notice and Ex. A-2 dated 20-8-1969 is the reply. Not being satisfied with the reply given by defendants 1 and 2, as according to the plaintiff it contains false allegations, the present suit was filed.

2. The first defendant's case is that Veerabadra Chettiar executed a will Ex. B-6. In answering the vague allegations that there was no will of Veerabadra Chettiar, the first defendant would refer to certain proceedings initiated by her mother to obtain a succession certificate from the court of the District Munsif, Coimbatore (O. P. No. 37 of 1951 on the file of that court) to collect some outstandings due to the estate of her husband. In those proceedings, the will was produced and therefore, the story that there was no will of Veerabadra Chettiar as exhibited under Ex. B-6 is a fanciful one. She refers to the partition deed Ex. B-7 under which her mother retained a life estate in the properties and divided the vested interests among her three daughters to be taken by them absolutely after her lifetime. She effected such a partition at the instance of the well-wishers of the family and in order to give effect to the desire and wishes of her husband. As per the above document, the plaintiff obtained a vested interest in the suit properties and a half share in a property in the Variety Hall Road. She claims that the mother treated the plaintiff well and educated

her in a convent and that she finally appeared for the Pre-University Examination also in a college, shows that she could never have been coerced into accepting the transactions relating to the suit properties, as she was able to form her own judgment in such matters. There were no misunderstandings and the marriage was brought about with the consent of the plaintiff and that the plaintiff knowing fully well that it would be advantageous to sell the suit properties, she willingly executed the sale deed which was duly attested by respectable people and registered openly in the office of the concerned Sub-Registrar. According to this defendant, the price of Rs. 10,000/- was fair and that there was no need to indulge in any unfair transaction against the plaintiff in the year 1964.

3. The second defendant practically adopts the statement of the first defendant and adds that she was never under the influence of her daughters or her sons-in-law and denies that her husband ever left any cash from and out of which she could perform the marriage of the plaintiff. Her case is that she had to celebrate the marriage of her first daughter and that of the plaintiff only with the monies borrowed and with the money realised by the sale of certain shares and properties. It was in that connection she had to sell the suit properties in order to perform the plaintiff's marriage. The plaintiff is an educated girl, who could form her own judgment and she having willingly joined as an executant in the sale deed, she cannot complain about it. She also added that the plaintiff is not entitled to claim possession of the properties as she is only entitled to a vested remainder after her life. The case that the price paid is low is incorrect because what was sold included her life interest in the properties and it was never made out that the sale was for a low price or for an unjust consideration. She would also plead that the suit is barred by limitation and denies that the plaintiff came to know of the sale deed only in February 1969 and this allegation was made only to avoid the bar under the law of limitation.

4. On the above pleadings, the following issues were framed;

1. Whether the sale deed dated 29-6-1964 was executed on account of undue influence ?

2. Whether late S. P. Veerabadra Chettiar executed a will on 22-1-1950 in respect of his properties ?

3. Whether the sale deed dated 29-6-1964 was executed by the plaintiff in pursuance of her right title conferred by the said will and, the deed of partition dated 27-2-1952 ?

4. Whether the suit is not correctly valued for purposes of court-fees and jurisdiction ?

5. Whether the plaintiff is entitled to possession of the properties ?

6. Whether the plaintiff is entitled to any and if so what mesne profits ?

7. Whether the plaintiff is entitled to a decree for redemption as an alternative relief ?

8. To what relief is the plaintiff entitled.

5. Additional issues framed as per order in I. A. No. 177 of 1971 dated 12-3-1971.

1. Whether the suit is barred by limitation as contended by the defendants ?

6. The trial court held that Ex. B-2 is vitiated because the plaintiff should be deemed to have been unduly influenced to be a party to the transaction and that such influence was exercised by her mother, her sister and her brothers-in-law. It however, finds that Ex. B-6 is genuine and finds that the story of the plaintiff that there was no will of Veerbadra Chettiar is false. On the ground that the document could be avoided by the plaintiff, the trial Court held that Ex. B-2 is not binding upon the plaintiff, but dismissed the suit on the ground that she cannot get any of the reliefs asked for in the plaint. It negatived the relief for redemption claimed as an alternative relief by the plaintiff, as that contention was not even seriously pursued during trial. In fact, it held almost all other issues against the plaintiff. The plaintiff appeals in A. S. No. 102 of 1973 complaining that though the lower Court dismissed the suit in view of the peculiar situation in which the plaintiff was placed it ought to have incorporated its finding that the sale under Ex. B-2 stands cancelled in the decree and that not having been done, she is prejudiced by it. A. S. No. 84 of 1972 is by the first defendant against the judgment and decree of the court below, which set aside the sale in her favour of the suit properties under Ex. B-2.

7. The case of the learned Advocate General appearing for the appellant in A. S. No. 84 of 1972 is that no parti-

culars of undue influence are given either in the plaint or in the course of her examination in the witness box and that there is absolutely no evidence to show that the plaintiff was under the dominating influence of her mother or her sister or her brothers-in-law and the very fact that the plaintiff set up an alternative case such as the existence of another will and to treat the consideration paid as a loan and enable her to redeem the properties and having ultimately accepted in this Court that Exs. B-6 and B-7 are genuine documents, the plaintiff's case is rippling with inconsistencies and, therefore, the finding of the court below that Ex. B-2 is vitiated is absolutely baseless. Lastly, the learned Advocate General contends that the suit is barred by limitation.

8. On the other hand, Mr. Thiagarajan, learned counsel appearing for the first respondent would strenuously contend relying upon a catena of decisions that Ex. B-2 is an unenforceable instrument. After having referred to the oral evidence in this case, he would mainly rely upon the alleged inexperience of the plaintiff and her young age besides the alleged low price paid for the (fair) price and would attempt to sustain the finding of the court below that the properties were sold for a song.

9. The plaintiff obviously came to Court with an inconsistent plea and contradictory stories. She would pretend that there was another will executed by Veerabadra Chettiar. She would try to sustain it in the trial Court, but would not even argue or refer to it in this Court and would accept Exs. B-6 and B-7 as valid instruments under which she obtained a title to the suit properties. Apart from this, her vehement case in the court below was that Ex. B-6 was not the will of her father and, therefore, Ex. B-7 is not supportable at all. But in the appeal, there is no whisper about such a challenge as against Ex. B-6 and Ex. B-7.

10. Civil Courts trying domestic litigations like the one under consideration ought to be very slow in accepting the case of a litigant, who is prepared to change his stand like a chameleon and bolster up theories according to convenience. It is fundamental that in a case where a plaintiff abandons her case at any stage of the conduct of her own suit and practically accepts the opponent's case, since it is more convenient and suitable to her then it would be unjust and indeed unusual to allow the plaintiff to choose a different plane of action and practically claim the relief on the facts pleaded and proved by the opponent. She cannot approbate and reprobate and compel the Court to accept her case after an open exhibition of her inconsistence. We are referring to such conduct on the part of the plaintiff at this stage only to show that it is not open to the plaintiff as a party to the litigation to allege one set of facts as against the other side and after being confronted with a denial of such facts by the opponent make a volte-face and attempt to sustain the case of the plaintiff on the facts alleged by the opponent and seek for relief on such an inconsistent stand. This attitude of the plaintiff has to be borne in mind before we go deep into her case about undue influence.

11. The plea of undue influence as raised in the pleadings rests upon the following facts urged by the plaintiff. According to the plaintiff she came to understand that the defendants have taken undue advantage of the dominant position which they and the first daughter and the husbands of both the sisters occupied with reference to her and it was in that atmosphere she was compelled to execute the challenged sale deed. The second objection is that the consideration said to have been paid under the document is ridiculously low, the third contention is that the document is a sham one not intended to be acted upon. To further this contention, the plaintiff would allege that she was told that the mother was taking a loan and that she should attest the document and she believed her mother and signed the same. She would also add that the document on the face of it is unconscionable and gives the first defendant unfair advantage. But the telling irreconcilable part of it is that in the alternative, the plaintiff accepts the document partially and she is prepared to redeem the properties without payment of the consideration mentioned therein, if the Court ultimately holds that the money was lent under the document. She claims that she is not liable to pay any amount for such redemption, since the first defendant was in possession and enjoyment of the properties till the date of suit. In a case where a litigant intends to overlook and bypass a registered document under which prima facie certain rights have become vested and under which third par-

ties have acquired indefeasible rights, then the challenging party should be in a position to give such particulars about such undue influence which should form the basis of her complaint. The primary ground on which the plea of undue influence is founded is based on relationship. It is axiomatic that mere proof of relationship however near it may be, is not sufficient for a Court to assume that one relation was in a position to dominate the will of the other. Such bonds of kinship which are universally felt should not be mistaken as equivalent to saying that one kinsman could unduly influence the other in the circuit of such bondage. Even if any advice is given it may be influence but not undue influence. The tie of relationship need not necessarily be used unwisely, injudiciously and unhelpfully so as to gain an unfair advantage by the relation who is advising the other relation. Particularly in a Hindu family a widowed mother, who would rather be fairly and affectionately inclined to an unmarried daughter would not make undue preferences in favour of a married one who has already been provided for and who was well set in life. The sentiment, the traditional features of a Hindu Home, the love and affection of a mother towards her natural and last child which is a always in one way unless there are very extraneous circumstances to assume otherwise should always prompt a Court to raise the reasonable presumption that any advice or influence which a parent brought to bear on his own child is not to gain an advantage for herself or to see that an unfair advantage is gained by another child of hers in preference to the challenging child. There is also one other important and salient feature which ought to be established on materials pleaded and acts established that the 'bargain is tainted by undue influence' and it is unconscionable that it could reasonably be said that the person to obtain unfair advantage for himself and so as to cause injury to the person sought relying upon his authority or aid. It is only after such particulars are made available and a reasonable proof thereof has been given, the onus probandi would shift on the so-called 'person of domination'. Until then the burden is on the complainant to establish it is so.

12. In the instant case, the particulars given are not so appealing and telling. It is essential that in a case where fraud, undue influence or coercion is put at the forefront the complaining party should set forth the facts in full and give such essential particulars instead of making general allegations. That this is the legal requirement as provided for in O. 6, R. 4, C. P. C. is reiterated by the Supreme Court in Subhas Chandra v. Ganga Prosad (AIR 1967 SC 878). The Supreme Court said that the Court must scrutinize the pleadings to find out that a plea has been made out and that full particulars thereof have been given before examining whether undue influence was exercised or not. In the light of this, the pleadings and the evidence let in should be scrutinized.

13. Before doing so, it would be convenient to refer to the plaintiff herself and her ability and capability. She had her early education in an Anglo Indian School and studied up to Pre-University Class in the Nirmala College, Coimbatore. She is, therefore, an educated lady and not an illiterate or a person, who could be said to be incapable of acting on her own. In cases where a person suffers from an infirmity or backwardness, then standards of proof regarding undue influence or coercion may be slightly different. The case cited by the learned counsel for the respondent in Nibaran v. Nirupama (AIR 1921 Cal 131) deals with the transaction of a Pardanashin lady. They divided the decisions on the subject under two groups as follows:

"... ... ... First, cases where the person who seeks to hold the lady to the terms of her deed is one who stood towards her in fiduciary character or in some relation of personal confidence; and secondly, cases where the person who seeks to enforce the deed was an absolute stranger and dealt with her at arm's length. In the former class of cases, the Court will act with great caution and will presume confidence put and influence exerted; in the latter class of cases, the Court will require the confidence and influence to be proved intrinsically".

A fortiori therefore, in a case where the challenging litigant is capable and literate and the parties are parent and child, the Courts, must be doubly careful and would certainly demand strict proof of the misuse of confidence and influence said to have been exercised by the other party when the other party is none else than the mother. P. Ws. 1, 2 and 3 do not convincingly refer to any unfair practice indulged in by the mother when

she joined with the plaintiff to sell the property to the sister of the plaintiff. P. W. 4, the plaintiff's father-in-law, does not even wisper about undue influence having been exercised by the mother or any other member of the family. He would only ask us to draw some inference from surrounding facts. He would say that Dr. Punnaivanam, the husband of the first defendant took active part in arranging the marriage of the plaintiff and that the husband chosen was according to the choice of the plaintiff herself and that considerable sums were spent for her marriage. It is in this background of total lack of particulars of undue influence that we should read the evidence of P. W. 5, the plaintiff herself. She admits that she might have read the document Ex. B-2. This necessarily means that she has read it, since there is no denial of it. Her case is that she was not aware that she was executing a sale deed. Her specific particulars which she gives in the witness box about the practice of undue influence are that her mother, the second defendant, her elder sister, the first defendant, and Punnaivanam, the husband of the first defendant, informed her that another family house had been brought to sale in Court auction and that in order to save the property she must sign the document. There is no corroboration about this extraordinary version. The first defendant as D. W. 6 speaking to the contrary would say that the property had to be sold in order to secure money for purpose of the marriage of the plaintiff and since she was inclined to purchase the property she bargained for and fixed a fair price of Rs. 10,000/- and purchased the property under Ex. B-2. No doubt the mother whose act has been challenged and who is obviously in an embarrassing position, did not choose to get into the box. D. W. 5 is characterised by the lower court as a respectable person. He deposed that Ex. B-2 was read over and after it was so read over only, the plaintiff signed Ex. B-2. But the trial Judge thought that D. W. 5 should have expressed an opinion besides having spoken the truth. He was of the view that D. W. 5 should have specifically stated that the plaintiff signed the document after knowing the true nature of it. We are unable to share the view of the trial court in this behalf. When once a person placed in the position of the plaintiff who is not an illiterate and who could be said to have such experience in life and matters to understand things it is very difficult to infer that the plaintiff has discharged her burden. She would say in the witness box that she signed because she wanted to avoid a sale of another property of the family. She improves her case in the witness box so as to satisfy the legal requirement about the particulars of undue influence by saying that she believed her mother and her elder sister and signed the document. She would pretend that she signed as a witness to some document. She also would say that there was no necessity for sale, since there were family jewels and other monies of her father which was available for celebrating her marriage. The document is of the year 1964. Her mother was sending her regularly some amounts by way of pocket money and there was therefore no ill-feelings or any difference of opinion in the family. It is only in 1969, when she was in Coimbatore, she came to know that her property has been sold. Excepting for this evidence that it was P. W. 3 who told her about it no other speak about it, P. W. 3 was examined on 23-3-1971 and P. W. 5 was examined on 24-3-1971. There is no consistent version which is acceptable even as regards the information said to have been given by P. W. 3 in 1969. P. W. 3 would not specifically refer to the meeting at Coimbatore in 1969, whilst P. W. 5 the plaintiff refers to it very vaguely. In the suit notices which were exchanged under Exs. A-1 and A-2 there is no specific reference to the plaintiff having been unduly influenced by her mother. One other important feature which has to be borne in mind in the instant case is that the plaintiff should be deemed to have understood the challenged deed and signed it. The plea of non est factum is therefore not available to her. She says "PADITTHU ERUKKALAM" but she does not say " PADIKKAVILLI". The fair assumption is that she read it, understood it and signed it. To quote the observations of the Privy Council in Martin Cashin v. Peter J. Cashin (AIR 1938 PC 103):

"In a case where the person executing the deed is neither blind nor illiterate, where no fraudulent misrepresentation is made to him, where he has ample opportunity of reading the deed and such knowledge of its purport that the plea of non est factum is not open to him, it is quite immaterial whether he reads the deed or not. He is bound by the deed

because it operates as a conclusive bar against him not because he has read it or understands it, but because he has chosen to execute it".

Mr. Thiagarajan referred to various decisions. Narayanadoss Balakrishna Doss v. Buchrai Chordia Sowcar (53 Mad LJ 842) : (AIR 1928 Mad 6); Rama Patter v. Lingappa Gounder (69 Mad LJ 104) : (AIR 1935 Mad 726); Mannankatti Ammal v. Vaiyapur Udayar (1961-2 Mad LJ 367); Abdul Malick Sahib v. Md. Yousuf Sahib (1960-2 Mad LJ 355) : (AIR 1961 Mad 190) and other cases to show that this is a case where the plaintiff should be deemed to have been unduly influenced. In all those cases the following principles were laid down.

"(1) Where confidential relations exist, those standing in such relations cannot entitle themselves to hold benefits unless they can show that the persons who have conferred the benefits had competent and independent advice. In this case, neither does the age nor the capacity of the person conferring the benefit affect the principle".

"(2) Age and capacity are considerations which may be important in cases where no confidential relation exists".

There can be no quarrel relating to such accepted and general proposition. But each case has to depend upon its facts. In the instant case, the parties are parent and child. The document was executed at a time when the marriage negotiations of the plaintiff were going on. According to us, the plaintiff understood that it was sale of her property for consideration. The story that there were other moveable properties such as jewels and cash which ought to have been sufficient for the conduct of her marriage though spoken to vaguely has not been established. No such evidence has been placed before us either. The normal circumstance of securing competent and independent advice would not enter for consideration in this case because it was all arranged in a family council in which there was no distrust or mistrust as between the one and the other. What was sold did not belong to the plaintiff at all on the date of sale. She had only a bare right of expectancy; it may be a vested right. The subject-matter of the sale was not fully appreciated by the trial court. Both life interest of the mother as well as the ultimate remainder vested in the plaintiff were act (sic) of the second defendant after freely exercising her independent will and mind. The case relied on by Mr. Tyagarajan in Lancashire Loans Ltd. v. Black (1934-1 KB 380) which, of course, is a case as between a daughter and a mother, is certainly distinguishable. There, the daughter, who did not understand the transaction, signed the document at the request of her mother. The only advice which the daughter received was that of a Solicitor, who also acted for the mother and the money-lenders, who duped the daughter and who prepared the documents. It was in those circumstances the Court of Appeal held that the daughter was under the undue influence of her mother when she entered into the transaction in question and as the money-lenders had notice of the facts which constituted undue influence on the part of the mother, the transaction must be set aside. The facts of our case are entirely different.

14. Learned counsel for the first respondent rests his case in the alternative on the inadequacy of consideration which was more or less the sole ground on which the lower Court found a case of undue influence. The Court thought that the price paid under Ex. B-2 was ridiculously low. We have already referred to the fact that the plaintiff came to Court with inconsistent plea and she was not able to substantiate her case of undue influence, by concrete evidence. The sale is both the life estate and the vested remainder. But the lower court did not have this in mind and went on evaluating the property on some uncertain evidence regarding the income which it fetched and came to the conclusion that the price paid was ridiculously low, and therefore, the document should be set aside. Ex. A-17 dated 3-3-1965 furnished data with reference to some other property but said to be similar. This was proved by P. W. 2, who asserts that the suit land would fetch an annual rent of Rs. 5,000/-. Reliance is also placed on Ex. A-37 which is a diary said to have been written by the second defendant. Apart from the fact that this diary appears to be a book, which cannot be relied upon in a Court of law, the entry therein does not show that the amount mentioned therein related to one year's period only. But according to the Court below Ex. A-41 dated 14-12-1950 and Exs. A-60 dated 25-1-1962 and A-61 provided clinching evidence about the income. The mother was a party to Exhi-

bits A-60 and A-61. The lower Court accepted the materials furnished under Exs. A-41, A-60 and A-61 and came to the conclusion that the annual rent yield from the property would be about Rs. 3,500/- to Rs. 4,250/-. Prima facie it appears that a sale of a property for a sum of Rs. 10,000/- when its annual yield is in the range of Rs. 3,000/- to Rs. 4,000/- is not a fair transaction. But as we said, the second defendant, who is a party to Ex. B-2 had a life-interest over the property and she was selling her life-interest also under it. The second defendant is still alive. The document is of the year 1964. Even now she is reported to be hale and healthy. For six years, therefore, that is, six years before the suit, she lost her annual income of Rs. 4,000/- subsequent to the institution of the suit, she has lost another like sum. In cases where it is necessary to take subsequent events into consideration, the Court is not powerless to view those events also and weigh the reality of the situation or the equity of the bargain. If the mother has lost Rs. 48,000/- so far which ought to form part of the consideration, then the property should be deemed to have been sold for a sum of Rs. 60,000/- in 1964. This is not an unfair price even if the annual yield was about Rs. 4,000/-. This was not borne in mind by the learned Judge. The lower Court apparently was of the view that it was the plaintiff and the plaintiff alone who was entitled to the property on the date of sale and it is in that light, it considered the issue whether the price paid was ludicrously low. The plaintiff's case is that the property could have fetched only a sum of Rs. 40,000/-. Even on the date of suit, the consideration which should be deemed to have passed under the sale was very near that amount. But this is not all. The entirety of the transaction must be taken into consideration and the necessity for the sale, are all factors which should necessarily be borne in mind before a transaction could be set aside on the ground that the price paid therein is so low that it could be said to have been tainted by undue influence. In A. S. No. 644 of 1972* this Division Bench held:

"When once it is proved that the properties in question were sold for a consideration by the vendor without being influenced either by coercion or by undue influence then the question as to why he had sold the property may not loom large. More so in the instant case when the father of the vendor himself had attested the said document ... ..."

For the above reasons, we are unable to share the view of the trial court that Ex. B-2 should automatically fail and be held as an inoperative document on the only ground that prima facie the consideration is not adequate.

15. The plaintiff cannot succeed on one other specific ground which affects the very maintainability of her suit. The plaintiff was born on 2-8-1945. Ex. B-2 sale was executed on 29-6-1964. Her marriage was on 10-6-1965 and the plaint was presented to set aside the sale under Ex. B-2 on 22-2-1970. She tries to get over the plea of limitation by saying that she came to know that Ex. B-2 was a sale only in 1969. There is no reliable evidence at all on this. The lower court was influenced by the only fact that the mother and Dr. Punnaivanam did not get into the box. The finding of the court below that she came to know of the true nature of the document only in 1969 should be accepted, is not based on any acceptable material. We have already referred to the fact that the plaintiff examined as P. W. 5 says that she knew about it from P. W. 3 while she was in Coimbatore. P. W. 3 himself does not whisper about this. Then the question is whether the suit instituted in 1970 to set aside a document executed in 1964 is in time. When once the document is a registered one, and the plaintiff herself attended the Sub-Registrar's Office and accepted the nature of the transaction and when according to us, she must have acquainted herself with the recitals of the document she should have understood it as a sale of her interest in the property. Therefore, the facts entitling her to have the instrument set aside became known to her even on 29-6-1964. She has invented the year 1969 as the year when she first became known of such facts. This story is unbelievable. Even in the notice Ex. A-1 she would not set out the necessary particulars as to how she came to know about the unfairness of the transaction only in 1969. We have repeatedly referred to the fact that the plaintiff came forward with a case that there was a second will and she was unable to prove it. She would assert that the will Ex. B-6 was not duly executed

*(Muthusamy Goundar v. Komarasamy Goundar.)

by her father. She made a faint attempt to prove it. She would not even accept the partition deed Ex. B-7 when she came to Court. But in appeal she accepts that Exs. B-6 and B-7 are valid. She does not press her case about the existence of a second will but is satisfied with the judgment of the court below and would only ask this Court to incorporate in the decree the finding of the court below that Ex. B-2 is vitiated by undue influence and is unenforceable. Such being the attitude of the plaintiff and in the absence of any evidence which could be accepted to show that it was only in 1969 that she came to know that Ex. B-2 was a sale of her interest in the property, we are unable to accept the said version of the plaintiff. We find that she had knowledge about the sale even in 1964 and she not having taken any action within three years from the date of such execution, the suit is barred under Art. 59 of the Indian Limitation Act, 1963.

16. On the ground that what was sold was the life-interest and the ultimate remainder of the plaintiff in the property and that the price, therefore, paid therein cannot be said to be inadequate, for the mother parted with her life-interest, the value of which is considerable and on the ground that the mother cannot be said to have exercised any undue influence over her daughter and lastly on the ground that the suit itself should be held to be barred by limitation, we accept the dismissal of the suit made by the court below and would also hold that the plaintiff has failed to prove that Exhibit B-2 has to be set aside or cancelled on the ground that her mother or any of her near relations unduly influenced her to be a party to it.

17. The appeal, A. S. No. 84 of 1972 is, therefore, allowed; but there will be no order as to costs. In the circumstances, the request of the appellant in A. S. 102 of 1973 that the decree should be modified as prayed for by her cannot be countenanced and A. S. 102 of 1973 is dismissed. There will be no order as to costs. But the appellant in A. S. No. 102 of 1973 shall pay the court-fee payable to the Government.

Order accordingly.

AIR 1978 MADRAS 370

NAINAR SUNDARAM. J.

Chidambaram Chettiar, Petitioner v. Periyasamy Chettiar, Respondent.

Civil Revn. Petn. No. 1598 of 1974, D/- 10-4-1978.*

Limitation Act (36 of 1963), Art. 136 — Fresh application for execution or one for revival of prior proceedings — Order for statistical purposes — Meaning.

If an execution petition is dismissed for statistical purposes, there being no adjudication of the rights of the parties on merits or there being no disposal of the contentions of the parties conclusively, such an order is not a final order and must be deemed to be an order passed for statistical purposes. Such being the case, a fresh application filed must be deemed to be one for revival or continuance of the former applications. (Para 3)

An order dismissing an execution petition for want of bidders at the execution sale is unlawful. The fact that there are no bidders on one occasion did not prevent the decree-holder from asking the court in the same proceedings to put up the property for sale at a later date. (Para 2)

Where the order of dismissal of execution petition further directed that the attachment was to continue, it could be safely concluded that the said order is an order passed for statistical purposes. In this view also, a subsequent application under O. 21, R. 66. Civil P. C. to bring the properties for sale, would not be a fresh application for execution but could be deemed to be only an application for revival or continuance of the prior proceedings. AIR 1940 Mad 566 and AIR 1963 Mad 127, Rel. on. (Para 3)

Anno: AIR Comm. Lim. Act (5th Edn.) Art. 136 N. 46.

Cases Referred: Chronological Paras

AIR 1963 Mad 127 2

AIR 1940 Mad 566 : (1940) 1 Mad LJ 537 2

V. C. Viraraghavan, for Petitioner; S. Balathandapani, for Respondent.

ORDER:— This revision arises out of execution proceedings. The petitioner herein is the decree-holder. The respondent herein is the judgment-debtor. The

*(Against order of Dist. Munsif, Dindigul in unnumbered E. P. of 1973.)

decree in question is dated 29-4-1961. Earlier, E. P. 1050 of 1972 was filed for sale of the properties and on 31-3-1973, the Dist. Munsif, Dindigul, before whom the above proceedings were instituted passed orders and from the original order endorsed on the execution petition, though there is difficulty in deciphering it, I find that the order reads—

"No bidders at the sale on 28-3-1973. No steps. E. P. dismissed. The attachment to continue."

Both the counsel for the petitioner and the respondent concede that the above is the correct version of the order passed by the Court below on 31-3-1973. On 27-7-1973 the petitioner herein filed a petition under O. 21, R. 66 C.P.C. to bring the properties for sale. His application was contested by the judgment-debtor (respondent herein) on the ground that the present petition is barred by limitation since twelve years have lapsed from the date of the decree. This contention has been upheld by the court below and the petition has been dismissed. The present revision is directed against the order of the court below.

2. Mr. V. C. Veeraraghavan, learned counsel for the petitioner, submits that on a proper construction of the order passed by the court below on 31-3-1973. it must be held that the present application is only for revival of the execution proceedings and it cannot be stated that the present application is a fresh application for execution so as to attract the provisions of the Limitation Act. The learned counsel relies on a dictum of a Division Bench of this court consisting of Leach C. J. and Krishnaswami Aiyangar J. in Sivasubramaniam Chettiar v. Murugesan Mudaliar, 1940-1 Mad LJ 537 : (AIR 1940 Mad 566). It has been recognised by the Division Bench that where there are no bidders at the auction, the dismissal of the application is unlawful and the fact that there are no bidders on one occasion did not prevent the decree-holder from asking the court in the same proceedings to put up the property for sale at a later date. The Division Bench observed as follows:—

"It has been decided over and over again that an application in execution which is necessitated by the action of the court in striking off a previous application for execution is not in law a fresh application, but must be taken to be an application to revive or continue the former application."

Another Division Bench of this court consisting of Ramachandra Iyer C. J. and Kunhamed Kutti J. in Marudanayakam Pillai v. Krishna Sami Naidu, AIR 1963 Mad 127 had dealt with a case of similar nature and the Division Bench held that the petition filed for identical relief was for revival of the old petition, which was in accordance with law, and therefore no question of limitation arose.

3. If an execution petition is dismissed for statistical purposes, there being no adjudication of the rights of the parties on merits or there being no disposal of the contentions of the parties conclusively, such an order is not a final order and must be deemed to be an order passed for statistical purposes. Such being the case, a fresh application filed must be deemed to be one for revival or continuance of the former applications. The order in the present case significantly directs the attachment to continue. Hence it can be safely concluded that the said order is an order passed for statistical purposes. In this view also, it cannot be stated that the present application is a fresh application for execution and, in my view, it can be deemed to be only an application for revival or continuance of the prior proceedings.

4. Keeping the above principles in mind, I find that the court below has not appreciated and applied them to the facts of the present case; and if so applied, there will not be any difficulty in coming to the conclusion that the present application is one for revival and renewal of the earlier application and there is no question of limitation involved. The order of the court below cannot be upheld in law and accordingly this revision petition is allowed and the order of the court below is set aside and the execution petition filed by the petitioner will be numbered and will be prosecuted and disposed of in accordance with law. There will be no order as to costs in this revision.

Petition allowed.

AIR 1978 MADRAS 372

MOHAN, J.

Cheran Transport Corporation Ltd., Coimbatore, Petitioner v. The State Transport Appellate Tribunal, Madras and another, Respondents.

Civil Revn. Petn. No. 673 of 1978. D/-27-3-1978.*

Motor Vehicles Act (4 of 1939), S. 134 (1A) — Permits for stage carriage — Renewal — Authority refusing to renew — Appeal — Exercise of discretion by appellate authority under S. 134 (1A) — Legality.

Applications for renewal of stage carriage permits were notified under S. 57 of the Act. Objections were filed on ground that a draft scheme for the nationalisation of the route had been published. It was also alleged that the history sheet of the applicant was bad in that the permits were suspended for offence like overloading etc. The authority rejected the renewal applications and thereafter granted temporary permits under S. 68-F (1A) to the objector. The appeal was filed by the applicant. Interim directions were issued under S. 134 (1A) and the temporary permits were stayed.

Held, that the exercise of discretion under S. 134 (1A) was illegal. (Para 5)

The Tribunal did not consider the instant case in the light of the existence of a draft scheme, because in such a case S. 88-F (10) proviso will have a great bearing. The renewal therein, no doubt, could be granted in the discretion of the authority concerned, but that is a limited renewal so as to synchronise with the finalisation of the scheme. In the first part of the order relating to the exercise of discretion under S. 134 (1-A) the Tribunal was not even conscious of the statutory provisions occurring under Chap. IV-A. To a case falling under Chap. IV-A whether the discretion could be exercised under S. 134 (1A) or not. does not seem to have occurred to the Tribunal. (Paras 4, 5)

Anno: AIR Comm. M. V. Act (1st Edn.), S. 134 N. 1.

Cases Referred: Chronological Paras

AIR 1976 SC 2161 3, 4

*(Against order of State Transport Appellate Tribunal, Madras in I. A. No. 214 of 1978.)

GV/IV/C953/78/MVJ

N. G. Krishna Iyengar, for Petitioner; M. N. Rangachari for V. Subramaniam, for Respondents.

ORDER:— This is rather an unfortunate case. The second respondent (V. C. K. Bus Service) applied for renewal of permit in respect of the buses TNE 5406 and MDB 7206 plying on the inter-State route Coimbatore to Koduvapur for a period of five years from 1-7-1977 for the portions lying in the State of Tamil Nadu. The applications were notified under S. 57 (3) of the Motor Vehicles Act, 1939 (hereinafter referred to as the Act). In response to the notification, representations were received from the revision petitioner (Cheran Transport Corpn. Ltd., Coimbatore) objecting to the renewal. It also stated therein that a draft scheme for the nationalisation of the route under S. 68-C of the Act had been published in the Tamil Nadu Government Gazette dated 15-9-1976, and temporary permit could be granted under S. 68-F (1-A). It has further stated that the history sheet of the applicant (V. C. K. Bus Service) was bad and no renewal could be granted. The State Transport Authority by its order dated 28-2-1978 rejected the renewal on the ground that the permit of the second respondent herein was suspended on 12 occasions for offences like overloading etc., which the authority considered to be a serious disqualification. It was also of the view that having regard to the draft scheme, the proviso to S. 68-F (1-D) would apply in which case if a renewal took place, it should be to limit the same to the date of finalisation of the scheme. On this reasoning it rejected and later on granted temporary permits in order to maintain continuity of service to the revision petitioner. Against this order rejecting the request for renewal, an appeal was preferred to the Tribunal. In the appeal, interlocutory applications were taken out for issue of necessary directions under S. 134 (1-A) of the Act and interim directions were issued. To cancel the interim directions, the revision petitioner took out an interim application. All these applications came up on 15-3-1978 for consideration and the Tribunal passed an order confirming the interim directions on the view that the lower authority has not given any detail about the history sheet excepting a passing reference that the appellant's permit has been suspended on 12 previous occasions for offences like overloading

etc. and since this is the very crux of the matter which is to be decided in the appeal pending the appeal discretion may be exercised under S. 134 (1-A). It is against this order. Cheran Transport Corporation has come up by way of revision.

2. Mr. N. G. Krishna Iyengar, learned counsel for the petitioner, urges that this is a case in which the consideration as set out under S. 68-F (1-D) read with S. 68-F (1A) will have to be applied. Those considerations loomed large before the Regional Authority, namely, the Transport Authority. When an appeal was filed against that order rejecting renewal on the ground that there were 12 offences against the appellant including overloading, the Tribunal ought to have considered the applicability of S. 134 (1-A) to a case falling under Chap. IV-A. That has not been done. Instead, it merely grants renewal as a routine stating that the question, relating to the punishment could be relegated to the final decision in the appeal. Therefore, exercise of the discretion is highly improper. More so when in order to maintain continuity of service and to avoid inconvenience to the passenger public temporary permits had been granted to the revision petitioner-Corporation.

3. Mr. M. N. Rangachari, learned counsel for the second respondent in meeting these contentions urges that this is a case in which the Tribunal felt that the question relating to offences could be conveniently gone into during the final hearing of the appeal. Nevertheless S. 134 (1-A) would enable the Tribunal to exercise the discretion in favour of his client. Chapter IV-A is not a self-contained Code; not does it exclude the application of S. 134 (1-A). Even by the application of S. 68-F (1D), the renewal could be ordered in favour of the second respondent, because the renewal is not altogether excluded excepting that it would be limited to the date of finalisation of the scheme. In support of this, the learned counsel relies on Mohd. Ashfaq v. S.T.A.T. U. P., AIR 1976 SC 2161.

4. I have very carefully gone through the order of the Tribunal. It leaves me with the impression that the Tribunal had not considered this case in the light of the existence of a draft scheme, because in such a case S. 88-F (1D) proviso will have a great bearing. The renewal therein, no doubt, could be granted in the discretion of the authority concerned, but that is a limited renewal so as to synchronise with the finalisation of the scheme. This is precisely how the matter was approached by the original authority. It found, while exercising that discretion. the second respondent before me had 12 punishments including for overloading. Certainly it was well open to the original authority to consider that as a serious disqualification. Where therefore in consideration of the same, it rejects the renewal, certainly no objection could be taken to the same. Later on, it found temporary permits will have to be issued and therefore it did issue temporary permits. What the Tribunal does is, relegates the question of punishment to the final hearing and chooses to exercise its discretion under S. 134 (1-A). In the first part of the order relating to the exercise of discretion under S. 134 (1-A) it is not even conscious of the statutory provisions occurring under Chap. IV-A. To a case falling under Chap. IV-A whether the discretion could be exercised under Section 134 (1A) or not, does not seem to have occurred to the Tribunal. The reason why I am saying this is because of S. 68-B. No doubt in Mohd. Ashfaq v. S.T.A.T., U. P., AIR 1976 SC 2161 at p. 2166 it is stated—

"Moreover, it is implicit in the enactment of S. 68-B that Chap. IV-A is not a self-contained Chapter to which the other provisions of the Act are inapplicable. If Chap. IV-A were a self-contained Code by itself, there would have been no need to give overriding effect to the provisions in that Chapter as against the other provisions of the Act."

But the real question is, was the Tribunal aware whether it could entertain an appeal, in a matter falling under Chapter IV-A? If it is so, under S. 134 (1). it could entertain an appeal in which event, because of the non obstante clause occurring under S. 134 (1-A) it could exercise its discretion. Not one of these considerations prevailed with the Tribunal. There is no use, now, the learned counsel for the respondent trying to buttress the order with the Supreme Court case, since the Tribunal should have been conscious of this legal position and yet must have chosen to exercise its discretion. It cannot merely say that the question relating to punishment should be relegated to final hear-

ing and discretion could be exercised. What are the details relating to history sheet that were required? Could not the Tribunal have asked for those details, especially when the lower authority was available at its elbow? Nothing of the sort was done. In my view. there is every justification for the complaint of Mr. N. G. Krishna Iyengar that the discretion has been exercised as a matter of course.

5. Worst still to follow. As if it is a logical conclusion, having chosen to exercise its discretion, the temporary permits granted in favour of the revision petitioner Corporation are stayed. Why should it be stayed? No reason is found, as if it is a case of balancing between two rival claims. One is independent of the other. Therefore. I see no justification for the Tribunal ordering so. In the result I am fully satisfied that the Tribunal seriously erred in exercising its discretion without having regard to the relevant provisions of law and as a matter of course.. Therefore, this revision petition is allowed. No costs,

6. I think the interest of justice would be met by directing the Tribunal to take up the main appeal itself and dispose of the same on or before 10-4-1978.

Order accordingly.

AIR 1978 MADRAS 374

RAMANUJAM AND PAUL, JJ.

M/s. Gordon Woodroffe and Co., Madras (P.) Ltd.. Appellant v. C. D. Gopinath and another, Respondents.

O.S.A. No. 17 of 1978, D/- 21-3-1978.*

(A) Letters Patent (Mad.), Cl. 15 — Judgment — Order refusing or granting temporary injunction pendente lite is appealable under Cl. 15. (1912) ILR 35 Mad 1 (FB); AIR 1968 Mad 1 (FB); (1969) 82 Mad LW 361 (FB) and AIR 1972 Cal 469, Foll., AIR 1974 SC 1719 and AIR 1978 Bom 48, Ref. (Para 11)

Anno: AIR Manual (3rd Edn.), L. P. (Mad.) Cl. 15, Notes 2, 3.

*(Against judgment of Natarajan J. in Appln. No. 3892 of 1977 in C. S. 450 of 1977.)

GV/HV/D166/78/VBB

(B) Specific Relief Act (47 of 1963), Ss. 37, 38, 41 (1) and 42 — Service agreement by respondent with steamer agency company (appellant) as Chairman — Covenant that respondent shall be true and faithful to company and shall use his best endeavours for its advancement and prosperity — Termination of company's steamer agency — Agency offered to respondent after certain date — Unilateral termination of service agreement by company after such offer — Suit against appellant for permanent injunction to restrain him from taking up same agency— Interim injunction pending suit if can be granted — Covenant whether could be construed as negative covenant not to take up same agency after termination of service agreement. (Civil P. C. (1908), O. 39, Rr. 1 and 2).

The plaintiff appellant company was appointed in 1878 as steamer agents of a shipping company. After the Foreign Exchange Regulation Act was introduced in June 1974, the appellant was not granted the permission by the Reserve Bank of India to carry on its steamer agency activities as before, as 79% of the shareholding in the appellant company was being held by an English Company. At that stage, the defendant respondent was functioning as Chairman of the appellant company under a service agreement dated 3-1-1975 for 5 years. As the alternative proposals put forward by the appellant was not acceptable to the Reserve Bank, the respondent made the shipping company agree that from 1-2-1978, they would divert their steamer agency to the company to be started by the respondent. The steamer company informed the appellant agency company about its decision to terminate the agency from 31-1-1978 and to give it over to the respondent. Proceeding on the basis that the termination of the agency by the steamship company had been purposely brought about by the respondent by making false, fraudulent and unauthorised representations both to the steamship company and the Reserve Bank, with a view to divert the steamer agency for his benefit, the appellant company terminated the services of the respondent by an order dated 3-12-1977. Subsequently the appellant filed the suit for a permanent injunction restraining the defendants from taking over the steamer agency and for a decree for damages suffered by the appellant by respondent's breach of the service agree-

ment. Along with the plaint the appellant filed an application for interim injunction pending disposal of the suit restraining the defendants from taking over jointly and severally the said steamer agency from 1-2-1978. One of the Clauses (cl. 2) in the service agreement said that the first respondent should be just, true and faithful to the appellant company in the performance of his duties and should use his best endeavours to the advancement and prosperity of the company. He had also to obey all reasonable instructions issued by the company from time to time.

Held that the clause in the service agreement could not be constrained as implying a negative covenant. The said clause nowhere stated that the respondent could not take up the same or similar agency after his services were terminated. Even assuming that Cl. 2 could be construed as implying a negative covenant that the respondent could not compete with the appellant or take up any similar or same agency business, so long as his services stood terminated, the proviso to S. 42 came into operation. The appellant having terminated the services of the respondent, it was no longer in a position to perform its part of the service contract and, therefore, it could not seek to enforce the alleged negative covenant contained in the contract of service. Therefore, the normal rule that the court shall not grant an injunction in the matter of a contract of service which could not be specifically enforced, contained in S. 41 (e) would apply to the facts of the case and the appellant could not invoke the exception contained in S. 42. (Para 16)

Held also that even if there was a breach of the negative covenant as alleged, it could be compensated in money and therefore Ss. 38 (3) (c) and 14 (a) would come in the way of the court granting relief to the appellant by way of an injunction. AIR 1974 SC 158; (1972) 1 Ch 305 and (1975) 1 All ER 504, Disting; Appln. No. 3892 of 1977 in C. S. 450 of 1977 (Mad), Affirmed. (Para 17)

Anno: AIR Manual, 3rd Edn., Spec. Rel. Act, S. 37 N. 2, S. 38 Notes 12, 14, 15; S. 41, N. 5; S. 42, N. 3; AIR Comm. Civil P. C., 8th Edn., O. 39 R. 2 Notes 3 and 3-B.

Cases Referred: Chronological Paras

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(1912) ILR 35 Mad 1 (FB) 11

S. Chellaswami, for Appellant; S. Govind Swaminathan, for Respondents.

RAMANUJAM, J.:— This appeal arises out of an order of Natarajan J. in Appln. No. 3892 of 1977 declining to grant an interim injunction pending disposal of C. S. No. 450 of 1977 filed by the appellant herein as plaintiff.

2. The circumstances under which the said suit came to be filed have been clearly and fully set out by Natarajan J. in the order under appeal and, therefore, it is not necessary to restate the same herein in elaborate detail and we will refer only to certain basic and salient facts. The appellant (plaintiff) was originally started as a partnership concern in 1868 but later converted into a limited company in 1924. It started as a subsidiary of Gordon Woodroffe Ltd., London which even now holds 79% of its shares. It has its registered office at Madras and branch offices at Kakinada and Vizagapattinam, for its steamer business. It was appointed as steamer agents of the Clan Line Steamers Ltd. in the year 1878, hereinafter referred to as Clan Line and the said agency was continued ever since. In the pooling system which was introduced in the year 1960. Clan Line had been allotted 47 per cent of the traffic from Kakinada and 30 per cent of the traffic from Madras.

3. Under the Foreign Exchange Regulation Act which was introduced in June 1974, the appellant has to get the permission of the Reserve Bank of India to carry on its steamer agency activities as before as 79% of the shareholding in the appellant company is being held by the Gordon Woodroffe Ltd. London. Therefore an application was made by the appellant for such permission. The Reserve Bank of India by its letter dated 16-8-1977 stated that the permission sought for cannot be granted to

the appellant in its present set up where the foreign shareholding is 79% and that permission would be granted if the appellant conforms to the provisions of the Foreign Exchange Regulation Act and the directives of the Reserve Bank of India by bringing down the holding of its shares by foreigners to 40% level, the balance of the 60% being taken by Indian Nationals. It is at that stage, the first respondent herein (the first defendant in the suit) who was functioning as Chairman of the appellant company under a service agreement dt 3-1-1975 for a period of five years was asked to put up certain alternative proposals to the Reserve Bank. The alternative proposals put forward by the appellant not being acceptable to the Reserve Bank, the first respondent wrote a letter on 13-10-1977 to the Reserve Bank stating that the appellant was prepared to give up the agency business, and that it may be given time till 1-2-1978 to complete the formalities in relation thereto. The first respondent thereafter got in touch with Clan Line and made them agree that with effect from 1-2-1978 they would divert their steamer agency to the second respondent to be started by him. Clan Line informed the appellant about its decision to terminate the agency with effect from 31-1-1978 and give it over to the second respondent. The appellant wrote many persuasive letters to Clan Line not to terminate its agency. But the Clan Line stuck to their original decision to terminate their agency with effect from 31-1-1978. Proceeding on the basis that the termination of the agency by the Clan Line has been purposely brought about by the respondent by making false, fraudulent and unauthorised representations both to the Clan Line and the Reserve Bank with a view to divert the steamer agency for his benefit, the appellant company terminated the services of the first respondent by an order dated 3-12-1977.

4. Subsequently the appellant filed the suit on 8-12-1977 against respondents 1 and 2 for (1) a permanent injunction restraining the defendants from taking over Clan Line Steamer agency for the Ports of Madras, Kakinada and Vizagapattinam and functioning as Clan Line Co-ordinating agents for their trade from India and functioning as Clan Line controlling agents for Cuddalore, Nagapatnam, Masulipatnam and Trivandrum or acting as agents for the Clan Line Steamers Ltd., London and (2) for a decree for a sum of Rs. 5,00,000, being the damages suffered by the appellant by the first defendant's breach of the service agreement dated 3-1-1975 entered into between the appellant and the first respondent.

5. After service of summons in the suit, the first respondent filed on 13-1-1978, an application under S. 34 of the Arbitration Act for stay of the said suit on the ground that in view of the arbitration clause contained in the service agreement, the matter has to be settled only by arbitration as provided for therein. The second defendant a firm consisting of the first defendant and two others as partners, which is to take over the business of Clan Lines agency as and from 7-2-1978 after the plaintiff's agency stood terminated by the notice of termination of agency issued by the Clan Line on 19-10-1977 also did not put forward its defence pending the result of the application for stay filed by the first respondent.

6. Along with the plaint the appellant filed an application for interim injunction pending disposal of the suit restraining the defendants from taking over jointly and severally the said Clan Line Steamers agency, for the ports of Madras, Kakinada and Vizagapatnam and functioning as Clan Line agent for their trade from India and Clan Line controlling agents for Cuddalore, Masulipatnam, Nagapattinam and Trivandrum or acting as gents for the Clan Line Steamers Ltd., London in respect of the aforesaid agencies.

7. Though notice of this application was given to the defendants, they did not file any counter affidavit as they apprehend that any step taken by them in the said injunction application will prejudice them in the prosecution of their application under S. 34 of the Arbitration Act for stay of the suit.

8. In support of the application for injunction it was submitted on behalf of the appellant before the trial Court that it has been acting as the sole agent for Clan Line for the past 100 years and more, that on account of the efforts, exertions taken and investment of large sums of money made by the appellant the cargo trade of Clan Lines had been developed in a substantial measure in Indian Ports so as to enable it to get a quota of 47 per cent of the traffic from

Kakinada and 30 per cent of the traffic from Madras and that as the agency is thus coupled with interest, it cannot be terminated by the Clan Lines unilaterally and the same diverted to defendants 1 and 2. Secondly it was contended that the first respondent who was in a fiduciary capacity cannot take advantage of his own fraud in diverting the agency business to his own advantage and therefore he must be restrained by an injunction from taking over of the agency business which not only amounts to a breach of the covenants contained in the service agreement, but also amounts to a breach of trust. Thirdly it was contended that the termination of agency will lead to disastrous consequences and great financial loss to the appellant and that such loss cannot be compensated in money. Fourthly it was said that the balance of convenience lay in favour of the appellant as the first and second respondents have not made any arrangements so far for taking over and carrying on the agency business.

9. Natarajan J. considered each one of the above contentions and finally held that there are several factors which militate against the grant of an interim injunction as prayed for by the appellant. The several militating factors referred to by the learned trial Judge are these— (1) Neither Clan Line Steamer Co., nor its Managers, Cayzer Irwine and Co. Ltd. by whom the appellant had originally been appointed as agent for Clan Line being parties to the suit, any order of injunction passed against respondents 1 and 2 touching the agency business of Clan Line will affect the interest of Clan Line which is not before the court and that, therefore, in their absence no interim injunction could be granted. (2) Even if an injunction is granted restraining respondents 1 and 2 from taking over the Clan Line agency business from 1-2-1978, Clan Line having already cancelled the agency of the appellant, any order of injunction will not benefit the appellant. (3) The appellant has not satisfactorily established that the loss that might be sustained by it by the alleged wrongful act of the first respondent or the wrongful termination of agency by Clan Line cannot be compensated in terms of money and that as a matter of fact the appellant itself has estimated the damages in a sum of Rs. 64-5 lakhs though it has restricted its claim to Rs. 5 lakhs; (4) The first respondent having filed an application for stay of the suit is handicapped in participating in the injunction petition and, therefore, it will be against equity and good conscience to grant an ex parte order of injunction. The said order of Natarajan J. refusing to grant an interim injunction has been challenged in this appeal by the appellant on the ground that in the circumstances of the case an interim injunction should have been granted.

10. Before going into the merits of the appellant's contentions, it is necessary to dispose of a preliminary objection taken by Mr. Govind Swaminathan learned counsel for the respondents as to the maintainability of this appeal. According to him an order refusing to grant an interim injunction pending the suit cannot be a judgment as contemplated by Cl. 15 Letters Patent and as such it is not appealable. The learned counsel refers to the decisions in Shanti Kumar v. Home Insurance Co. New York, AIR 1974 SC 1719 and Putla Rustomji v. Gul Mani, AIR 1978 Bom 48 in support of his plea. In Shanti Kumar v. Home Insurance Co. New York, AIR 1974 SC 1719 the Supreme Court had to consider whether an order permitting amendment of a plaint will be a judgment within Cl. 15 Letters Patent and could be appealed against. The Supreme Court expressed (at p. 1722)—

"In finding out whether the order is a judgment within the meaning of Cl. 15 Letters Patent, it has to be found out that the order affects the merits of the action between the parties by determining some right or liability. The right or liability is to be found out by the court. The nature of the order will have to be examined in order to ascertain whether there has been a determination of any right or liability."

In Putla Rustomji v. Gulmani, AIR 1978 Bom 48, a Division Bench of the Bombay High Court had held that an order refusing to grant an interim injunction is not a judgment within the meaning of Cl. 15 Letters Patent as none of the rights of the parties in the litigation was determined in the proceedings and that the entire litigation was still at large. The learned Judges in that case observed (at p. 51)—

"However, the legal position seems to be that the affectation of interference with the right of possession or any

other right for the time being of a party must be the result of the court's order determining some right inter partes during that litigation. If it is not so, then undoubtedly mere refusal to give interim relief in a litigation where ultimately the relief claimed may be granted would not amount to a judgment within the meaning of Cl. 15."

11. As against these decisions, Mr. Chellaswami, learned counsel for the appellant, refers to the Full Bench decisions in Tuljaram Rao v. Alagappa Chettiar, (1912) ILR 35 Mad 1, Palaniappa v. Krishnamurthi, 1967-2 Mad LJ 1 : (AIR 1968 Mad 1) and V/O Tractor Export, Moscow v. Tarapore and Co. (1969) 82 Mad LW 361. In the first case, Sir Arnold White C. J. speaking for the Bench pointed out that an order on an independent proceeding which is ancillary to the suit, such as an order on an interim injunction application or for appointment of a receiver will certainly constitute a 'judgment' within the meaning of Cl. 15. The tests laid down therein for determining whether the order is a judgment within the meaning of Cl. 15 Letters Patent are to see—

(1) If its effect is to put an end to the suit or proceeding so far as the court before which the suit or proceeding is pending is concerned; or

(2) if the non-compliance therewith will have the effect of putting an end to such suit or proceedings; or

(3) if it is passed in an independent proceeding which is ancillary to the suit (not instituted as a step towards judgment, but with a view to rendering the judgment effective when obtained) e. g., an order on an application for temporary injunction or for the appointment of a receiver.

In Palaniappa v. Krishnamurthi, 1967-2 Mad LJ 1 : (AIR 1968 Mad 1) (FB) another Full Bench of this Court reviewed the entire situation elaborately including the trends of the case law in the other High Courts and expressed the view that so long as there is a judgment in an independent proceeding, though it may be ancillary to the suit, which determines the rights of parties in that proceedings, it is appealable within Cl. 15 and this was beyond any doubt or controversy. In V/O. Tractor Export, Moscow v. Tarapore & Co. (1969) 82 Mad LW 361 (FB) an appeal against an order granting an interim injunction was entertained on the basis of the above Full Bench decisions. The learned counsel also refers to the Bench decision in Chittaranjan v. S. P. Sahni, AIR 1972 Cal 469. In that case an order refusing to grant an injunction pending the suit was held to be appealable under Cl. 15 Letters Patent (Calcutta) following the Full Bench decision in Tuljaram Row v. Alagappa (1912) ILR 35 Mad 1. Therein the Court observed (at p. 470)—

"The position, therefore, is that in the present state of the law it is open to us to apply the third test of White C. J. to the facts of this case. The order of Amaresh Roy J. refusing to grant an injunction restraining execution of the judgment decree was passed in an independent proceeding which was ancillary to the appeal and as such it is a 'judgment' within the meaning of Cl. 15 Letters Patent. We hold that this is an appealable order."

Since for more than half a century this Court has been entertaining appeals under Cl. 15 Letters Patent (Madras) from orders made on application in the exercise of its original jurisdiction, we see no justification for taking a different view. It is true the Bombay High Court in Putla Rustomji v. Gulmani, AIR 1978 Bom 48 has taken a contrary view. But so far as this court is concerned, it has taken a uniform and consistent view, based on the earliest of the decisions in Tulrajam Rao v. Alagappa (1912) ILR 35 Mad 1 (FB) that an order refusing or granting a temporary injunction pendente lite is appealable under Cl. 15 and we are bound by the said Full Bench decision. We have to therefore hold that the appeal is maintainable.

12. Then the only question to be considered is whether the appellant has established a case for the issue of an interim injunction restraining the respondents from taking up the Clan Line agency from 1-2-1978. In fact no injunction has been asked for against Clan Line regarding the cancellation of the agency by the Clan Line or their managers in the suit. Nor have they been made parties to the suit. Hence no relief could be claimed in this suit by the appellant against the Clan Line on the basis that the termination of its agency is wrongful and there can be no question of any mandatory injunction being issued against the Clan Line directing the continuation of the appellant's agency beyond 1-2-1978.

13. According to Mr. Chellaswami, learned counsel for the appellant, Cl. 2 of the service agreement dated 3-1-1975 entered into between the appellant and the first respondent contains a negative covenant and the court can always prevent breach of such a negative covenant by issuing an injunction. It is also said that the first respondent's status under the service agreement is that of a trustee and that his conduct in procuring the termination of the Clan Line Agency in favour of the appellant and getting the benefit thereof to himself and the second respondent is in breach of trust. The learned counsel also submitted that the first respondent has not only acted in breach of trust but also is guilty of fraudulent conduct in acting against the interest of the appellant, his employer and securing a benefit for himself, and that, therefore, he cannot be allowed to enjoy or retain the benefit so obtained against the interest of his employer.

14. Chap. VIII of the Specific Relief Act, 1963, deals with perpetual injunction, and that Chapter consists of Sections 38 to 44. S. 38 (1) says that a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication, subject to the other provisions of the Act. Sub-section (2) of S. 38 says that when any such obligation arises from contract, the Court shall be guided by the rules and provisions contained in Chap. II. Sub-sec. (3) however says that the court can grant a perpetual injunction in the following cases if the defendant invades or threatens to invade the plaintiff's right to or enjoyment of the property—

"(a) Where the defendant is trustee of the property for the plaintiff.

(b) Where there exists no standard for ascertaining the actual damages caused or likely to be caused, by the invasion,

(c) Where the invasion is such that compensation in money would not afford adequate relief;

(d) Where the injunction is necessary to prevent a multiplicity of judicial proceedings."

Section 40 (1) enables the plaintiff to claim damages either in addition to, or in substitution for, such injunction. Section 41 says that an injunction cannot be granted—

"(a) ..... (b) ..... (c) ..... (d) ..... (e) to prevent the breach of a contract the performance of which would not be specifically enforced."

Sec. 42 however enables the Court to grant an injunction to perform negative agreement notwithstanding anything contained in S. 41 (e) provided the plaintiff has not failed to perform the contract so far as it is binding on him.

15. Chap. II deals with specific performance of contracts and the provisions contained in that chapter are to govern the grant of injunctions as per S. 38 (2). Sec. 10 deals with cases in which specific performance could be granted. Section 10 (b) says that a specific performance can be granted in the discretion of the court if the act agreed to be done is such that compensation in money or its non-performance would not afford adequate relief. Sec. 14 which deals with contracts which cannot be specifically enforced also says that a contract for non-performance of which compensation in money is adequate relief cannot be specifically enforced. It is with reference to those statutory provisions the appellant's prayer for an interim injunction has to be considered.

16. It is well established that normally a contract of service or a contract of agency cannot be specifically enforced as the breach thereof can always be compensated in money. The learned counsel for the appellant does not dispute this proposition. But what he contends is that as the contract of service in this case contains a negative covenant, such a negative covenant can be enforced by granting an injunction pending the suit. It is said that under Section 42 the court is empowered to grant an injunction to perform a negative agreement. The learned counsel reads Cl. 2 of the contract of service dated 3-1-1975 as providing for an implied negative covenant that the first respondent will work for the benefit of the appellant company and not for any body else including himself. Cl. 2 of the service agreement is as follows—

"Mr. Gopinath shall be just, true and faithful to the Company in the performance and carrying out of his duties and shall use his best endeavours to ensure the advancement and prosperity of the business of the company and shall in all things carry out, obey and fulfil all such reasonable instructions and directions as shall from time to time be given to him by the company or any

person or persons authorised by the company."

This clause says that the first respondent should be just, true and faithful to the company in the performance of his duties and shall use his best endeavours to the advancement and prosperity of the company. He has also to obey all reasonable instructions issued by the company from time to time. We are not inclined to construe this clause as implying a negative covenant. The said clause nowhere states that the first respondent cannot take up the same or similar agency after his services are terminated. It is true, so long as he is in office as Chairman of the Board of directors he cannot act against the interests of the Company but has to faithfully act for its advancement. In this case, as already stated, the first respondent's services have been admittedly terminated by the appellant company by an order dated 3-12-1977. Therefore, even assuming that cl. 2 can be construed as implying a negative covenant that the first respondent cannot compete with the appellant or take up any similar or same agency business, so long as his services stand terminated, the proviso to S. 42 comes into operation. The appellant having terminated the services of the first respondent, it is no longer in a position to perform its part of the service contract and, therefore, it cannot seek to enforce the alleged negative covenant contained in the contract of service. Any order granting an injunction now for the performance of a negative covenant would actually amount to specific performance of a covenant in an agreement which has been put an end to by the appellant itself. We are, therefore, of the view that the normal rule that the court shall not grant an injunction in the matter of a contract of service which cannot be specifically enforced, contained in S. 41 (e) will apply to the facts of the case and the appellant cannot invoke the exception contained in S. 42, as it has terminated the service contract before it invoked the assistance of the court to enforce the negative covenant by the issue of an injunction. After the termination of the service agreement by the appellant there is no obligation existing in its favour which could be specifically enforced. Clause 2 of the said service agreement which is the only provision relied on by the appellant does not create any obligation in its favour after the contract of service comes to an end and it deals with the first respondent's obligations only during the currency of the service agreement. There is, therefore, no enforceable obligation in favour of the appellant as on the date of suit.

17. We are also satisfied that even if there is a breach of the negative covenant as alleged, it could be compensated in money and therefore Ss. 38 (3) (c) and 14 (a) will come in the way of the court granting relief to the appellant by way of an injunction. This is the view taken by the trial Judge and we are in entire agreement with him. It is well established that a contract of service cannot be specifically enforced as a breach thereof can always be compensated in money. The general rule is that the grant of an injunction is a matter of discretion of the court and it cannot be claimed as of right. No doubt, the discretion has to be exercised in a judicious manner and in accordance with the provisions relating to the grant of injunction contained in the Specific Relief Act. As already stated, in this case the appellant's prayer for an interim injunction is based on S. 42, which is more or less an exception to the general rule contained in S. 41 (e). That an injunction cannot be granted to prevent the breach of a contract which cannot be specifically enforced is not disputed. The learned counsel for the appellant refers to cl. 2 of the service agreement dated 3-1-1975 and submits that though there is no express negative covenant, a negative covenant that the first respondent cannot take over a similar or the same steamer agency should be implied. We do not see how the above clause in the service agreement can be construed as an implied negative covenant. Under this clause the first respondent is bound to be faithful to the company and should use his best endeavours to ensure the advancement and prosperity of the company and to obey all instructions of the Company. That does not expressly or impliedly prevent the first respondent from giving up his service under the appellant and starting an agency business of his own. As already stated, the first respondent's services have been terminated on 3-12-1977 and even if cl. 2 of the service agreement is construed as an implied negative covenant not to work against the interests of the company, that negative covenant

cannot subsist after the service agreement has been put an end to by the appellant itself by terminating the services of the first respondent. It is in this context the proviso to S. 42 becomes material. The proviso says that the applicant who seeks an injunction must be in a position to perform the contract so far as it is binding on him. The obligations of the first respondent under clause 2 of the service agreement cannot extend beyond the period referred to in the service agreement and his obligations are limited only to the period of his service under the appellant. Now that the appellant has put an end to the service agreement by terminating the services of the first respondent, he has failed to perform his part of the contract by retaining the first respondent till the expiry of five years from 3-1-1975. In view of the proviso to Section 42 the appellant who has terminated the services of the first respondent unilaterally, cannot now seek to enforce the alleged negative agreement. In this view of the matter, the appellant has disabled himself from getting a relief of interim injunction by terminating the service agreement. Therefore it is not necessary to go into the various decisions and authorities cited by the learned counsel for the appellant.

18. The learned counsel for the appellant would contend that though the services of the first respondent have been terminated by the appellant by an order dated 3-12-1977, the service agreement should be deemed to continue or subsist for the purpose of claiming injunction under Sec. 42 and that the first respondent himself has treated the service agreement as subsisting by invoking the arbitration clause contained therein even after the filing of the suit. The learned counsel also refers to the fact that the first respondent has not accepted the validity of the order of termination of his services and states that therefore he is not entitled to take advantage of the order of termination of service and that the order of termination would not stand in the way of the appellant from getting a relief by way of injunction under S. 42. Mr. Govind Swaminathan, learned counsel for the first respondent, however, submitted that the first respondent has accepted the order of termination and has invoked the arbitration clause contained in the service agreement only for damages arising out of the termination of services. The question is not whether the first respondent has actually accepted the order of termination of service or not. The relevant question is what is the conduct of the appellant with reference to the service agreement when he has approached the court seeking a relief of injunction. We are of the view that even if the first respondent has not accepted the validity of the order of termination, so far as the appellant is concerned, he having unilaterally put an end to the service agreement, he cannot seek the relief of injunction to enforce the so-called implied negative covenant in cl. 2 of the service agreement.

19. In support of his plea that the service agreement though terminated should be deemed to continue or subsist for purposes of S. 42, Mr. Chellaswami relies on the decisions in Damodar Valley v. K. K. Kar, AIR 1974 SC 158 and Hill v. C. A. Parsons and Co. Ltd., 1972-1 Ch. 305. In the first case it has been held that a mere repudiation by one party alone does not terminate the contract and that as even after such repudiation the contract subsists for the determination of the rights and obligations of the parties thereunder, an arbitration clause contained therein also survives. This decision recognises the well-established principle that even after the termination of a contract, the arbitration clause contained therein has to operate for the purpose of determining the rights and obligations of the parties thereunder. As a matter of fact, in most of the cases, arbitration agreement will be operative only after either of the party commits a breach of the agreement or resiles from the same. Therefore this decision which merely says that the arbitration clause in an agreement survives for the purpose of determination of the rights and obligations of the parties even though the contract has been put an end to, will not be of any assistance to the appellant who seeks to enforce a covenant in a contract by getting an injunction, after the contract has been put an end to. In Hill v. C. A. Parsons & Co. Ltd., 1972-1 Ch 305, there was a termination of a service agreement unilaterally by the employer which was not accepted by the employee. The employee sought an injunction from the court to restrain the employer from implementing the notice of termination. In that case the employee who approached

the court for an injunction was willing to perform his part of the contract while the employer had committed a breach of the contract of service by terminating the service of the employee without due notice as provided for in the contract. Therefore the court granted interim injunction. There the person who approached the court is not the one who terminated the contract of service. Therefore that decision also does not have any relevance in determining the question whether the appellant has satisfied the proviso to S. 42.

20. The learned counsel for the appellant also referred to the decision of the House of Lords in American Cynamid v. Ethicon, 1975-1 All ER 504 in support of his plea that it is not necessary for the appellant to establish a prima facie case and that if the plaintiff's claim is not frivolous or vexatious, interlocutory relief could be granted after considering the balance of convenience. In that case the House of Lords held that there was no rule of law that the court was precluded from considering whether, on a balance of convenience, an interlocutory injunction should be granted unless the plaintiff succeeded in establishing a prima facie case or a probability that he would be successful at the trial of the action, that all that was necessary was that the court should be satisfied that the claim was not frivolous or vexatious, i.e., that there was a serious question to be tried. According to the learned counsel the appellant need not establish a prima facie case at this stage and it is sufficient if his claim in the suit is found to be not frivolous or vexatious. It is said that the appellant's claim in the suit is not frivolous or vexatious and, therefore, the court has to consider the grant of injunction on a consideration of the balance of convenience.

21. We have already held that the appellant by terminating the service contract has disabled itself from getting a specific performance of the negative covenant said to be contained in cl. 2 of the service agreement and in reaching that conclusion we have not proceeded on the basis that the appellant has not established a prima facie case, nor have we decided the matter on the basis of balance of convenience. Therefore, the above decision does not help the appellant. In this view we are not also considering the contention put forward by Mr. Govind Swaminathan, learned counsel for the respondents that on the facts of this case the appellant cannot get a permanent injunction even after the trial of the suit and, therefore, he cannot get an interim injunction. We are also of the view that it is unnecessary to decide the tenability of the contention urged by the learned counsel for the respondents that under S. 27 of the Contract Act any service agreement which puts a restraint on a contracting party exercising a lawful profession, trade or business of any kind will be void and the applicability of the decision of the Supreme Court in N. S. Golikari v. Century Spg. and Mfg. Co., AIR 1967 SC 1098 to the facts of this case.

22. Since we are of the view that the service agreement, the covenants of which are sought to be enforced by the appellant by the issue of an injunction does not subsist after its termination by the appellant itself on 3-12-1977, we are not going into the question whether the appellant has got a prima facie case or whether the balance of convenience warrants the grant of an injunction. Besides, we are inclined to agree with the learned trial Judge that even if an injunction is granted against the respondents restraining them from taking up the Clan Line Agency, it will not enable the appellant to continue the Clan Line Agency. We therefore find that there are no merits in the appeal.

23. The appeal is, therefore, dismissed with costs.

24. Any observation made in this appeal will not, however, prejudice the appellant in establishing its case at the trial of the suit. Mr. Chellaswami submits that having regard to the heavy stages involved, there may be a direction to the learned trial Judge to dispose of the suit C. S. 450 of 1977 expeditiously. Such a request may be made to the learned trial Judge and it is for him to consider the request and dispose of the suit as early as possible.

Appeal dismissed.

AIR 1978 MADRAS 383

SURYAMURTHY, J.

S. Nesamony Nadar, Petitioner v. Nidalam Government High School, Improvement Committee, Respondent.

Civil Revn. Petn. No. 1921 of 1975, D/- 8-3-1978*

Civil P. C. (5 of 1908), O. 1, R. 12 — Authorisation — Suit by President of unregistered society for recovery of loan advanced by society — No power of attorney given by members of society — Suit held not maintainable.

The money was not advanced by the President from his pocket. The money belonged to all the members of the Committee and not to the President. He is not, therefore, entitled to the money exclusively. He has not been given a power of attorney by the other members to institute the suit on their behalf also. Therefore, the suit by the President of the unregistered society is not maintainable without a power of attorney being given by all the members of the Committee empowering him to institute a suit. (Para 3)

Anno: AIR Comm. C. P. C. (8th Edn.) O. 1, R. 12 N. 1.

ORDER:— This is a civil revision petition against the judgment of the learned Subordinate Judge, Padmanabhapuram, dismissing A. S. No. 92 of 1972, preferred against the judgment of the learned District Munsif of Padmanabhapuram, who decreed O. S. No. 450 of 1969 on the file of his court, instituted by the respondent Committee for the recovery of a sum of Rs. 500.

2. The plaintiff is one A. G. Bhaskaran Nair who claims to be the President of the Nidalam Government High School Improvement Committee, and claims to represent the said Committee. A loan of Rs. 500 was given by the said Committee to the revision-petitioner herein for putting up a thatched roof. This amount was to be repaid by the revision petitioner on receipt of the same from the Government grant. The fact that such an amount was paid to him is not denied by the revision petitioner. The fact that he has been subsequently reimbursed by the Government which gave a grant also has not been disputed by him. His contention was that he had repaid this amount to the Secretary of the said Nidalam Government High School Improvement Committee. In addition, he contended that the suit by the President, A. G. Bhaskaran Nair, alone is not maintainable. The courts below held that the suit by the President alone is maintainable. In this view they are wrong. It is not alleged in the plaint that Nidalam Government High School Improvement Committee is a society registered under the Societies Registration Act. It is not a corporate body. The learned counsel for the respondent contends that if such a contention, as is now put forward by the counsel for the revision petitioner, had been raised at the stage of the trial, he would have produced the documents necessary to prove that this Committee has been duly registered under the Societies Registration Act. I offered to adjourn this revision petition for hearing till he is able to produce such a document. He confesses that he cannot give me any guarantee that he will be able to produce any such record. If the Nidalam Government High School Improvement Committee is a registered Society, the Articles of Association should have been produced along with the plaint and the particular provision of the same under which the President can sue or be sued on behalf of the Society also should have been stated in the plaint. That has not been done. Therefore, there is no doubt about the fact that the plaintiff is not a Society duly registered under the Societies Registration Act, and is not, therefore, a corporate body.

3. In such circumstances, the question to be considered is whether only one member of the Society, whether he be the President or Secretary or something more than both, can maintain a suit on behalf of the Society. In my opinion, he cannot. The money was not advanced by him from his pocket. The Committee is a mere association of some gentlemen for a special purpose, viz., the improvement of the High School referred to above, whatever be the improvement that they hope to effect. The money belonged to all the members of the Committee and not to the President. He is not, therefore, entitled to the money exclusively. He has not been given a power of attorney by the other members to institute the suit on their behalf also. Therefore, the suit by the President of an unregistered Society is

*(Against decree of Sub-J., Padmanabhapuram in A. S. 92 of 1972.)

not maintainable without a power of attorney being given by all the members of the Committee empowering him to institute a suit. Therefore, the judgment of the learned Subordinate Judge in A. S. No. 92 of 1972 and that of the learned District Munsif, Padmanabhapuram in O. S. No. 450 of 1969 are set aside and this civil revision petition is allowed, and the suit in O. S. No. 450 of 1969 is dismissed without costs. There will be no order as to costs in this revision petition.

4. The institution of a fresh suit by all the members of the Committee or by the President or any one else with a power of attorney or powers of attorney given by all the members of the Committee empowering him or them to file a suit will not be barred by this judgment.

Revision allowed.

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NAINAR SUNDARAM, J.

M/s. Aruppukottai Sri Jaya Vilas (P.) Ltd., Petitioner v. K. N. Karuppiah and others, Respondents.

Civil Revn. Petn. No. 61 of 1974, D/- 9-3-1978.*

Civil P. C. (5 of 1908), O. 1, R. 10 (2) and O. 9, R. 5 (2) — Addition of defendant — Summons to one defendant returned unserved — Suit dismissed against him under O. 9, R. 5 (1) for failure of plaintiff to apply for substituted service — Whether he can be added as defendant under O. 1, R. 10 (2).

A suit for damages was filed against D (the owner of the truck alleged to be driven rashly) and the insurance company. Summons could not be served on D though batta was paid thrice. The plaintiff failed to apply for substituted service of the summons on D. This resulted in the Court dismissing the suit against D under O. 9, R. 5 (1). The plaintiff applied to add D as defendant in the suit under O. 1, R. 10 (2).

Held that, even in cases where the suit has been dismissed as against the defendant concerned under O. 9, R. 5, the court may have the power to implead the very same defendant by exercise of power under O. 1, R. 10 (2) to give a complete and comprehensive adjudication of the questions that would arise for consideration in the suit. AIR 1966 Cal 60, Rel. on. (Para 5)

The instant suit was one for recovery of damages sustained in an accident. D was the owner of the lorry and the other defendant was the Insurance Co. It might not be proper and comprehensive adjudication of the question that might come up for consideration, if the suit was to be decided in the absence of D. Even assuming that the plaintiff could institute a fresh suit as contemplated under O. 9, R. 5 (2) there was a likelihood that conflicting decisions may be rendered in the suits. Addition of D as defendant to the suit was, therefore, allowed. (Paras 4 and 5)

Anno: AIR Comm. Civil P. C. (9th Edn.), O. 1 R. 10 N. 14 and O. 9 R. 5 N. 4A.

Cases Referred: Chronological Paras

AIR 1966 Cal 60 5

E. Padmanabhan, for Petitioner.

ORDER:— The plaintiff in O. S. No. 380 of 1972, on the file of the District Munsif of Sattur, is the petitioner in this revision. The respondents herein are the defendants in the said suit. That suit was instituted by the plaintiff against the defendants for the recovery of a sum of Rs. 2,405 being the damages sustained by the plaintiff on account of the accident on 18-7-1971, involving the bus owned by the plaintiff and the lorry owned by the first defendant. According to the plaintiff, the accident occurred on account of the rash and negligent driving of the driver of the lorry owned by the first respondent. The second defendant is the insurance company with which the lorry belonging to the first defendant was insured. It seems that summons could not be served on the first defendant in spite of the fact that batta was paid thrice and there was a failure on the part of the plaintiff to apply for substituted service of the summons on the first defendant. This necessitated the court below to pass orders, dismissing the suit as against the first defendant on 7-12-1972.

2. It is the case of the plaintiff that it was not aware of such orders passed by the court below and this came to the knowledge of the plaintiff only on 24-7-1973. The plaintiff filed I. A. No. 789 of 1973 in the court below, under O. 1,

*(Against order of Dt. Munsif, Satur in I. A. No. 789 of 1973.)

R. 10 (2) C.P.C. to implead the first defendant against whom the suit was dismissed for default, once again a party defendant to the suit.

3. Sri E. Padmanabhan, learned counsel appearing for the petitioner, submits that the court below has not properly appreciated and applied the principles under O. 1, R. 10 (2) C.P.C. and even though the suit as against the first defendant, was dismissed under O. 9, R.5 C.P.C., it is still open to the court in the interests of justice and in exercise of the powers under O. 1, R. 10 (2) C.P.C. to add the first defendant as a party defendant, so that the rights of parties can be adjudicated upon comprehensively in the same suit. I find that there is substance in the submission made by the learned counsel for the petitioner. Order 9, R. 5 C.P.C. contemplates the dismissal of the suit against the defendant or defendants concerned, where there is a failure on the part of the plaintiff to apply for issue of fresh summons. Order 9, R. 5 (2) C.P.C. states in such a case, the plaintiff may, subject to the law of limitation, bring a fresh suit. In the case of dismissal of the suit under O. 9, R. 5 C.P.C., there is no specific provision in that Order which would enable the plaintiff to have the order of dismissal set aside on sufficient cause being shown for not applying for the issue of fresh summons to the defendant or defendants concerned. It is only in this context, we have to construe the powers of the court. under O. 1, R. 10 (2) C.P.C. If, in fact, the presence of the defendant is necessary for a proper adjudication of the questions that would arise for consideration in the suit, the court will have ample power to implead the very same defendant as a party defendant to the suit by exercise of powers under O. 1, R. 10 (2) C.P.C. The exercise of such powers will depend upon the facts and circumstances of the case.

4. In the present case, the suit is one for recovery of damages sustained in an accident. The first defendant is the owner of the lorry and the second defendant is the Insurance Co. It may not be proper and comprehensive adjudication of the question that may come up for consideration, if the suit is to be decided in the absence of the first defendant. Even assuming that the plaintiff can institute a fresh suit as contemplated under O. 1, R. 10 (2) (sic) (O. 9, R. 5 (2)?) C. P. C., there is a likelihood that conflicting decisions may be rendered in the suits.

5. A similar question arose for consideration before the Calcutta High Court, and in Setabi Dei v. Ramdhani Shaw, AIR 1966 Cal 60, Mallick J. held that there is no reason why, power under Or. 1 Rule 10 (2), could not be exercised in appropriate cases by adding a person as a party against whom an order under Or. 9. Rule 5, C. P. C. has been passed previously. I appreciate the view taken by the learned Judge and adopt the same and in my opinion, even in cases where the suit has been dismissed as against the defendant or defendants concerned under O. 9, R. 5, C.P.C., yet the court may have the power to implead the very same defendant or defendants concerned by exercise of power under Or. 1 Rule 10 (2) C. P. C. to give a complete and comprehensive adjudication of the questions that would arise for consideration in the suit. In the present case, the court below was under the impression that the order of dismissal passed earlier against the first defendant, admittedly under Or. 9, Rule 5, C. P. C., can be set aside by an application. This approach is not tenable on the facts of the case. There is a warrant for adding the first defendant again as a party defendant to the suit. Since the correct principles have not been applied by the court below, to the facts of the present case, I am inclined to allow this revision. Hence, this revision is allowed, and the order of the court below is set aside and the application I. A. No. 779 of 1973 in O. S. 380 of 1972 on the file of the District Munsif, Sattur, will stand allowed and the court below will proceed with the suit after adding the first defendant as a party defendant to the suit. There will be no order as to costs in this revision.

Revision allowed.

AIR 1978 MADRAS 385

N. S. RAMASWAMI, J.

Amirjan Saheb, Appellant v. Syed Khader, Respondent.

S. A. No. 52 of 1975, D/- 1-2-1978.*

Limitation Act (36 of 1963), Art. 113 — Collateral agreement executed on same

*(Against decree of Sub Judge Vellore in A. S. 5 of 1973).

GV/HV/D169/78/GDR

day as promissory note postponing time for payment — Limitation for suit on promissory note.

Where by a collateral agreement executed on the same day as the promissory note parties agreed to postponement of the time for payment of amount under the promissory note; the suit filed on the basis of promissory note will be governed by Art. 113. Consequently if no right to sue is accrued as contemplated by the colllateral agreement, the suit based on the promissory note will be premature. AIR 1950 Mad 749, Referred. (Para 10)

Anno: AIR Comm. Limitation Act (5th Edn.), Art. 113, N. 2.

Cases Referred: Chronolgoical Paras

AIR 1950 Mad 749 : (1950) 1 Mad LJ 161 7

G. Jagadesa Iyer, for Appellant; V. Venkataraman Amicus Curiae, for Respondent.

JUDGMENT:— The plaintiff is the appellant. The suit out of which this second appeal arises is one on a promissory note admittedly executed by the defendant in favour of the plaintiff. Ex. A-1 D/- 6-4-1966, is the promissory note for a sum of Rs. 1250 so executed. Admittedly this amount represents part of the consideration detained by the defendant in respect of a land purchased by him from the plaintiff. On the same date, namely 6-4-1966, when the promissory note was executed there was an agreement between the parties as per Ex. B-1. That shows that the parties contemplated that there would be litigation regarding the title to the property as the Wakf Board was likely to claim the same to be its property and therefore out of the total consideration of Rs. 4500 a sum of Rs. 1250 was left with the defendant, namely the purchaser himself, so that the said amount could be spent for litigation expenses. The agreement provides that if any litigation starts within five years of transaction dated 6-4-1966, the expenses towards the same have to be met from out of the said sum of Rs. 1250 (and the plaintiff) would be entitled only to the balance if any after meeting the litigation expenses. There is also provision in the agreement that if no litigation is commenced disputing the title to the property within five years, the plaintiff would be entitled to the entire promissory note amount and that if any litigation starts after the period of five years it was the lookout of the defendant himself to meet the litigation expenses. There is the further provision that the defendant should keep the promissory note alive by making payment before the expiry of three years.

2. Ex. A-3 dated 13-9-1968 is an endorsement admittedly made by the defendant on the promissory note paying a sum of Rs. 50 towards the same. This is in accordance with the terms of the agreement, Ex. B1.

3. The plaintiff filed the suit on the promissory note claiming the entire amount as per the promissory note less the sum of Rs. 50 paid under Ex. A.3. The defendant contended that the Wakf Board has filed a suit claiming title to the property which was sold by the plaintiff to the defendant and that therefore the promissory note must be held to have been discharged. He also contended that, in any event, the suit is premature.

4. These contentions were not accepted by the trial Court because it was of the view that there was no suit filed by the Wakf Board in respect of the property sold by the plaintiff to the defendant.

5. On appeal by the defendant, the lower appellate Court has found that the Wakf Board has in fact filed a suit claiming title to the property sold by the plaintiff to the defendant and that therefore the suit is premature.

6. Ex. B.3 dated 8-2-1971, is a copy of the plaint in O. S. No. 256 of 1971, on the file of the trial Court. That is a suit instituted by the Wakf Board against the present defendant. The lower appellate Court has pointed out that the subject-matter of this suit included the property sold by the plaintiff to the defendant. This finding is not challenged before me by the plaintiff who has filed the second appeal. Therefore, the question is whether the suit is premature as held by the lower appellate Court.

7. Mr. G. Jagadisa Iyer, learned counsel for the plaintiff-appellant contended that the promissory note, though contains the endorsement Ex. A.3, which is an acknowledgment made by the defendant, was getting time barred when the suit was filed and under such circumstances, the lower appellate Court is wrong in its view that the suit is premature. The view taken by the lower appellate Court is that because of Ex. B.1, agreement be-

tween the parties, the time for payment of the amount under the promissory note has been postponed and therefore even though as an ordinary promissory note it would get time barred within a few days after the date on which the present suit was filed, it would not be so time barred inasmuch as time for payment had been postponed by a collateral agreement, namely, Ex. B.1. The decision of this Court reported in Subbamma v. Venkanna (1950) 1 Mad LJ 161 : (AIR 1950 Mad 749) has been relied upon by the lower appellate Court.

8. The contention of Mr. Jagdisa Iyer, learned counsel, is that that decision was rendered because of Art. 80 of the Limitation Act of 1908 and that the said decision would not be applicable now because, according to the learned counsel, Art. 80 in the earlier Act has been omitted in the Limitation Act of 1963 and there is no corresponding provision now. This contention is incorrect. Art. 80 of the former Act said that in respect of a suit on a bill of exchange, promissory note or bond, not expressly provided for, the three year period of limitation would begin to run when the bill, note or bond becomes payable. If this Article is applicable then undoubtedly the present suit must be held to be premature, for the contention that the promissory note was getting time barred and therefore the plaintiff was forced to file a suit would not be available. As already seen, Ex. B1 is a collateral agreement executed on the same day as the promissory note and that contemplates the promissory note amount being spent for the litigation. The litigation having been started within five years as mentioned in the agreement, before ever the same comes to an end, there is no knowing whether there would be any balance left out of the sum of Rs. 1250, after meeting the litigation expenses. Under these circumstances, surely on the date when the present suit was filed, no amount had become payable.

9. That means the promissory note would not be time barred and the plaintiff need not have rushed to court saying otherwise the suit would be time barred.

10. It is true that Art. 80 of the former Act has been omitted in the Act of 1963. But it is incorrect to say that there is no corresponding provision and that in spite of Ex B 1, the suit would be barred by limitation within three years of the date of Ex. A.3 (acknowledgment) and on that score it must be held that the suit is not premature. In the objects and reasons to the Limitation Act, 1963, dealing with notes on clauses it is pointed out that some of the Articles which may be conveniently omitted in favour of the residuary entry have been omitted and one such Article so omitted in favour of the residuary entry, namely, Art. 113 of the new Act would certainly cover a suit of the present type. No doubt, that Article is the one corresponding to Art. 120 of the former Act. Even though this Article does not specifically refer to suits on promissory note, bill of exchange or bond, it can certainly be invoked in cases as the present one. The Article is general, in that any suit for which no period of limitation is provided elsewhere the period of limitation is three years and from the date when the right to sue accrues. In the present case undoubtedly when the suit was filed, a right to sue had not accrued. It is not the case of the plaintiff that when he filed the present suit the litigation started by the Wakf Board had come to an end and after meeting the litigation expenses there was any balance left in the hands of the defendant.

11. Under the above circumstances, the view taken by the lower appellate court that the suit is premature is therefore correct. The second appeal fails and is accordingly dismissed. No costs.

12. My thanks are due to Mr. V. Venktaraman for having acted as amicus curiae in this case. The appellant to pay the court-fee.

Appeal dismissed.

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RAMAPRASADA RAO AND SATHAR SAYEED, JJ.

S. P. Ramakrishnan, Appellant v. V. Bashyam Achari and another, Respondents.

O. S. A. No. 132 of 1977, D/- 30-1 1978.*

Presidency Towns Insolvency Act (3 of 1909), S. 36 (4) — Voluntary adjudication as insolvant — Powers of Insolvency Court subsequent to such adjudication,

*(Against judgment of Suryamurthi J. in Appln. No. 329 of 1975 in Petn. No. 31 of 1975, D/- 7-9-1977).

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to direct insolvent to deposit amounts believed to be squandered away by him. Appln. No. 329 of 1975 in Petn. No. 31 of 75, D/- 7-9-1977 (Mad), Reversed.

After an order of voluntary adjudication is made by the insolvency court, that court cannot at the instance of a single creditor take upon itself the investigation into the fact whether the insolvent has suppressed any property of his own or assets of his own without the Official Assignee coming before it with such a complaint and direct the insolvent to deposit in the Court the amount believed on such enquiry, to be squandered away by him. It is not as if every creditor who has proved before the Official Assignee can directly have recourse to the insolvency court for directions of the aforesaid kind, in particular for the resuscitation of the assets and the moneys said to have been squandered by the insolvent just before he entered the portals of the insolvency court for voluntary adjudication. For certain purposes a creditor has no independent legal existence after an order of adjudication because his persona is merged with the Official Assignee who represents the body of creditors. He would have a dialogue with the insolvency court only through the Official Assignee. The Official Assignee, of course, has the undoubted right to seek the assistance of any of the creditors who form the body of creditors and investigate into the conduct of the insolvent. If his assistance is sought for and if he is provoked to investigate a cause which is just, by a creditor belonging to that body of creditors, the Official Assignee is bound to investigate it even though it is inquisitorial in nature. But such an inquisitorial enquiry cannot be undertaken by the court at the instance of a creditor without reference to the Official Assignee or the Official Receiver. Appln. No. 329 of 1975 in Petn. No. 31 of 1975 (Mad), Reversed. (Para 3)

Anno: AIR Manual (3rd Edn.), Presidency Towns Insolvency Act, S. 36, N. 1.

Cases Referred: Chronological Paras

AIR 1977 Mad 250 : 89 Mad LW 547 3
AIR 1916 PC 64 : ILR 44 Cal 535 3

P. Sivaramakrishniah and Harikesavan, for Appellant; K. N. Balasubramanian and P. B. Ramanujam, for Respondents.

RAMAPRASADA RAO, J.:— The appellant is an insolvent, who was adjudicated as such on his own petition in I.P. No. 31 of 1975 on the file of this Court. The relevant facts which led to this voluntary adjudication may be stated thus: The insolvent, who was an employee as an officer in the Life Insurance Corporation of India, retired on 22-9-1974. Consequent upon his retirement, he received substantial amounts by way of gratuity and provident fund on 3-1-1975 and 9-1-1975, totalling a sum of Rs. 29,749-66. The first respondent, who was admittedly a creditor and who was also his neighbour, apparently being aware of such withdrawals of large funds by the insolvent from his quondam employer, was not satisfied about the voluntary adjudication sought for by the insolvent on 22-4-1975. But as law permits a person to assume on himself the badge of insolvency by filing a petition for voluntary adjudication after satisfying the requirements of a debtor's petition for adjudication, the first respondent cannot successfully challenge such a voluntary act on the part of the insolvent when he came to this court with his petition for adjudication as such. After the appellant-insolvent was so adjudicated, the first respondent took out two applications, Appln. No. 329 of 1975 in Aug., 1975 for a direction to the insolvent to deposit into court the amounts withdrawn by him from his erstwhile employer and concurrently, he also took out an application, Appln, No. 330 of 1975 to annul the order of adjudication and both the applications came up before Suryamurthy J. The learned Judge dismissed Appln. No. 330 of 1975 under which the first respondent sought for annulment of the order of adjudication, but allowed Appln. No. 329 of 1975 and gave direction to the insolvent, who is the appellant herein, to bring into court a sum of Rs. 29,000 received by him as provident fund, gratuity and other retirement benefits from the Life Insurance Corporation of India. The learned Judge examined the insolvent and he was not satisfied that the insolvent was not possessed of the funds, which his creditor wanted him to bring to court for the benefit of the body of creditors. He would disbelieve R.W. 1, who claims that he has spent out all such moneys by betting on horses and ultimately, he expressed the view that RW 1 has suppressed the entire cash of Rs. 29,000, which he received from the Life Insurance Corporation of India. It was in those circumstances, he directed the in-

solvent to deposit the sum of Rs. 29,000 received by him as provident fund, gratuity etc. As against this order, the insolvent, who was the first respondent in Appln. No. 329 of 1975, has presented this appeal.

2. It is common ground that the creditor who invoked the jurisdiction of the court in the above proceedings has not challenged the order of the learned Judge in Appln. No. 330 of 1975 under which he dismissed the application to annul the order of adjudication. In these circumstances, it is for consideration whether the insolvency court as such, can act at the instance of a single creditor and give directions to the insolvent in the manner the learned Judge did.

3. It has been repeatedly pointed out by this Court and the Privy Council — vide Chhatrapat Singh Dugan v. Kharag Sing Lachmiram, ILR 44 Cal 535 : (AIR 1916 PC 64) and Karnagam v. Jayaseelam Chettiar, 89 Mad LW 547 : (1976) 2 Mad LJ 342 : (AIR 1977 Mad 250) that the expression of inability by the debtor to pay his debts cannot lightly be disregarded by courts on a priori consideration and refuse relief to the debtor who seeks for being adjudicated voluntarily as an insolvent, provided the other conditions for the filing of a debtor's petition under the Presidency Towns Insolvency Act are satisfied. The ratio behind the principle as above appears to be that if a person seeks the assistance of court, but through the channel of law, for being badged as an insolvent on the ground that he is unable to pay his creditors, then, such an exposure of his status and (in)ability is prima facie proof that he seeks for relief under the Insolvency Law for being adjudicated as bankrupt. At that stage, it would be hazardous to enquire into the correctness or otherwise of such voluntary statements made by a debtor. This is because the Insolvency law creates within its frame-work an apparatus to discover whether there is any mala fides or act of suppression or a design to avoid the creditors by secreting property. Such investigations to net the activities of the insolvent and bring into the common pool all the available resources and properties of the insolvent could be undertaken by the public officer, namely, the Official Assignee in the Presidency Towns and the Official Receiver in places where the Provincial Insolvency Act is in force. Such is the power of the Official Assignee created under the various provisions of the bankruptcy law that it is not for a single creditor to single out himself and act on his own and apart from the Official Assignee who represents the body of creditors. It is the Official Assignee who should act and function for and on behalf of the creditors after an order of adjudication is made. This entitlement which is vested in the Official Assignee by statute cannot be lightly denied by a creditor, however inquisitive he may be and knowledgeable of the affairs connected with the debtor.

The claim of the first respondent in this appeal as one of the creditors of the insolvent, against whom an order of adjudication has become final, is that he has knowledge of the fact that the insolvent has squandered funds which he received from his quondam employer about ninety days prior to the order of voluntary adjudication and that he has suppressed such amounts to the disadvantage of the body of creditors. It might be that this statement may be true. But the question is whether, after an order of voluntary adjudication is made by the insolvency court, that court could take upon itself the investigation into the fact whether the insolvent has suppressed any property of his own or assets of his own without the Official Assignee coming before it with such a complaint, or before a creditor, who has already proved before the Official Assignee being dissatisfied with the conduct of the Official Assignee or the Official Receiver, comes to court for such assistance. It is not as if every creditor who has proved before the Official Assignee can directly have recourse to the insolvency court for directions of this kind and in particular for the resuscitation of the assets and the money said to have been squandered by the insolvent just before he entered the portals of the insolvency court for voluntary adjudication. In our view, for certain purposes a creditor has no independent legal existence after an order of adjudication because his persona is merged with the Official Assignee who represents the body of creditors. He would have only a dialogue with the insolvency court through the Official Assignee. The Official Assignee, of course, has the undoubted right to seek the assistance of any of the creditors who form the body of creditors

and investigate into the conduct of the insolvent. If his assistance is sought for and if he is provoked to investigate a cause which is just, by a creditor belonging to that body of creditors, the Official Assignee is bound to investigate it even though it is inquisitorial in nature. But, we are unable to agree with Mr. Balasubramanian, learned counsel for the first respondent, that such an inquisitorial enquiry can be undertaken at the instance of a creditor without reference to the Official Assignee or the Official Receiver and pass orders sought for against the insolvent to bring into court amounts said to have been squandered by him or utilised by him without a just cause prior to the order of adjudication which, as we have already stated, is a result of a voluntary act on the part of a debtor. No doubt, Suryamurthy J. was provoked to make the order in question after the enquiry which he undertook for himself and which, in our view, ought to have been undertaken by the Official Assignee, since he was of the view that the insolvent should be deemed to have suppressed the assets which he received prior to the date when he was adjudicated as an insolvent. This fact may be true, or may not be true. But, we are of the view that the insolvency court cannot at that stage make such an independent and original enquiry, by-passing the statutory officer, namely, the Official Assignee or the Official Receiver who is obligated under the statute to enquire into such matters. It is for the Official Assignee to bring to the notice of the court after such investigation and seek for further directions from it either under S. 36 of the Presidency Towns Insolvency Act, or under any other appropriate provision of the Provincial Insolvency Act. But, as matters stand, we are of the view that the directions given by the learned Judge asking the insolvent to bring into court the sum of Rs. 29,000 said to have been received by him as provident fund, gratuity etc.. from the Life Insurance Corporation of India cannot be made under any of the provisions of the Act as they stand and at the time he made it, as, in our view, it is premature to do so. It should not be understood that the insolvency court has no jurisdiction to issue such directions. But, the time was not ripe for such issuance as any such order could be passed only after, the Official Assignee, as representing the body of creditors, investigates fully into the matter and makes a report and seeks for directions, may be for the same purpose as the present first respondent sought for earlier. As the order is not sustainable in law, we have to set it aside, but make it clear that it is open to the creditor to assist the Official Assignee to investigate into the matter and it is for the Official Assignee to take up such inquisition and ultimately if he finds the necessary data for prosecuting the matter further, he is at liberty to do so. The appeal is accordingly allowed, but there will be no order as to costs.

Appeal allowed.

AIR 1978 MADRAS 390

MOHAN, J.

V. Natarajan, Petitioner v. The Govt. of Tamil Nadu and another, Respondent.

Writ Petn. No. 28 of 1978, D/- 6-1-1978.

(A) Essential Commodities Act (10 of 1955), S. 3 (2) (f) (as amended by Act 92 of 1976) — Tamil Nadu Rice (Procurement by Levy on Millers) Order (1977) Para 3 — Rice miller only receiving stock of paddy comes within purview of Cl. (b) of S. 3 (2) (f) and can be required to sell stock received by him — The order is therefore, intra vires. (Para 6)

Anno: AIR Manual (3rd Edn.) Essential Commodities Act, S. 3, N. 3.

(B) Constitution of India, Article 14 — Tamil Nadu Rice Procurement by levy on Millers) Order (1977), Para. 3 — Power of exemption — Not itself ultra vires for absence of guidelines — Not violative of Art. 14 as wholesale millers are not comparable with other type of millers. (Para 7)

Anno: AIR Comm. Constitution of India, (2nd Edn.), Art. 14 N. 42 (1).

Cases Referred : Chronological Paras

AIR 1961 SC 552 5, 7

K. Parasaran, for T. Vadivel and V. Balachandran, for Petitioner.

ORDER:— The petitioner is a rice mill owner run under the name and style of Sri Nataraja Rice Mill at premises No. 68 Sivagamapuram Road, Velipattanam, Ramanathapuram Dt, under a licence duly granted to him under the provisions of the Rice Milling Industry

GV/HV/C954/78/ABO/SNV

Regulation Act, 1958. In addition to hulling paddy, he is also carrying on in the said mill flour mill business. The petitioner's mill hulls paddy of wholesale merchants holding licences for carrying on business in paddy and rice, and the paddy of small farmers, agricultural labourers and others who have stocks of paddy for their domestic consumptions which they desire to hull. Under the terms of the licence he is required to maintain four registers A, B, C and D.

2. He was served with a notice dated 19-10-1977 by the District Supply Officer, Ramanathapuram, at Madurai, informing him that as per para. 3 of the Tamil Nadu Rice (Procurement by Levy on Millers) Order 1977, hereinafter referred to as the Order, every wholesale rice miller and rice millers having mills which have soaking and drying facilities shall deliver 20 per cent of the rice produced in his rice mill as levy to the Government and that in respect of the other rice mills, the rice miller shall deliver a compounded levy of 18 tonnes of rice per annum. The notice further informed the petitioner that he should provide a separate meter for rice hulling operation in the mill. Aggrieved by these proceedings wherein a demand had been made on the petitioner to deliver 20 per cent of the rice produced in the mill, the present writ petition has been preferred challenging the validity of the proceedings.

3. In the affidavit filed in support of the writ petition it is stated that the order as amended from time to time is ultra vires and unconstitutional. Under S. 3 (1) of the Essential Commodities Act, 1955, the Central Government or the State Government has to form a necessary opinion. No such opinion has been formed by the Central Government and the mere fact of concurrence is not sufficient compliance of the statutory provision.

4. Under S. 3 (2) (f) of the Essential Commodities Act an order made under sub-sec. (1) of S. 3 may provide for requiring any person holding in stock, or engaged in the production or in the business of buying or selling of any essential commodity to sell the whole or a specified part of the quantity held in stock or produced to the Central Government. The petitioner does not hold any stock and, therefore, there cannot be any order on him. Assuming without admitting that the said order is ultra vires, unconstitutional, offending Arts. 14 and 19 of the Constitution, the order provides that the State Government may with the prior approval of the Central Government by notification exempt any rice miller or class of rice millers from the levy specified in Cl. (1) subject to such conditions if any, as the State Government deem it fit to impose. There being no guideline with regard to the grant of exemption, such power seems to be arbitrary and therefore, violative of Art. 14.

5. Though several grounds have been raised in the affidavit which have been extracted above, Mr. K. Parasaran, learned counsel for the petitioner, urges only two points before me in attacking the validity of the order. Firstly under S. 3 (2) (f) of the Essential Commodities Act, a person who holds any stock of the essential commodity notified therein can also be obliged to sell to the State Government, but the rice miller like the petitioner notwithstanding he being a wholesale rice miller does not hold any stock and secondly, there are no guidelines for the grant of exemption. Where such a power is exercised without any guidelines prescribed under the Act, it would amount to an arbitrary exercise of power, and, therefore, would be violative of Art. 14. In support of this submission, he relied on the decision in K. T. Moopil Nair v. State of Kerala, AIR 1961 SC 552 and particularly, on para. 8 at p. 558.

6. Both these contentions are not tenable. The Essential Commodities Act has been amended in that presently Section 3 (2) (f) after the amendment by Central Act 92 of 1976, reads—

"For requiring any person holding in stock or engaged in the production of or in the business of buying or selling of any essential commodity— (a) to sell the whole or a specified part of the quantity held in stock or produced or received by him or; (b) in the case of any such commodity which is likely to be produced or received by him, to sell the whole or a specified part of such commodity when produced or received by him, to the Central Government or a State Government, to an officer or agent of such Government or to a Corporation owned or controlled by such Government or to such other person or class of persons and in such circumstances as may be specified in the order."

Clause (b) extracted above clearly shows that an order could be issued so as to affect the person who is likely to produce essential commodity or who is likely to receive such essential commodity. The petitioner would fall under either of these categories. Therefore, the argument advanced on the basis of the unamended section has, necessarily to be rejected.

7. The exemption Cl. (3) occurring in the order states—

"The State Government may with the prior approval of the Central Government by notification, exempt any rice miller or class of rice millers from the levy specified in Cl. (1) subject to such conditions, if any, as the State Government deem fit to impose."

In exercise of the powers exemption has been granted under G. O. Ms. 311, Food, D/- 27-12-1977 to the following effect.

After considering the representations received from Millers regarding certain difficulties that have arisen in the implementation of miller's levy scheme, the Government have decided to exempt from levy the cooly-hulling done for agriculturists and retailers by any rice mill. Paddy which is moved from other States into Tamil Nadu is also exempted from the miller's levy.

(i) Cooly-hulling done by any 'A' class rice mill in respect of paddy brought by producers and retailers will not be subjected to a levy. For this purpose the rice mills should maintain separate account for cooly hulling done by them. Deterrent action will be taken against the rice millers for irregularities, if any, noticed in the maintenance of such account.

(ii) All rice mills which do not have soaking and drying facilities and are exclusively undertaking cooly hulling will also be exempted from levy irrespective of the number type and number of hullers fitted in the rice mills.

(iii) Paddy purchased from other States and moved into Tamil Nadu will not be subjected to a levy. The production of relevant documents, railway receipts or other receipts is essential for claiming exemption from levy on paddy which is transported from other States into Tamil Nadu....."

As such, all wholesale millers will be covered by the impugned order. Merely because some wholesale millers might be granted exemption by exercise of this power, it cannot be contended that the clause itself is ultra vires. The power of exemption itself has to be exercised depending upon the circumstances of each case. It cannot be postulated in advance as to on what conditions, the exemption should be granted. No doubt, the Act may provide guidelines but the failure to do so will not vitiate the order. The Supreme Court decision in K. T. Moopil Nair v. State of Kerala, AIR 1961 SC 552 relied on by the petitioner, has no application to the facts of this case, since the wholesale dealers are brought under the network of the order and it is not open to the petitioner (wholesale dealer) to compare himself with others, for instance, cooly hullers and state that a discrimination is perpetrated. Therefore, I conclude that the writ petition has no merit and it is hereby dismissed.

Petition dismissed.

AIR 1978 MADRAS 392

MOHAN, J.

Charles Robson, Petitioner v. The State of Tamil Nadu and another, Respondents.

W. P. No. 4448 of 1975, D/- 16-12-1977.

Constitution of India, Art. 30 (1) — "To establish or administer educational institution of its choice" — Interpretation of.

Where in view of notification issued by the State Government, a boys school (institution of minorities) could not admit girls except with specific and prior approval of inspecting officials of Education Department as there was a school exclusively for girls in the vicinity, the right of the boys school either to establish or to administer educational institution of its choice could not be said to have been violated. The notification was merely regulatory in its character and it did not interfere with the right of the school to impart education to boys. AIR 1977 Ker 58, Rel. on. AIR 1971 Mad 440 and AIR 1976 Mad 214, Disting; AIR 1974 SC 1389 and AIR 1958 SC 956 Ref.

(Paras 9, 10)

Anno: AIR Comm. Const. of India (2nd End.), Art. 30, N. 3.

Cases Referred: Chronological	Paras
AIR 1977 Ker 58	8, 14
AIR 1976 Mad 214 : (1975) 1 Mad LJ 353	5, 8, 13
AIR 1974 SC 1389	5, 11

FV/FV/C156/78/AMG/DVT

AIR 1971 Mad 440 : (1971) 1 Mad LJ 325 5, 8, 12

AIR 1958 SC 956 11

T. Martin, for Petitioner; N. R. Chandran Govt. Pleader, for Respondents.

ORDER :— This writ petition for certiorarified Mandamus arises under the following circumstances. The petitioner is the Manager and Correspondent of Dr. Samuel High School, Santhapuram, Kanyakumari Dist. He belongs to C. S. I. Christian community and he is an Indian Citizen. He is running a school which was established in 1935. It began with a preparatory class by the said Dr. Samuel, who is none other than the father of the petitioner. The school became an English medium School during the year 1938-39, with preparatory class to form III. Both boys and girls were admitted in the school and such school was recognised by the Travancore Government. It was upgraded to a High School in the year 1961-62 with the Standard IX and it became a completed High School during 1963-64, and the temporary recognition has been granted to the school under the Madras Education Rules. Both boys and girls have been admitted in the school.

2. The admission of students in the various schools in the State of Tamil Nadu was being regulated by the Madras Education Rules. The Government of Tamil Nadu regulated the admission of girl students by issuing G. O. Ms. 1664 Education department dated 19-10-1972, which runs as follows—

"The Government direct that in areas where there are separate girls schools, girls should not under any circumstances be admitted in boys' schools except with the specific and prior approval of the inspecting officials, and that too for vaild reasons.

The Government also agree with the views of the Director of School Education that this condition may also be imposed for granting recognition to secondary schools. The Director is requested to submit necessary draft amendments to the Tamil Nadu Educational Rules for the approval of the Government" :

3. There is a girls school by name L. M. S. Girls High School, Santhapuram which is situate within 400 yards from the petitioner's school, namely, Dr. Samuel High School, Santhapuram, Kanyakumari Dist. The girls school was a Tamil Medium School from 1926. In 1963 the school was upgraded into a girls High School. The school is being managed by the C. S. I. Corporate Body, under the Kanyakumari District C. S. I. diocese. In the locality, therefore, there are two schools. Inasmuch as by reason of the girl students being admitted into a boys' school like that of the petitioner, the petitioner was called upon to obey the terms of the G. O. Ms. 1664 Education department dated 19-10-1972, extracted above and by proceedings dated 18-6-1975, the Director of School Education, Madras issued instructions to the District Educational Officer, Thuckalai, that staff grant for Dr. Samuel High School, for the month of June 1975 need not be released, since the management has violated the rules regarding the admission of girls in boys schools during 1975-76 also. Therefore the petitioner has come up to this court seeking for certiorarified mandamus to quash the G. O. extracted above, and direct the respondents to forbear from interfering with the right of the petitioner in admitting girls in its school.

4. Mr. T. Martin, learned counsel for the petitioner, submits first and foremost that it is a fundamental right of the petitioner school to admit girl students in its school and any restriction on such a fundamental right which is guaranteed under Art. 30 of the Constitution would be violative of the said Article and that, therefore, the impugned G. O. has to struck down, in so far as it placed a restriction, as violative of the said Article and has to be set aside.

5. In support of this, reliance is placed on Director of School Education v. Rev. Brother G. Arogiasamy, 1971 (1) Mad LJ 325 : (AIR 1971 Mad 440), Rev. Br. A. Thomas v. Dy. Inspector of Schools, 1975 (1) Mad LJ 353 : (AIR 1976 Mad-214) and St. Xavier College v. State of Gujarat, AIR 1974 SC 1389. Elaborating this point, the learned counsel for the petitioner contends that it is not open to the Government, merely because they have the administrative control by means of a grant, to issue instructions to the schools as to whom they should admit.

6. The learned Government Pleader points out that it is a matter of policy in order that independent girls schools may come up. Therefore G. O. 1664 Education dated 19-10-1972 is issued where, as in the instant case within 100 yards, another girls school is available which imparts education solely to girls an impart of co-education may not be conducive and therefore the petitioner school was called upon not to admit girls. Notwithstanding this, there was complete disobedience of the same and therefore the District Educational Officer was directed by the Director of School Education not to release the staff grant for the academic year 1975-76.

7. There cannot be any fundamental right with regard to admission of girls into a co-education institution. None of the rights of the petitioner is infringed. The petitioner school can still impart education to boys in whatever manner it pleases.

8. Mr. M. Raghavan, learned counsel appearing for the girls High School, in supporting the submissions of the learned Government Pleader states that no fundamental right of the petitioner is hereby affected. If as a matter of policy, it is laid down that proper permission of the concerned educational authority should be obtained for admitting girls in a co-education institution, it will be purely regulatory in nature and such a regulation does not violate Art. 30 of the Constitution. In fact, an identical question arose before the Kerala High Court and the learned Judges of the Kerala High Court have held that there is no fundamental right involved, since still it will be open to the petitioner to impart education to the boys as is seen from Mark Metto v. Government of Kerala, AIR 1977 Ker 58.

8-A. Mr. Martin, learned counsel for the petitioner, in reply to this contention admits that the judgment of the Kerala High Court does not take note of the judgments of this court reported in 1971 (1) Mad LJ 325 : (AIR 1971 Mad 440) and 1975 (1) Mad LJ 353 : (AIR 1976 Mad 214) and therefore it cannot be held as laying down the correct law.

9. Unaided by any of the authorities, first of all let me consider whether the petitioner can contend that he has a fundamental right to admit the girls in the school, merely because it happens to be a minority institution. Art. 30 (1) of the Constitution states.

"All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice."

In the instant case, the right to establish the educational institution is not in any way interfered with. Nor again in my view, the administration is not interfered with because of the direction by the Government to the petitioner not to admit girls when an exclusive girls High School is available at a distance of 400 yards from the petitioner's school. Still the petitioner's right to impart education to boys is not in any way interfered with. Therefore, it does not pertain to the realm of administration. Looked at from that point of view, no right of the petitioner has been violated.

10. A careful reading of G. O. 1664 Education, dated 19-10-1972, extracted above clearly shows that it is merely regulatory in character since it says that in areas where there are separate girls schools, girls should not, under any circumstances, be admitted in boys schools except with the specific and prior approval of the inspecting officers and that too for valid reasons. It does not deny him the right, but merely requires the schools like petitioner to obtain prior approval. This may be a good policy from the view of the Government. This court cannot concern itself with the wisdom of such policy and hold that some rights of the petitioner have been infringed. However, I have already stated that no right has been infringed.

11. Now let me turn to the case law regarding the nature of the right conferred under Art. 30 of the Constitution. In St. Xavier College v. State of Gujarat, AIR 1974 SC 1389, Mathew J. stated the law as under (at p. 1441).

"Because Art. 30 (1) is couched in absolute terms, it does not follow that the right guaranteed is not subject to regulatory laws which would not amount to its abridgment. It is a total misconception to say that because the right is couched in absolute terms, the exercise of the right cannot be regulated or that every regulation of that right would be an abridgment of the rights."

Again in the Kerala Education Bill case 1959 SCR 995 : (AIR 1958 SC 956) it has been held that Art. 30 (1) gives two rights to the minorities (1) to establish and (2) to administer educational institutions of their choice. The right to administer cannot obviously include the right to mal-administer. The minority cannot surely ask for aid or recognition for an educational institution run by them to unhealthy surroundings, without any competent teachers, possessing any semblance of qualification, and which does not maintain even a fair standard of teaching or which teaches matters subversive to the welfare of the scholars. It stands to reason, then, that the Constitutional right to administer an educational institution of their choice does not necessarily militate against the claim of the State to insist that in order to grant aid, the State may prescribe reasonable regulations to ensure the excellence of the institutions to be aided."

12. Director of School Education v. Rev. Brother G. Arogiasamy, 1971 (1) Mad LJ 325 : (AIR 1971 Mad 440), related to the admission of students according to their choice. A Division Bench of this Court in dealing with the same held, (At p. 442 of AIR),

"In our opinion, it places serious restriction on the freedom of the minority institutions to make admissions of students accord-

ing to their choice. It throws the students of the minority community into a competition with the generality of students belonging to that and all other communities. The applications for admission to any institution cannot be restricted to a particular community because of Arts. 15 (1) and 29 (2). The result is the students of the Roman Catholic community, which is said to represent less than 10 per cent of the total population when in competition with students of the other communities who have all applied for admission, obviously will have but slender chances of admission, contrary to the protection afforded by Art. 30 (1). It is true the impugned, order is conceived in public interest to essure proper standards in the matter of admission to basic ond non-basic training schools. That is good by itself. But when applied to a minority institution, its effect is not to its benefit from its own point of view. That is forbidden by Art. 30 (1)."

13. Again in Rev. Br. A. Thomas v. Dy. Inspector of Schools, 1975 (1) Mad LJ 353 : (AIR 1976 Mad 214) while dealing with the right of a minority institution regarding the appointment of teachers, it was held — (At p. 215 of AIR).

"It will be an unreasonable interference to tell the institution that it could not employ a more highly qualifled teacher in the interests of better standards of education in its schools because it would not assist the scheme of the Government to find employment for higher grade teachers.....The Government cannot insist that a protected institution cannot take a more highly qualified teacher in the interests of higher standards of education in the institution. That will be an uncalled for, unreasonable and arbitrary interference with the management of the school. The aid given by the Government does not clothe the Government with any right to interfere with the freedom of management of the institution to employ teachers of their choice, who have a higher qualification than that prescribed by the Department."

14. Neither of these two decisions, in my view, affords any assistance to the petitioner since in those cases a right was held to have been established. That is not the position here, as I have held above the more direct authority is what is found reported in Mark Metto v. Govt. of Kerala, AIR 1977 Ker 58. In that case, the Regional Deputy Director of Public Instruction, Trivandrum, by his order dated 5-6-1973, refused permission to the petitioner to admit girls in his school which was a boys school. In dealing with the validity of that order, which was held under Rule 12 of the Kerala Education Rules, it was held — (At p. 62).

"This only says that girls may be admitted in secondary schools for boys in areas where there are no girls' schools, it does not prohibit the minority community from giving education to the girls. It does not prevent them from admitting girls in girls schools. It only prohibits admission of girls in secondary schools for boys if there is a girls school in the same area. The basis of the rule seems to be that it will be better for the girls to get instructions in girls schools as far as possible; and if there is a girls' school why the parents of the minority community should insist on admission of the girls in boys school is ununderstandable. By the time the child reaches the secondary school stage it would have grown up a little. At that age to keep them under proper guidance and discipline the rule is made that they should as far as possible be given education in girls schools only. This is only in the nature of a regulation for discipline and morality. It does not interfere with the power of administration of an educational institution by a minority community. Therefore, we do not find any reason to hold that the rule in so far as it applies to religious minorities is invalid.

The reasoning of this decision squarely applies to the instant case. Consequently, I hold there are no merits in the writ petition. It will stand dismissed. No costs.

15. It is brought to my notice that during the pendency of the writ petition, students have been admitted and therefore at this stage if they are directed to be sent out of the petitioner's institution. it will seriously interfere with their education and therefore it is appealed to me that my judgment may apply with regard to the future admission commencing from the next academic year. I see great justice in the appeal. Accordingly, my judgment will relate to admissions commencing from the academic year 1978-79.

Petition dismissed.

AIR 1978 MADRAS 395

VARADARAJAN, J.

K. Ramanujam Chettiar, Petitioser v. Arunachaleswarar Devastanam, and another, Respondents.

C. R. P. Nos. 2102, 2123, 2125 and 2199 of 1976. D/- 16-8-1977.

(A) Civil P. C. (5 of 1908), S. 115 — Question of jurisdiction — Question can be raised

in revision for first time. (Presidency Small Cause Courts Act (15 of 1882), S. 41.) Case law discussed. (Para 5)

Anno: AIR Comm. C. P. C. (9th Edn.), S. 115, N. 10; AIR Manual (3rd Edn.), Presidency Small Cause Courts Act, S. 41, N. 1.

(B) Presidency Small Cause Courts Act (15 of 1882), S. 41 — 'Rack-rent' — Determination of — Basis for — Should be determined on actual rent and not on standard rent.

Rack-rent has to be rent first before it will become rack-rent and that it could only mean gross rent and not net rent.

The rack-rent in respect of a house could not be said to be exceeding the limits prescribed in Sec. 41 just because the rent in the locality was never less than particular standard when, in fact much lesser rent was being paid for the house. Consequently, the jurisdiction of the Court could not be said to be ousted on the basis of such standard rent. Rent is a term of contract of the lease and in the absence of agreement between the parties to pay the rent at the standard rate, the actual rent could not be ignored. AIR 1969 Bom 73 Foll. (Para 9)

Cases Referred: Chronological	Paras
AIR 1969 Bom 73	9
AIR 1961 Bom 221	4
AIR 1956 Pat 294	4
(1952) 2 QB 803 Rawlance v. Croydon Corporation	9
AIR 1935 Mad 723	4
AIR 1933 Pat 246	5
(1911) ILR 38 Cal 639	4

ORDER :— These civil revision petitions arise out of the judgments and decrees of the Second Judge, Court of Small Causes, Madras, passed on 25-8-1976 in Ejectment suits Nos. 285, 280, 284 and 286 of 1975.

2. The trial court ordered eviction of the petitioners in these civil revision petitions holding that their old tenancy had been terminated and no new tenancy has come into existence thereafter, that there is no waiver of notice of the termination of tenancy by acceptance of any rent and that G. O. No. M. S. 1998 Home Department, dated 12-8-1974, exempting properties belonging to temples from the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act of 1960 applies to the respondent-devastanams.

3. The learned counsel for the petitioners canvassed before me only the question of the jurisdiction of the Small Cause Court, Madras, to entertain the ejectment suits under Sec. 41 of the Presidency Small Cause Courts Act, 1882. It may be stated at this stage that no plea of want of jurisdiction of the Small Cause Court to entertain the suits had been taken in the written pleas filed by the petitioners in the ejectment suits and that the plea of want of jurisdiction of the lower Court was taken by the petitioners in the C. R. Ps. 2102, 2123 and 2125 of 1976 for the first time only in the memorandum of grounds of the civil revision petitions. The petitioner in C. R. P. No. 2199 of 1976 had not raised the plea of want of jurisdiction of the lower Court to entertain the suit even in the Memorandum of grounds of civil revision petition. But he has been allowed to raise that plea by an additional ground as per order in C. M. P. No. 4657 of 1977 by this court. The result is that the plea of want of jurisdiction of the lower Court to entertain the suits under Section 41 of the Act has been taken for the first time only before this court in these civil revision petitions. The suits are really applications for issue of summons to show cause why the persons concerned should not be compelled to deliver up the properties.

4. The learned counsel for the respondent-devastanam contended before me that the plea of want of jurisdiction not having been taken before the lower Court should not be allowed to be raised for the first time before this court in the revision petitions. But the objection does not appear, in my opinion, to be well founded. Pandrang Row J. has observed in Kuppuswamy Chetty v. Ayyammai Ammal, AIR 1935 Mad 723, that in the matter of pecuniary jurisdiction, the waiver of a party is not sufficient to clothe the court with jurisdiction which it does not otherwise possess. A Bench of the Patna High Court has gone a step further in National Coal Co. Ltd. v. L. P. Dave. AIR 1956 Pat 294. The facts of that case disclose that the petitioner before the learned Judges submitted to the jurisdiction of the Tribunal below It was. therfore, urged on behalf of the opposite party that the opposite party cannot raise the question of want of jurisdiction. On the other hand, it was contended on behalf of the petitioner before the learned Judges that the consent of parties cannot give jurisdiction to a court or tribunal if it had none. The learned Judges have observed that the proposition was undoubtedly true, when there was inherent lack of jurisdiction in the court or Tribunal. They have further observed that where the want of jurisdiction had to depend upon proof of certain facts and those facts had not been raised and proved, a party cannot be permitted to raise a plea of want of jurisdiction so as to render its decision void

and ineffective. A Bench of the Calcutta High Court has observed in Rajalakshmee Dassee v. Katyayani Dassee, (1911) ILR 38 Cal 689 thus—

"It is an elementary principle of law that, if a court has no jurisdiction over the subject-matter, its judgments and orders are mere nullities, and may not only be set aside at any time by the court in which they are rendered, but be declared void by every court in which they are presented.....If a court has no jurisdiction, its judgment is not merely voidable, but void, and it is wholly unimportant how precisely certain and technically correct its proceedings and decisions may have been; if it has no power to hear and determine the cause, its authority is wholly usurped and its judgment and orders are the exercise of arbitrary power under the forms, but without the sanction of the law. These principles apply, not only to original courts, but also to courts of appeal. Jurisdiction over the subject-matter, whether in the court of first instance or in the Appellate Court, is given only by law, and cannot be conferred by consent of parties. Accordingly where an appellate court does not possess jurisdiction to review the action of the court below, jurisdiction cannot be conferred upon it by consent of the parties; and any waiver on their part cannot make up for the lack or defect of jurisdiction.....These cases lay down the doctrine that, where no jurisdiction exists no action on the part of the plaintiff, no inaction on the part of the defendant, can invest the court with any of the elements of power or of vitality, so as to convert the proceeding before it into a proper judicial process. If a court assumes to act where it has no jurisdiction, its adjudications are all utterly void and have no effect either as an estoppel or otherwise".

Shah J. of the Bombay High Court has observed in the Digambar Parshwanath Jain Mandir v. Valubai, AIR 1961 Bom 221, that even on general principles the point of jurisdiction, which goes to the root of the matter, can well be taken even in the highest court of the land because it is the duty of the higher courts to see that none of the subordinate courts exercises jurisdiction which the Legislature has not thought fit to confer upon it.

5. The learned counsel for the petitioners submits that it is unnecessary to adduce any evidence for considering the question of want of jurisdiction of the trial court to entertain the suits under Sec. 41 of the Presidency Small Cause Courts Act, and that a perusal of the claims in the ejectment suits alone would establish that the trial court had no jurisdiction. In this connection reliance was placed on the decision of Kulwant Sahay, J. in Ganpat Pujari v. Kanaiyalal Marwari, AIR 1933 Pat 246, where the learned Judge has observed that in order to determine the jurisdiction of the court, the plaint and not the written statement should be looked into. In these circumstances, I agree with the counsel for the petitioners that the question of the jurisdiction of the court goes to the root of the matter and that it is open to the petitioners to raise that question for the first time before this court in these civil revision petitions.

6. The extent of property involved in C. R. P. 2123 of 1976. (Ejectment suit No. 280 of 1976) is 250 sq. ft. of land which had been admittedly let for a rent of Rs. 15 per mensem which works out to Rs. 180 per annum. The property involved in C. R. P. 2125 of 1976 (Ejectment suit No. 284 of 1976) is 600 sq. ft. of land which had been admittedly let on a rent of Rs. 30 per mensem which works out to Rs. 360 per annum. The property involved in C. R. P. No. 2102 of 1976 (Ejectment suit No. 285 of 1975) is about 4370 sq. ft. of land which has been admittedly let for a rent of Rs. 100 per mensem which works out to Rs. 1200 per annum. The property involved in C. R. P. No. 2199 of 1976 (Ejectment suit No. 286 of 1975) is about 800 sq. ft. of land which had been admittedly let out on a rent of Rs. 70 per mensem which works out to Rs. 840 per annum.

7. The respondent has alleged in the plaints in all the four ejectment suits that the rent in the locality is never less than Re. 1 per square foot. On the basis of this allegation in the plaints it was contended by the learned counsel for the petitioners that the rack-rent of the aforesaid properties would be Rs. 3000, Rs. 7200, Rs. 52440 and Rs. 9600 per annum respectively. Sec. 41 of the Presidency Small Cause Courts Act under which the Ejectment suits have been filed, reads thus—

"When any person has had possession of any immoveable property situate within the local limits of the Small Cause Court's jurisdiction and of which the annual value at a rack-rent does not exceed two thousand rupees, as the tenant, or by permission of another person, or of some person through whom such other person claims, and such tenancy or permission has determined or been withdrawn, and such tenant or occupier or any person holding under or by assignment from him (hereinafter called the occupant) refuses

to deliver up such property in compliance with a request made to him in this behalf by such other person, such other person (hereinafter called the applicant) may apply to the Small Cause Court for a summons against the occupant, calling upon him to show cause, on a day therein appointed, why he should not be compelled to deliver up the property."

The learned counsel for the petitioners, therefore, contended that on the respondent's own showing in the plaints, the rack-rent for the properties exceeds Rs. 2000 per annum and that the lower Court, therefore, had no jurisdiction to entertain the suits under Sec. 41 of the Act.

8. In Stroud's Judicial Dictionary, 3rd Edn. 'Rack-rent' is defined thus :

" 'Rack-rent' under Sch. I, Pt. II (first Scale) of the General Order under Solicitors Remuneration Act, 1881, means a rent which represents the full annual value of the holding'.

Below that definition there is the passage reading thus—

"When deciding whether a person receives a rack-rent under Sec. 9 (4) of the Housing Act 1936, the effect of the Rent Restrictions Acts must be considered".

In 'Words and Phrases Legally Defined', 2nd Edn. by John B. Saunders it is stated—

"A rack-rent in legal language means a rent that represents the full annual value of the holding. The fact that in addition to the rent reserved a substantial premium has been paid by the tenant is clear evidence that the rent is not a rack-rent....." Rack-rent has been defined in 2 Blackstone's Commentaries page 43, as 'only a rent of the full value of the tenement or near it;' and in a judgment of Holmes L. J. in Ex parte Connolly to Sheridan and Russel is defined thus — 'a rack-rent in legal language means a rent that represents the full annual value of the holding.' "

In 'The Law Lexicon of British India' by P. Ramanatha Aiyar it is stated—

"Rack-rent is only a rent of the full value of the tenement, or near it. It is rent of, or approaching to, the full annual value of the property out of which it issues. Rent raised to the uttermost; the full annual value of the property. A term generally used to denote excessive rent".

In 'The Shorter Oxford English Dictionary', 3rd Edn. rack-rent is stated to be—

"A very high, excessive or extortionate rent; a rent equal or nearly equal to the full annual value of the land. Hence rack-rent (v. trans) to subject a person to the payment of rack-rent. Rack-renter, one who pays, or one who exacts rack-rent".

9. The meaning of 'annual value' or rack-rent came up for consideration before Jain J. of the Bombay High Court in Lakshmi Hirla and Co. v. Damji Khimji and Co., AIR 1969 Bom 73, where the learned Judge has extracted the following observations of Lord Justice Romer in Rawlance v. Croydon Corporation, (1952) 2 QB 803, namely—

"In my opinion, the Legislature. in Sec. 9 (of the Housing Act, 1936) was applying itself to a factual and not to a hypothetical position, If the standard rent is the greatest rent that is obtainable in respect of any particular premises then it is the full rent of these premises, the rack-rent, notwithstanding that (and indeed because) the owner is restricted from receiving the higher rent which the premises, if uncontrolled, could command",

and has proceeded to observe thus—

"This will indicate that the annual value at rack-rent is to be based on 'rent' even if the rent is controlled by legislature and not on licence fees. The rack-rent has to be 'rent' first before it becomes rack-rent. It can only mean gross rent and not net rent. In this particular case, the gross rent payable in respect of the premises by the petitioners as tenants to their own landlord who is the owner of the premises, is Rs. 2256 per annum, and this is the annual value of the premises at a rack-rent. The amount of Rs. 3120 per annum paid by the respondents to the petitioners as licence fees is neither rent nor rack-rent and cannot be the annual value at a rack-rent. In my opinion, the Bombay Small Cause Court had jurisdiction to entertain, try and determine the petitioner's application under Sec. 41 of the Presidency Small Cause Courts Act, in respect of the premises and it has failed to exercise jurisdiction vested in it."

This decision makes it clear that rack-rent has to be rent first before it will become rack-rent and that it could only mean gross rent and not net rent. The annual value at the rack-rent in Sec. 41 of the Presidency Small Cause Courts Act as applicable to Bombay is Rs. 3000, for the words 'three thousand rupees" have been substituted in that section for the words 'two thousand rupees' by Bombay Act XVI of 1958. The rack-rent in these cases cannot be said to be Rs. 3000, Rs. 7200, Rs. 52440 and Rs. 9600 respectively merely because the respondents-devastanams have alleged in the plaints that the rent in the locality is never less than Re. 1 per sq. ft. Rent is a term of contract of

the lease. There is no agreement between the parties to pay rent at Re. 1 per sq. ft. The petitioners cannot ask the court to ignore the actual rent paid by them, namely Rs. 15, Rs. 30, Rs. 100 and Rs. 70 respectively per mensem and contend that the rack-rent exceeds Rs. 2000 per annum on the basis merely of the aforesaid allegation in the plaints, for, the gross rent on the basis of the rent which was being actually paid by the petitioners, before the termination of their tenancies, amounted to only Rs. 180, Rs. 360, Rs. 1200 and Rs. 840 respectively per annum. Therefore, I am of the opinion that the court below had jurisdiction to entertain the ejectment suits.

10. The civil revision petitions are therefore dismissed with costs. Advocate's fee one set in C. R. P. Nos. 2102, 2123 of 1976.

Revisions dismissed.

AIR 1978 MADRAS 399

ISMAIL AND NAINAR SUNDARAM, JJ.

R. Radha, Petitioner v. C. R. Govindarajulu, Respondent.

C. R. P. No. 2271 of 1976 and C. M. P. No. 12384 of 1977, D/- 19-4-1978.°

(A) T. N. Buildings (Lease and Rent Control) Act (18 of 1960), S. 25 — Revision — Concurrent findings of Authorities under the Act — No interference by High Court.

Where the findings of the authorities under the Act are concurrent both on the question whether the tenant had committed, wilful default in the payment of rent or not and on the question whether the landlady required the premises for her own use and occupation or not and there is evidence to support these findings, the High Court will not interfere in revision. (Para 4)

(B) T. N. Buildings (Lease and Rent Control) Act (18 of 1960), Ss. 11 (4), 25, 10 — Revision before High Court pending — Application under S. 11 (4) by landlord for possession — Not maintainable — Scope of S. 11 (4), indicated — (1975) 2 Mad LJ 25 and AIR 1977 Mad 55 and 90 Mad LW 287 : AIR 1977 NOC 297 (Mad) Overruled.

Where a revision under S. 25 of the Act is pending before the High Court, an application under S. 11 (4) for directing the tenant to put the landlord in possession on ground that the tenant had not paid the arrears of rent is not maintainable. Sub-sec. (1) of S. 11 deals with only two situations: one is the tenant contesting the application for eviction filed by the landlord under S. 10 of the Act, and the second is the tenant against whom an order for eviction has been passed by the Rent Controller preferring an appeal under S. 23 of the Act before the appellate authority. Sub-sec. (1) provides that in either of these contingencies the tenant will not be entitled to put forward his case without paying the arrears of rent. Sub-sec. (1) of S. 11 does not even cover a case where a landlord prefers an appeal under S. 23 of the Act to the appellate authority against an order passed on his application under S. 10 of the Act. The principle under S. 11 (4) cannot be invoked in revision petition. S. 11 (1) is careful enough to pick out only two situations and deal with the same. No other situation is contemplated by the language of S. 11 and therefore S. 11 is not capable of general application to all proceedings under the Act before every one of the authorities functioning under the Act. The general principle that a revision is a continuation of the original proceeding, cannot also be invoked for applying S. 11 (1) and S. 11 (4). S. 10 (2) (i) and its proviso also make it clear that Section 11 (4) is not enacted as a substitute for a suit by a landlord for the recovery of arrears of rent from his tenant. (1975) 2 Mad LJ 25; AIR 1977 Mad 55 and 90 Mad LW 287 : AIR 1977 NOC 297 (Mad) Overruled. Case law discussed. (Paras 7, 12, 13, 14, 19, 21, 22)

Cases Referred: Chronological	Paras
AIR 1977 SC 1217	15
AIR 1977 Mad 55 : (1976) 2 Mad LJ 321	13
AIR 1977 NOC 297 : 90 Mad LW 287	14
(1975) 2 Mad LJ 25	12
1969 Ren CJ 1 (SC)	17

R. N. Kothandaraman, for Petitioner; T. R. Rajaraman, for Respondent.

ISMAIL J.:— The civil revision petition has been preferred under S. 25 of the Tamil Nadu Buildings (Lease and Rent Control) Act 1960 (Tamil Nadu Act 18 of 1960), (hereinafter referred to as the Act) by the landlady against the orders passed by the Rent Controller and the Appellate Authority functioning under the Act. The petitioner herein filed R. C. O. P. No. 163 of 1973 before the Rent Controller, Coimbatore. for eviction of the respondent herein on two grounds, namely, the respondent had committed wilful default in payment of rent and secondly the landlady petitioner bona fide required the premises for her

° (To revise judgment of Sub. J., Coimbatore in R. C. A No. 594 of 1974).

own use and occupation. The Rent Controller as well as the Appellate Authority held against the petitioner on both these grounds and dismissed the petition filed by the petitioner for eviction of the respondent under S. 10 of the Act. It is to revise these orders C. R. P. No. 2271 of 1976 has been preferred.

2. C. M. P. No. 12384 of 1977 has been filed under S. 11 (4) of the Act to stop all further proceedings in the civil revision petition and make an order directing the respondent tenant to put the petitioner landlady in possession of the building on the ground that the respondent had not paid the arrears of rent.

3. Both the civil revision petition as well as the civil miscellaneous petition, referred to above, are contested by the respondent herein.

4. As far as the civil revision petition is concerned. the findings of the authorities under the Act are concurrent both on the question whether the respondent tenant had committed wilful default in the payment of rent or not and on the question whether the petitioner landlady bona fide required the premises for her own use and occupation or not. Apart from these findings on these two questions being concurrent, there is evidence to support these findings, and we are not satisfied with reference to the evidence available on record that the said findings can be characterised as erroneous so as to warrant interference by this court in revision.

5. Consequently. the civil revision petition fails and it is dismissed.

6. Major portion of the arguments on both sides have been addressed only with regard to the civil miscellaneous petition. As far as the petitioner is concerned, as we pointed out already, the application has been filed under S. 11 (4) of the Act for direction to the respondent tenant to put the landlady petitioner in possession of the property on the allegation that the respondent tenant had not paid the arrears of rent. The learned counsel for the respondent wanted time for filing a counter affidavit to verify whether the respondent tenant had paid the rents or not. However. since the maintainability of the civil miscellaneous petition itself was challenged by the counsel for the respondent, we did not give time for filing a counter immediately and we informed the learned counsel for the respondent that we will consider the question of giving time for filing a counter if we hold that the civil miscellaneous petition is competent and, therefore we heard arguments on the maintainability of the civil miscellaneous petition. Consequently, we are now considering the question regarding the maintainability of the civil miscellaneous petition.

7. For the purpose of understanding the points urged before us, it is necessary to extract S. 11 of the Act in full—

11. Payment or deposit of rent during the pendency of proceedings for eviction — (a) No tenant against whom an application for eviction has been made by a landlord under S. 10 shall be entitled to contest the application before the Controller under that section, or to prefer any appeal under S. 23 against any order made by the Controller on the application, unless he has paid or pays to the landlord, or deposits with the Controller or the appellate authority, as the case may be, all arrears of rent due in respect of the building up to the date of payment or deposit, and continues to pay or to deposit any rent which may subsequently become due in respect of the building until the termination of the proceedings before the Controller or the appellate authority, as the case may be,

(2) The deposit of rent under sub-sec. (1) shall be made within the time and in the manner prescribed.

(3) Where there is any dispute as to the amount of rent to be paid or deposited under sub-sec. (1) the Controller or the appellate authority as the case may be, shall, on application made to him either by the tenant or by the landlord, and after making such inquiry as he deems necessary, determine summarily the rent to be so paid or deposited.

(4) If any tenant fails to pay or to deposit the rent as aforesaid, the Controller or the Appellate authority, as the case may be, shall, unless the tenant shows sufficient cause to the contrary stop all further proceedings and make an order directing the tenant to put the landlord in possession of the building.

(5) The amount deposited under sub-sec. (1) may, subject to such conditions as may be prescribed, be withdrawn by the landlord on application made by him in that behalf to the Controller or the appellate authority, as the case may be."

On a perusal of this section, the following features are clear —

Sub-sec. (1) of S. 11 deals with only two situations : one is the tenant contesting the application for eviction filed by the landlord under S. 10 of the Act, and the second is the tenant against whom an order for eviction has been passed by the Rent Controller preferring an appeal under S. 23 of the Act before the appellate authority. Sub-sec. (1) pro-

vides that in either of these contingencies the tenant will not be entitled to put forward his case without paying the arrears of rent. It may be worthwhile to point out that sub-sec. (1) of S. 11 does not even cover a case where a landlord prefers an appeal under S. 23 of the Act to the appellate authority against an order passed on his application under S. 10 of the Act. Thus, the scope of sub-sec. (1) of S. 11 is limited only to two cases as pointed out above.

8. Sub-sec. (2) deals with the manner and the time of payment contemplated by sub-sec. (1).

9. Sub-sec. (3) equally deals with a case where there is a dispute as to the amount of rent to be paid or deposited and provides that the Controller or the appellate authority, as the case may be, shall determine summarily the rent to be so paid or deposited.

10. Sub-sec. (4) deals with the case where a tenant fails to pay or deposit the rent under sub-sec. (1), read with sub-sec. (2) and sub-sec. (3), when sub-sec. (3) applies, and provides that the Controller or the appellate authority, as the case may be, shall, unless the tenant shows sufficient cause to the contrary, stop all further proceedings and make an order directing the tenant to put the landlord in possession of the building.

11. Sub-sec. (5) enables the landlord to withdraw the amount so paid or deposited by the tenant before the Controller or the appellate authority under the provisions of sub-sec. (1).

Thus, a reading of S. 11 makes it clear that S. 11 (4) will apply only to the cases covered by S. 11 (1), and the cases covered by S. 11 (1) are only two in number, namely, the application for eviction made by the landlord under S. 10 before the Rent Controller and the appeal preferred by the tenant under S. 23 to the appellate authority against an order made against him on the application made by the landlord under S. 10 of the Act. A reading of S. 11 (1) and S. 11 (4) together will exclude all other cases except these two from the scope of the operation of the provisions in question. The case before us is a revision petition preferred by the landlady under S. 25 of the Act against the dismissal of her application filed before the Rent Controller under S. 10 and the dismissal of her appeal by the appellate authority preferred under S. 23. The question for consideration is whether an application under S. 11 (4) can be made to this court by the petitioner in the civil miscellaneous petition during the pendency of the civil revision petition, requesting this court to stop further proceedings in the civil revision petition and direct the tenant respondent to put the petitioner landlady in possession of the building.

12. The learned counsel for the petitioner relies on three decisions of this court in support of his contention that such an application is competent. The first decision is that of Kailasam J. (as he then was) in Hemalnath v. Kasturi, 1975 (2) Mad LJ 25. In that case, the civil revision petition was preferred by the tenant against the order passed by the appellate authority directing his eviction on the ground that the landlady bona fide required the premises for additional accommodation. In the civil revision petition, the landlady filed a civil miscellaneous petition under S. 11 (4) of the Act, praying that all further proceedings be stopped in the civil revision petition and that direction be given that the landlady may be put in possession of the premises. That prayer of the landlady was contested by the tenant. The learned Judge overruled the objections of the tenant and issued a direction as prayed for by the landlady. The learned Judge stated:—

"Though this sub-section (referring to sub-sec. (4) of S. 11) is strictly applicable to the proceedings before the Rent Controller and the appellate authority, the principle can be and should be applied in proceedings in revision petitions also. The tenant cannot refrain from paying the rent merely because he has filed a civil revision petition. Whether S. 11 (1) is applicable or not, the civil revision petition is liable to be dismissed, on the ground that the tenant had defaulted in the payment of rent pending the civil revision petition".

Thus, it is clear that the learned Judge took the view that S. 11 (4) applies only to proceedings before the Rent Controller and the appellate authority. Notwithstanding this view, the learned Judge observed that the principle can be and should be applied in proceedings in revision petitions also. The learned Judge has not given any basis for coming to this conclusion, namely, on what principle of law the principle underlying S. 11 (4) can be and should be applied in proceedings in revision petitions also. We may also point out that without deciding whether S. 11 (1) is applicable or not, it cannot be decided whether S. 11 (4) applies or not. From what we have pointed out already, S. 11 (4) uses the expression 'if any tenant fails to pay or to deposit the rent as aforesaid'. The expression 'as aforesaid' will cer-

tainly attract S. 11 (1) and therefore S. 11 (1) and S. 11 (4) have to be read together, and if the case does not fall within S. 11 (1). S. 11 (4) cannot apply. Hence we are unable to agree with the reasoning of the learned Judge "whether S. 11 (1) is applicable or not, the civil revision petition is liable to be dismissed on the ground that the tenant had defaulted in the payment of rent pending the civil revision petition." Further, we are unable to share the view that simply because the tenant refrained from paying the rent merely because he has filed a civil revision petition he was liable to be evicted. In view of our construction of the provisions of S. 11, viz., that proceedings under S. 11 (4) can be initiated only before the Rent Controller or the appellate authority, as the case may be, we are unable to agree with the learned Judge that an application under S. 11 (4) of the Act can be filed before this court during the pendency of the civil revision petition.

13. Second decision is that of Ramaprasada Rao J. (as he then was) in Basheer Ahmed Khan v. Krishna Chetti, 1976 (2) Mad LJ 321 : (AIR 1977 Mad 55). In that case also, the revision petition had been preferred by the tenants. In the course of the hearing of the case, the landlord, respondent filed an application under S. 11 (4) of the Act for stopping all further proceedings since the petitioner-tenant had failed to pay the rent due. The tenants resisted that application contending that the landlord had already filed a suit for the recovery of the arrears of rent and therefore S. 11 could not be invoked and that the plea could be raised only before the Rent Controller or the appellate authority, and not in the High Court when it is exercising jurisdiction under S. 25 of the Act. Dealing with the second contention, the learned Judge observed (at p. 56 of AIR):—

"In so far as the last contention is concerned, I am of the view that as the High Court is exercising jurisdiction under the very Act and as it has been vested with such jurisdiction under it, it has a right to invoke each and every provision of the said Act for purposes of a successful conclusion of the hearing and also for the purpose of rendering justice as between the parties in accordance with the codified law as set out in the Tamil Nadu Buildings (Lease and Rent Control) Act. One such provision in the Act is the right vested in the Rent Controller or the appellate authority, as the case may be, to stop further proceedings and make an order directing the defaulting tenant who fails to pay rent to put the landlord in possession of the building. As in my view, such jurisdiction can be exercised by the High Court as well while it deals with revision petitions under S. 25, the argument of Mr. Balakrishnan that this court cannot entertain the application under S. 11 made by the landlord at the revisional stage is not impressive and I am unable to accept it."

We are unable to share this view also. In fact, from the extract given above, the learned Judge has not considered the exact scope of the provisions contained in Section 11 (1) and S. 11 (4) of the Act. As we have pointed out already, S. 11 (1) is careful enough to pick out only two situations and deal with the same, the two situations being an application filed by the landlord under S. 10 of the Act and the tenant contesting the same before the Controller, and an appeal preferred by the tenant before the appellate authority under Section 23 of the Act against an order passed on an application by the landlord under Section 10. No other situation is contemplated by the language of Section 11 and therefore Section 11 is not capable of general application to all proceedings under the Act before every one of the authorities functioning under the Act.

14. The third decision is that of Suryamurthy J. in Badrunnissa Begum v. Palani Ambalam, 90 Mad LW 287 : (AIR 1977 NOC 297 (Mad)). That was also a case of a revision petition preferred by the landlady. In the civil revision petition an application under Section 11 (4) was filed. The tenant contested the maintainability of that application. The learned Judge overruled the objection of the tenant and held that the application filed under Section 11 (4) was maintainable. The learned Judge observed—

"However, he (counsel for tenants) contends that as the tenants are not the civil revision petitioners, the provisions of S. 11 (1) and 11 (4) of the Act are not applicable and the tenants cannot be directed to put the landlady in possession merely because they have not paid the arrears. I am unable to accept this strained construction of S. 11 (1) and S. 11 (4) of the Act. S. 11 (1) is to the effect that no tenant against whom an application for eviction has been made by a landlord under S. 10 shall be entitled to contest the application before the Controller under that section or to prefer any appeal under S. 23 against any order made by the Controller on the application, unless he has paid or pays to the landlord, or deposits with the Controller or the appellate authority, as the case may be, all arrears of rent due in respect of the building up to the date of pay-

ment or deposit and continues to pay or to deposit any rent which may subsequently become due in respect of the building until the termination of the proceedings before the Controller or the appellate authority, as the case may be. The civil revision petition is a continuation of the proceedings instituted for the eviction of the tenant before the learned Rent Controller. The petition was filed under Section 10 of the Act. As the civil revision petition is a continuation of the proceedings before the Controller, what applies to a petition before the Controller under S. 10 or to an appeal before the learned appellate authority under Section 23, applies equally to a petition in revision to this court. The tenants are not entitled to contest the revision petition unless and until they pay or deposit the rent due by way of arrears. As they have not paid the arrears to the landlady or deposited the same into court, all further proceedings are stopped and the tenants are directed to put the landlady in possession of the buildings."

That a revision is a continuation of the original proceedings may be correct, as a general proposition. But, as far as the present case is concerned, having regard to the express language contained in Section 11 (1) and Section 11 (4), which are strictly limited to the two cases, to which we have drawn attention, it is not possible to apply the general principle that the revision is a continuation of the original proceeding and therefore whatever is applicable to the original proceeding will apply to the revision also. In fact, as we have pointed out already, having regard to the language of Section 11 (4) the provision contained therein will not apply even to an appeal preferred by the landlord under S. 23 of the Act, against an order passed by the Rent Controller on an application filed by the landlord, under Section 10. If so, the general principle that a revision is a continuation of the original proceeding, cannot be invoked in these cases, for applying S. 11 (1) and S. 11 (4).

15. We can usefully contrast the provisions contained in Sec. 11 of the Act with the provisions contained in S. 11-A of the Bihar Buildings (Lease, Rent and Eviction) Control Act (3 of 1947) considered by the Supreme Court in Radhakishan Sao v. Gopal Modi, AIR 1977 SC 1217. In that case, the suit filed by the landlord for eviction of the tenant was dismissed by the learned District Munsif. On appeal, the Additional Subordinate Judge reversed that conclusion and decreed the suit. The tenant's second appeal to the High Court also failed. During the pendency of the appeal before the Subordinate Judge, an application was filed under S. 11-A for directing the tenant to deposit the rent of the premises in terms of that section. The learned Subordinate Judge dismissed that application holding that the defendant had paid the rent. A second attempt was made in the High Court by the plaintiff landlord to press the ground under Section 11-A of the Act to strike out the tenant's defence and the High Court allowed that application. When the matter went up in appeal to the Supreme Court, one of the questions that came to be considered was whether S. 11-A could be invoked before the appellate court. S. 11-A of the Bihar Act read as follows—

"Deposit of rent by tenants in suits for ejectment. If in a suit for recovery of possession of any building the tenant contests the suit, as regards claim for ejectment, the landlord may make an application at any stage of the suit for order on the tenant to deposit month by month rent at a rate at which it was last paid and also the arrears of rent, if any; and the court, after giving an opportunity to the parties to be heard, may make an order for deposit of rent at such rate as may be determined month by month and the arrears of rent, if any, and on failure of the tenant to deposit the arrears of rent within 15 days of the date of the order or the rent at such rate for any month by the 15th day of the next following month, the court shall order the defence against ejectment to be struck out and the tenant to be placed in the same position as if he had not defended the claim to ejectment. The landlord may also apply for permission to withdraw the deposited rent without prejudice to his right to claim decree for ejectment and the court may permit him to do so. The court may further order recovery of cost of suit and such other compensation as may be determined by it from the tenant."

16. After extracting the above section, the Supreme Court observed (at p. 1220 of AIR SC):—

"It is submitted by the defendant that an order under Sec. 11-A can be passed only by the trial court. We are, however, unable to accept this position, since appeal is a continuation of the suit. The advantage which is given to the landlord under Section 11-A for the purpose of realisation of the arrears of rent pendente lite which is in the nature of lawful enforcement of the conditions of tenancy can be secured by the landlord at the stage of the litigation, whether in the trial court or in appeals. The

penalty of striking out defence for non-compliance of an order under S. 11-A has to be kept distinct from the grounds of eviction permitted under S. 11 of the Act."

Thus, it will be seen that S. 11-A of the Bihar Act contemplated the landlord making an application at any stage of the suit for order on the tenant to deposit month by month rent at a rate at which it was last paid. Therefore, this expression was wide enough to include an application by the landlord not only at any stage of the suit but also at any stage of the subsequent proceedings which may be construed to be a continuation of the suit. As the Supreme Court itself pointed out, the appeal was a continuation of the suit and therefore the application made by the landlord before the learned Subordinate Judge during the pendency of the appeal was held to be competent. However, as we pointed out already, the language of S. 11 of the Act is strikingly different from the language of S. 11-A of the Bihar Act, and, therefore, the general proposition mentioned by the Supreme Court in that judgment, viz., that an appeal is a continuation of the suit, will have no application to the question which we are considering with reference to the language of S. 11 of the Act.

17. The only other decision of the Supreme Court, to which our attention was drawn, is that of Abdul Hameed Yousuf Sait v. Kalavathi, 1969 Ren CJ 1. In that case Section 29 (1) of the Mysore Rent Control Act, 22 of 1961, read as follows—

"No tenant against whom an application for eviction has been made by a landlord under S. 21, shall be entitled to contest the application before the court under that section or to prefer or prosecute an appeal or revision petition under S. 48 or S. 50 against any order passed by the court on an application under S. 21 or an order passed by the District Judge on appeal, as the case may be, unless he has paid or pays to the landlord or deposits with the court or the District Judge or the High Court, as the case may be, all arrears of rent due in respect of the premises up to the date of payment or deposits and continues to pay or to deposit any rent which may subsequently become due in respect of the premises at the rate (at) which it was last paid or agreed to be paid, until the termination of the proceedings before the court or the District Judge or the High Court, as the case may be."

Section 29 (4) read as follows—

"If any tenant fails to pay or deposit the rent as aforesaid, the court, the District Judge or the High Court, as the case may be, shall, unless the tenant shows sufficient cause to the contrary, stop all further proceedings and make an order directing the tenant to put the landlord in possession of the premises or dismiss the appeal or revision petition, as the case may be."

18. The Supreme Court, in the context of those two statutory provisions, observed—

"Sub-sec. (4) of Section 29 would be attracted to a case only if the tenant fails to comply with S. 29 (1). Therefore, all that we have to see is whether the appellant had contravened S. 29 (1). S. 29 (1) would apply either when a tenant contests the application of a landlord under Section 21 before the 'court' or when he prefers or prosecutes an appeal or revision under S. 48 or S. 50. There is no complaint that the appellant had failed to comply with the requirements of Section 29 (1) when the matter was pending in the Munsif's court. As seen earlier, it was the respondent who went up in appeal to the District Court and later in revision to the High Court. During those stages it cannot be said the appellant was either preferring or prosecuting an appeal or revision. In this case we are concerned only with the period during which the revision petition was pending. We are unable to accept the contention of Mr. B. R. L. Iyengar that as the appellant was contesting the revision petition filed by the respondent he must be held to have been prosecuting the revision petition. This is a wholly unacceptable contention. To prosecute a petition is one thing, to contest it is a wholly different thing. One is the opposite to the other. In the High Court the appellant was contesting the petition filed by the respondent. Undoubtedly he did not prefer that petition nor can it be said that he was prosecuting that petition. In our judgment, the High Court was clearly wrong in holding that the failure on the part of the appellant to deposit the rent due from him during the pendency of the revision petition brought the case within the mischief of Sec. 29 (1). That would have been the position if he was the petitioner before the High Court. A failure on the part of a tenant to pay or deposit the rent falling due during the pendency of an appeal or revision does not enable the appellate court or the High Court to allow the appeal or revision as the case may be. No provision in the Act empowering the appellate court or the High Court to do so is brought to our notice. We think that the High Court had misunderstood the scope of S. 29 (1)."

19. We are of the opinion that this decision, though dealing with the language of a different section, in a way, supports the conclusion we have reached with reference to the language of S. 11 of the Act. As we pointed out already, S. 11 deals with only two cases, the tenant contesting the application for eviction filed by the landlord under S. 10 and the tenant preferring an appeal under Section 23 against an order made by the Controller on the application preferred by the landlord under S. 10. The civil revision petition preferred to this court by the landlord will not come within the scope of Section 11 (1) and therefore S. 11 (4) cannot be attracted. Consequently, simply as a matter of construction, we come to the conclusion that an application under S. 11 (4) can be filed only before the Rent Controller when the landlord has preferred an application under S. 10 for eviction of the tenant and the tenant is seeking to contest that application, and before the Appellate Authority when the tenant is preferring an appeal against an order of eviction passed against him on an application preferred by the landlord under S. 10, without paying the arrears of rent, and to no other case S. 11 (4) will have application. Comparison of S. 29 of the Mysore Rent Control Act, considered by the Supreme Court, with S. 11 of the Act, will further re-enforce our conclusion on the scope of S. 11 of the Act. Section 29 (1) of the Mysore Act mentioned the court before which an application under Section 21 is filed, the District Judge before whom an appeal is filed and the High Court before whom a revision is filed. Yet the liability of the tenant to pay or deposit the rent was confined before the District Judge or the High Court only when he happens to prefer or prosecute the appeal or revision and not when he happens to defend the appeal or revision, preferred or prosecuted by the landlord. S. 11 of the Act refers to the Controller and the appellate authority alone all along the line and does not refer to the High Court at all. S. 11 (1) refers to the Controller and the appellate authority and 'the termination of the proceedings before the Controller or the appellate authority, as the case may be. Ss. 11 (3), 11 (4) and 11 (5) also refer to 'the Controller or the appellate authority as the case may be'. The High Court does not come into the picture in any of the sub-sections. Even the proceedings before the appellate authority under Section 11 (1) is confined only to the appeal preferred by the tenant and does not cover the appeal preferred by the landlord. The meticulous care with which the Legislature has enacted S. 11 will exclude the invocation of any general principle that the appeal or revision is a continuation of the original proceeding. If it was the intention of the Legislature that this provision concerning the liability of the tenant to pay or deposit the rent should apply to every stage of the proceeding, the language of S. 11 (1) will be different, probably similar to the language of S. 11-A of the Bihar Act, as in every stage, whether in the application filed by the landlord or in the appeal or revision, whoever preferred the same, the tenant will only be contesting the claim of the landlord for an order of eviction against him.

20. We may point out another feature present in this case, which may, in a way, support this conclusion of ours. S. 10 (2) (i) states—

"(2) A landlord who seeks to evict his tenant shall apply to the Controller for a direction in that behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause against the application is satisfied—

(i) that the tenant has not paid or tendered the rent due by him in respect of the building within fifteen days after the expiry of the time fixed in the agreement of tenancy with his landlord or in the absence of any such agreement, by the last day of the month next following that for which the rent is payable, the Controller shall make an order directing the tenant to put the landlord in possession of the building and if the Controller is not so satisfied, he shall make an order rejecting the application."

21. There is a proviso to this section which says—

".....in any case falling under clause (i) if the Controller is satisfied that the tenant's default to pay or tender rent was not wilful, he may, notwithstanding anything contained in S. 11, give the tenant a reasonable time, not exceeding fifteen days, to pay or tender the rent due by him to the landlord up to the date of such payment or tender and on such payment or tender, the application shall be rejected."

Thus, this deals with a case where the landlord files an application for eviction of the tenant on the ground that he had committed default in the payment of rent. If the Rent Controller finds that the default in the payment of rent is wilful, he shall order eviction. But, if he finds that the deafult in the payment of rent is not wilful, he has been given the power, notwithstanding anything contained in S. 11, to give a reasonable time to

the tenant to pay the arrears of rent. In this context, if the argument of the learned counsel for the petitioner is to be accepted, S. 11 can be simply made use of for recovery of the arrears of rent due from a tenant without filing a suit for recovery of the same. If the argument advanced on behalf of the petitioner is to be accepted, all that a landlord to whom his tenant has not paid the rent has to do is just to file a petition under S. 10 of the Act, whether he has a good ground or not for obtaining an order of eviction against the tenant under the provisions of the Act, and thereafter to file a petition under S. 11 (4) calling upon the tenant to pay the arrears of rent and if he does not pay, to obtain an order of eviction against him, even though the ground on which he filed the application for eviction of the tenant may be totally untenable. Certainly the Legislature could not have contemplated such a situation in enacting S. 11 (4) as a summary remedy for recovery of arrears of rent from a tenant by the landlord in all cases, as a substitute for a suit by a landlord for the recovery of arrears of rent from his tenant.

22. Having regard to these features, we are clearly of the opinion that the petition filed before us under S. 11 (4) of the Act during the pendency of the civil revision petition, is not maintainable and the decisions of this court, to which we have drawn attention, do not lay down the correct law in this behalf.

23. In the result, the civil miscellaneous petition also fails and is dismissed. There will be no order as to costs in either.

Petitions dismissed.

AIR 1978 MADRAS 406

RAMAPRASADA RAO AND SATTAR SAYEED, JJ.

The Spl. Tahsildar (R. W. L. A.) Srivilliputtur, Appellant v. Sri Pethavanallur Mayuranathasami Temple, Rajapalayam, Respondent.

Appeal No. 796 of 1969, D/- 22-2-1978.*

(A) Land Acquisition Act (1 of 1894), S. 25 (1) — Grant of excess compensation — No written application by claimant — Government not taking objection to enquiry into the grant at any stage — Objection held could not be allowed to be raised in appeal against grant of excess compensation.

This passive attitude by the State in the lower Court at a time when it ought to have objected to an enquiry into the grant of compensation in excess of the amount granted by the Land Acquisition Officer was a pointer to the fact that the court might have been apprised orally of a request for such enhanced compensation and that the court might have been satisfied that there was sufficient cause or reason for condoning the omission. A. S. No. 31 of 1975, D/- 9-1-1978 (Mad) and 1966 Ker LR 98, Foll. (Paras 6, 7 and 8)

Anno: AIR Manual (3rd Edn.). Land Acquisition Act, S. 25, N. 1.

(B) Land Acquisition Act (1 of 1894), Ss. 48 (1) and 4 (1) — Power to withdraw from acquisition — Notification issued by Government withdrawing some portion of land from total acquisition — Notification held not tantamount to notification under Section 4 (1).

Under S. 48 (1) the Parliament makes it clear that completion of acquisition as notified is not compulsory and it is left to the discretion of the Government to withdraw from the acquisition of any land of which possession has not been taken. The expression of 'any land' obviously means any portion of the land. If therefore the Government has the liberty to withdraw from the acquisition any portion of the land which was the subject matter of the notification made originally under S. 4 (1) then it is not open to the claimant to say that the notification issued under S. 48 (2) tantamounts to or is equivalent to a fresh notification issued under S. 4 (1) of the Land Acquisition Act with reference to the left out portion. (Para 9)

Anno: AIR Manual (3rd Edn.), Land Acquisition Act, S. 48, N. 1.

Cases Referred: Chronological Paras

(1978) A. S. No. 31 of 1975, D/- 9-1-1978 (Mad) 7

1966 Ker LR 98 7

RAMAPRASADA RAO J.:— This appeal by the State is against the judgment of the principal Subordinate Judge, Ramanathapuram at Madurai. As to the reason why this appeal was in the shelf of the High Court for nearly one decade cannot be explained. It is however resurrected and brought before us, but with scanty record and with no sufficient typed papers for a Division Bench, yet with the assistance of counsel, we could gather the necessary facts for the disposal of this appeal.

*(Against decree of Sub J., Ramanathapuram at Madurai in O. P. No. 8 of 1967.)

2. An extent of 2.18 acres of agricultural land in S. No. 289-1-B in Rajapalayam village was acquired along with some more extent of land for the public purpose of providing house sites for Katta Naickers. The notification under S. 4 (1) of the Land Acquisition Act was made on 11-11-1964. A year later, a portion of the above notified land was withdrawn from acquisition by the Government issuing a notification under S. 48 (1) of the Land Acquisition Act. This withdrawal became necessary as the acquiring authorities were of the view that a portion of the land which was originally notified for acquisition was unsuitable for house sites because there was an odai running in the middle of the land. Such a notification for withdrawal of the excess land not required for the public purpose was made on 17-11-1965. In so far as the lie of the land which is acquired and which is the subject matter of acquisition is concerned, it is common ground that it is surrounded by the roads formed by the Rajapalayam Municipality. The Land Acquisition Officer enquired into the value of the land and whilst doing so found that the land sought to be acquired is Government dry land and was registered as such in the records of the Rajapalayam village. The description as given by the Land Acquisition Officer thus establishes that the land was dry land and was classified as agricultural land. He evaluated the land with the assistance of the sales statistics gathered by him. In the sales statistics referred to by him, he took into consideration the sales of small extents of land in the vicinity of the acquired land. In particular he relied upon such sales which took place in S. No. 161/3. In sales particulars given by the Land Acquisition Officer, we find three such particulars on record. The first sale in S. No. 161/3 of the year 1963 gave a price of Rs. 10888 per acre. The second sale in the same survey number but of the month of July 1963 gave a price of Rs. 8000 per acre. The third sale which was in the month of Aug. 1963, gave a price of Rs. 6667 per acre. The Land Acquisition Officer adopted the last price fetched for a portion of the land sold in S. No. 161/4 and he was of the view that that would be the rate at which the fair price of the acquired land should be evaluated. He found that the said data lands are only about one furlong from the land to be acquired and in respect of the tharam, soil and fertility, both S. No. 161/3 and S. No. 289-1-B are comparable land. When he took up the enquiry, the owner who is Sri Pethavanallur Mayuranathasami devastanam, Rajapalayam did not prefer a claim about the quantum of compensation in spite of notice having been served on the devastanam to make such a claim. Finally, at the time of the award enquiry, the executive officer of the Devastanam, not only failed to make a claim but did not give the rate of compensation at least, which he thought would be the scale for assessing the just compensation for the acquired land. In these state of affairs, the Award was passed by the Land Acquisition Officer on 21-9-1966, but without any claim as such for compensation having been made by the devasthanam before the said officer. But the devastanam, however, sought for a reference under S. 18 (1) of the Land Acquisition Act for enhancement of the compensation awarded. On such an application, the subject matter was referred to civil court and the learned Subordinate Judge was of the view that the acquired land has to be valued as on 17-11-1965 and not as on 11-11-1964 since, according to him, a revised notification under S. 4 (1) has been published or re-issued on 17-11-1965. We have already referred to the fact that the Government decided to take out of consideration and compulsory acquisition one portion of the originally notified land for the public purpose aforesaid and such a notification under S. 48 (1) was made on 17-11-1965. The learned Subordinate Judge was of the view that that ought to be the date on which the property has to be valued. He relied upon Ex. B. 2 which the Land Acquisition Officer himself took into consideration in fixing the value of the acquired land. Whilst the Land Acquisition Officer fixed the value at Rs. 6667 per acre, the court below raised the compensation to Rs. 15000 per acre on two grounds. Firstly, it thought that the date of notification on which the property had to be evaluated should be 17-11-1965 and secondly, the same being two years after the date on which the sale took place under Ex. B. 2, and also giving such due weightage to the lapse of time between the date of sale under Ex. B. 2, and the date on which, according to the lower Court, the property has to be evaluated, it granted a compensation at the rate of Rs. 15000 per acre. It is as against this the State has preferred the present appeal.

3. Smt. Vimala, learned counsel for the Government, raised three contentions before us. Firstly, she would say that in the absence of any statement by the claimant either in the shape of quantified claim or at least in the nature of a claim setting forth the rate at which the owner sought for compensation and no application in writing having been

made under S. 25 (2) of the Land Acquisition Act, to show that there was sufficient reason for not making such a claim before the Land Acquisition Officer, the grant of compensation in excess of that awarded by the Land Acquisition Officer is without jurisdiction. Secondly, the contention was that in the absence of anything under the provisions of the Land Acquisition Act, which prompted the civil Court to call upon the claimant before it to make such a claim for increased compensation and show unjustifiable reasons for not having made such a claim before the Land Acquisition Officer, the court below suo motu ought not to have increased the compensation. Thirdly, it is said that as the above two contentions are matters inextricably connected with the jurisdiction of a civil Court, it could be raised in this court, even though such a plea either expressly or by necessary implication was taken before the learned Subordinate Judge of Ramanathapuram. Lastly, the contention more or less bordering partly on facts and partly on law in that the lower Court was wrong in having evaluated the property as on 17-11-1965 on the assumption that a notification issued under S. 48 (1) of the Land Acquisition Act tantamounts to a fresh notification under S. 4 (1) of the Act.

4. On the other hand, Mr. Peter Francis would say that as the lower Court granted an excess compensation it shall be reasonably presumed that there was such a request for an increased grant and the formality of a written application for showing such need for an increased compensation before the Land Acquisition Officer ought to be condoned, or in any event, ought to be presumed on the facts and circumstances of the case. Government counsel would, however, say that there is no duty cast on civil courts to help a litigant who by his indolence did not conform to law.

5. It is no doubt true that under S. 25 (1) of the Land Acquisition Act, the civil Court has no jurisdiction to grant an amount in excess of the amount granted by the Land Acquisition Officer when a claimant has refused to make a claim or has omitted to give sufficient reasons (to be allowed by the Judge) to make such a claim. On a fair appraisal of the record which, as we prefaced earlier, is not full and complete, because of the lapse of time, we are unable to say that the claimant has refused to make a claim in this case. Even the Land Acquisition Officer would record that at the time of the award enquiry, the Executive Officer stated that he would give the details about the compensation after the meeting of the trust board. However, no such claim was made before the Land Acquisition Officer before the passing of the award.

6. The question is whether in the circumstances there has been an omission with sufficient cause to make such a claim. It is pertinent to observe that in the lower Court no objection was taken by the Government regarding the enquiry into the grant of excess compensation, in the sense, in excess of the compensation granted by the Land Acquisition Officer. This passive attitude by the State in the lower Court at a time when it ought to have objected to an enquiry into the grant of compensation in excess of the amount granted by the Land Acquisition Officer is a pointer to the fact that the Court might have been apprised orally of a request for such enhanced compensation and that the court might have been satisfied that there was sufficient cause or reason for condoning the omission. We are not called upon in this case to answer the contention raised by Smt. Vimala that in all such cases where an increased compensation is asked for, a written application should be made by the claimant and that would be the only process which would qualify a civil Court to entertain an application for the grant of increased compensation. Whilst there is some force in this contention, we are not inclined to go into it for the reason that neither at the stage when the State Government ought to have acted and pleaded, nor at the time when it came to this court in 1969 with a memorandum of grounds of appeal, the specific objection was taken by the Government that the civil court had no jurisdiction to grant a compensation higher than that given by the Land Acquisition Officer, except that there was no written application for condonation of the indolence on the part of the claimant.

7. In fact, Padmanabhan J, had occasion to consider a similar circumstance while dealing with A. S. No. 31 of 1975 by judgment dated 9-1-1978 (Mad) (Ramaswami Reddiar v. Special Tahsildar, Harijan Welfare, Tindivanam) and he accepts generally the equitable principles touched upon by Vaidialingam J. in State of Kerala v. Ranga Iyengar Veera Ranghavan Iyengar (died) 1966 Ker LR 98, who said that in the absence of any issue having been framed on this aspect before the Civil Court and as that aspect cannot be squarely treated as a pure question of law because so long as jurisdiction is vested in the court before whom the reference for enhanced compensation is made, to consider the question as to whether even if there had been an omission or refusal to make a claim before the Land Acquisition Officer, whether

that refusal or omission was without sufficient cause and a party is given, so to say, an opportunity to satisfy the court that such omission or refusal was for sufficient reason. We are inclined to agree with this and hold that the very fact that the Government did not object to an enquiry into the grant of an increased compensation before the civil court is sufficient indicia that the civil court was by necessary implication satisfied that the omission to make a claim was with sufficient reasons. We have expressed already that for the purpose of this case, it is not necessary to speak any more on this legal contention raised by Smt. Vimala.

8. We may also add, however, that as this objection has not been taken in the memorandum of grounds of appeal, we are not inclined to lay greater accent on this objection at this stage but feel satisfied by expressing our view that the Government never intended to oppose the grant of excess compensation if really such a grant was justified on the facts and circumstances of the case.

9. The next point urged, of course, has real force and has to be sustained. S. 48 (1) of the Land Acquisition Act is an independent provision which acts on its own without reference to S. 23 of the Land Acquisition Act or any other provision thereunder. Under S. 48 (1) the Parliament makes it clear that completion of acquisition as notified is not compulsory and it is left to the discretion of the Government to withdraw from the acquisition of any land of which possession has not been taken. The expression of 'any land' obviously means any portion of the land. If therefore the Government has the liberty to withdraw from the acquisition any portion of the land which was the subject matter of the notification made originally under S. 4 (1) then it is not open to the claimant to say that the notification issued under S. 48 (1) tantamounts to or is equivalent to a fresh notification issued under Sec. 4 (1) of the Land Acquisition Act with reference to the left out portion. It is common ground that the totality of the land which was to be compulsorily acquired for the public purpose of providing house sites for Katta Naickers in Rajapalayam was undertaken by the Government and according to the process so put into action, two S. Nos. 288/2 measuring about 14 cents and 289-1-B measuring about 8.01 acres, were to be acquired. Later it was discovered that there was an odai running in the middle of S. No. 288/2 and in consequence a portion of S. No. 289-1-B also could not be fruitfully utilised for the public purpose and therefore a notification under S. 48 (1) was issued withdrawing from the acquisition S. No. 288/2 and portion of S. No. 289-1-B as both those portions of land were unsuitable for use as house sites because of the presence of an odai running in the middle of those portions. It was in the above circumstances that the extent of land originally notified was reduced by the subsequent issuance of the notification under S. 48 (1). As the power exercisable by the State under S. 48 (1) is independent and not referable to the original power under which it could act, it issued a notification under S. 48 (1) and it cannot be said that an order under S. 48 (1) withdrawing a portion of land originally notified as being unfit for a public purpose under S. 4 (1) should be understood and interpreted as a fresh notification under S. 4 (1) and the property revaluated as on the date of the alleged fresh notification. This assumption on the part of the learned Subordinate Judge that the order made on 17-11-1965 withdrawing a portion of the land from acquisition would amount to re-issuance of a notification under S. 4 (1) is incorrect and has to be set aside. We accept the argument of Smt. Vimala that the withdrawal of a part of the land under orders of the Government under S. 48 (1) would not impinge upon the date on which the lands originally notified under S. 4 (1) of the Act have to be valued under S. 23 of the Act.

10. If therefore the land has to be valued as on 11-11-1964 only, then, what would be the reasonable compensation payable, is the question. We are unable to agree with the court below that a sum of Rs. 15,000 per acre ought to be granted as compensation for the land in question. The lower Court rightly rejected Exs. A. 2 to A. 7, which were filed by the claimant for the first time before the civil Court. Exs. A. 2 to A. 5 relate to sales of land abutting the trunk road and are to the west of the railway line besides being far away from the acquired lands. Exs. A. 7 and A. 8 lands are in the midst of built up area and therefore those sales were not rightly taken by the court below for the purpose of comparing. We are, therefore, again left with Ex. B. 2. We have already referred to the fact that the Land Acquisition Officer noted the sales in S. No. 161/3 in the year 1963. One of such sales related to the hypothesis provided for under Ex. B. 2. There were three such sales in the year 1963. The price paid thereunder ranged between Rs. 6667 per acre, as in Ex. B. 2 to Rs. 8000 and Rs. 10888. The average price fetched by

these sales amounts to Rs. 8500. The grant of Rs. 15,000 per acre cannot certainly be justified. Having regard to the lapse of time as between August 1963 when the sale under Ex. B. 2 took place and November 1964, which is the month of the Notification which ought to be taken for the purpose of evaluation and in the light of the finding of the court below that the prices of land in the locality have been showing a definite upward trend, we fix the value of the acquired land at Rs. 8500 per acre. We have also borne in mind that the land acquired is of an extent of 2.18 acres while the compared lands are much smaller in extent at the time when they were sold. Taking all such factors into consideration, the price for the compulsorily acquired land is reduced to Rs. 8500 per acre and compensation shall be granted on that basis together with the usual solatium and the interest at 4 per cent on the enhanced compensation from the date of taking possession till date of payment. The appeal is, therefore, allowed in part. No costs. As regards the rest of the claim, the appeal is dismissed. No costs.

Appeal allowed in part.

AIR 1978 MADRAS 410

ISMAIL, J.

Naziruddeen, Petitioner v. P. A. Annamalai and others, Respondents.

C. R. P. No. 2810 of 1977, D/- 23-6-1978.*

(A) U. P. State Lottery Rules (1969), R. 35 — Expression "legal jurisdiction" — Interpretation of — Jurisdiction of Courts other than Courts in Lucknow not taken away — Civil P. C. (1908), S. 9.

The expression 'legal jurisdiction' in R. 35 is so ambiguous, so nebulous and so tenuous to draw the inference that the said R. 35 necessarily refers to the jurisdiction of the courts alone. Consequently it is not correct to say that by R. 35 of the Rules the jurisdiction of the other courts has been taken away and the exclusive jurisdiction has been vested only in the Courts in Lucknow. (Para 3)

Anno: AIR Comm., C. P. C. (9th Edn.), S. 9, N. 3.

(B) Civil P. C. (5 of 1908), Ss. 20 (c) and 115 — Question as to jurisdiction of particular Court — Finding given without taking evidence — Legality.

When the question, whose decision will have the effect of affecting the jurisdiction of the particular court, one way or the other, has to be decided only on taking evidence, the trial Court is in error in deciding the same as a preliminary point without taking evidence. (Para 4)

Anno: AIR Comm., C. P. C. (9th Edn.), S. 20, N. 15; S. 115, N. 12-A.

K. Parasaran for S. Jagadisan and V. Balachandran, for Petitioner; M. R. Narayanaswami for P. Raghaviah and Mrs. M. Gomathi for Addl. Govt. Pleader, for Respondents.

ORDER:— The second respondent in O. P. No. 78 of 1977 on the file of the Court of the Subordinate Judge of Vellore is the petitioner herein. The first respondent herein filed the original petition under O. 33 R. 1 C. P. C. to permit him to file the suit as an indigent person. In the suit, the first respondent prayed for a declaration that he has won the first prize of Rs. 27,00,000 on the lottery ticket issued by the Director of State lottery, U. P. (Lucknow) in the draw held on 17-3-1977, by the State of Uttar Pradesh by Secretary to Government, Finance Department, Lucknow U. P. and for a decree directing the Director of State Lottery as well as the State Government to pay the sum to him. The petitioner herein filed a counter opposing the prayer of the first respondent herein by contending that the first respondent is in possession of sufficient means to pay the Court fees due on the plaint and that the first respondent has got lands, houses, pumpsets, rice mill and other immoveable properties worth more than Rs. 3,00,000. He also raised the contention that the Subordinate Judge's court, Vellore has no jurisdiction to entertain the claim of the first respondent herein. The basis on which the last para was put forward was that the relevant rule under the Uttar Pradesh State Lottery Rules, 1969 according to the petitioner herein, vested exclusive jurisdiction in such matters only in the courts in Lucknow and therefore the Subordinate Judge's court of Vellore has no jurisdiction. By consent of both sides, the question of jurisdiction was taken up as a preliminary point and arguments were heard on that point and by the order dated 8-8-1977, the learned Additional Subordinate Judge of Vellore held that the Subordinate Judge's Court had jurisdiction to entertain the matter. It is to revise the said order that the present civil revision petition has been filed.

2. Mr. K. Parasaran, learned counsel for the petitioner, contends that there is absolutely nothing illegal in the parties agreeing when two or more courts have jurisdiction in res-

* (Against order of Sub. J. Vellore in O. P. No. 78 of 1977.)

pect of a particular matter, to designate a particular court alone as the competent court to entertain the controversy and deal with and dispose of the same. According to the learned counsel for the petitioner, admittedly the courts in Lucknow have jurisdiction because the Director of State Lottery is there, and if the allegation of the first respondent that his lottery was stolen within the jurisdiction of the Court at Vellore was true, a part of the cause of action arose within the jurisdiction and consequently as between the two courts, it was open to the parties to agree as to which court will have exclusive jurisdiction to try the controversy. In this context, the learned counsel relied on the following rule, namely, R. 35 in Uttar Pradesh State Lottery Rules, 1969 —

"35. The legal jurisdiction in all matters concerning the State Lottery shall be Lucknow."

The sole question for consideration in this revision petition is, whether the abovesaid rule has the effect of vesting exclusive jurisdiction only in the courts in Lucknow and thereby taking away the jurisdiction which the Subordinate Judge's Court at Vellore would have, if it was established that the lottery ticket was stolen within the jurisdiction of that Court from the first respondent herein, as alleged by him.

3. It is well established that the jurisdiction of a civil court can be taken away only by an express provision or by necessary implication and the ousting of jurisdiction of a civil court should not and ought not to be lightly inferred from an ambiguous provision. In this particular case, it is common case of the parties that Rule 35 of the Uttar Pradesh State Lottery Rules, 1969, extracted above does not expressly take away the jurisdiction of any other court and vest the exclusive jurisdiction only in the courts in Lucknow However, Mr. Parasaran wants me to draw an inference from R. 35 extracted above, that under that rule the parties intended that the courts in Lucknow should have exclusive jurisdiction. I am unable to accept this argument. For one thing, R. 35 of the Rules referred to above does not refer to any court at all, nor does it refer to the solving of any dispute arising out of the rules by a court. Mr. Parasaran wants me to draw the inference that the said rule really means 'the jurisdiction of the court', when it uses the expression 'legal jurisdiction'. I am of the opinion that such a conclusion cannot be drawn. The expression 'legal jurisdiction' is so ambiguous, so nebulous and so tenuous to draw the inference that the said R. 35, necessarily refers to the jurisdiction of the courts alone. Consequently I am unable to accept the argument of the learned counsel that by R. 35 of the Rules referred to above, the jurisdiction of the other courts has been taken away and the exclusive jurisdiction has been vested only in the Courts in Lucknow.

4. The next question is, whether the learned Subordinate Judge was right in finding that a part of the cause of action arose within the jurisdiction of his court and under S. 20 (c) of the Civil P. C., the said court had ample jurisdiction to try the said suit. I am of the opinion that the learned Subordinate Judge was in error in coming to that conclusion. Just prior to the recording of the said finding, the learned Subordinate Judge himself has stated—

"Whether the ticket was stolen from the custody of the plaintiff within the jurisdiction of this court, has to be decided at the time of the trial. On the allegations mentioned in the plaint, it cannot be said that no part of the cause of action arose within the jurisdiction of this court."

The allegation itself, without more, does not confer jurisdiction on the court. Consequently the Subordinate Judge's Court, Vellore will have jurisdiction only if it was established that the lottery ticket was stolen from the custody of the first respondent herein within the jurisdiction of the said court. The same has not yet been established and the learned Subordinate Judge is fully aware of it and has expressly stated that the said question can be decided only at the time of the trial. Under these circumstances, when the question whose decision will have the effect of affecting the jurisdiction of the Subordinate Judge's court, Vellore, one way or the other, has to be decided only on taking evidence, the learned Subordinate Judge was in error in deciding the same as a preliminary point without taking evidence. Hence while holding that R. 35 of the Uttar Pradesh State Lottery Rules 1969, does not take away the jurisdiction of the Subordinate Judge's court of Vellore, if the said court is otherwise having jurisdiction under the law, in respect of the present matter, I set aside the order of the learned Subordinate Judge and direct him to dispose of the question of jurisdiction along with the other questions, after taking evidence. I may make it clear that there is no controversy that if the first respondent establishes that the lottery ticket was stolen from his custody within the jurisdiction of the Subordinate Judge's Court, Vellore. that court

will have jurisdiction to entertain the suit under Section 20 (c) C. P. C.

5. The civil revision petition is accordingly disposed of in the above terms. There will be no order as to costs.

Order accordingly.

AIR 1978 MADRAS 412

NAINAR SUNDARAM, J.

P. Moorthy, Petitioner v. A. R. Kothandaraman, Respondent.

C. R. P. No. 1519 of 1975, D/- 14-8-1978.*

Stamp Act (2 of 1899), Ss. 11, 74 — Rules framed by (Tamil Nadu), Rule 13 — "May" — Meaning of — Promissory note can be stamped with adhesive stamps or be engrossed on a stamp paper. AIR 1968 Raj 45 and ILR (1965) 15 Raj 231, Foll. (Para 6)

Anno: AIR Manual (3rd Edn.) Stamp Act, S. 11, N. 1.

Cases Referred :	Chronological	Paras
AIR 1968 Raj 45		5
ILR (1965) 15 Raj 231		4

ORDER :— The defendant in suit No. 401 of 1974 on the file of the III Judge, Court of Small Causes, Madras is the petitioner in this revision. The respondent is the plaintiff in that suit. The plaintiff laid the suit for recovery of the amounts due under a promissory note dated 11-1-1971. Several contentions were raised by the defendant and the main among them centered around the question as to whether the document upon which the plaintiff laid the suit is properly stamped within the meaning of the provisions of the Stamp Act and the rules framed thereunder so that it can be counted and acted upon as a promissory note. The document is written up on a stamp paper of the value of Rs. 1.50. The III Judge, Court of Small Causes, Madras considered the questions raised in the case and found that the writing up of the promissory note in a stamp paper of the value of Rs. 1-50 would not demolish the character of the document being a promissory note and would not make it a document not duly stamped within the meaning of the provisions of the Stamp Act and the rules framed thereunder. He found the other points also against the defendant and the suit of the plaintiff was decreed as prayed for. The defendant preferred a new trial application No. 194 of 1974 and the new trial bench of the Court of Small Causes considered the case of the defendant and the Judges of the new trial bench did not agree with the finding of the first court that the document in question is a promissory note obviously on the reasoning that the document is not duly stamped. However they treated the document as a voucher executed by the defendant in respect of the borrowing concerned. The Judges of the new trial Bench also declined to accept the other contentions of the defendant and the new trial application was dismissed. The present revision is directed against the judgment and decree of the new trial Bench of the Court of Small Causes, Madras.

2. Thiru Vittal V. Souli, learned counsel appearing for the petitioner, contends that under the provisions of the Stamp Act and the rules framed thereunder, the promissory note must be stamped by the use of adhesive stamps and the engrossment of the document on stamp papers of the value of Rs. 1.50 is irregular and will not make the document a duly stamped one so as to be acted upon in evidence in the courts.

3. Thiru R. N. Kothandaraman, learned counsel appearing for the respondent-plaintiff, in the suit, submits that it would suffice the provisions of the Stamp Act and the rules framed thereunder if the proper stamp duty is paid and the mode adopted in the present case, viz, writing up the documents on a stamp paper of the value of Rs. 1.50 will not make the document an improperly stamped or a not duly stamped one, so as to make it inadmissible for consideration in courts.

4. I find there is force in the contention put forth by the learned counsel for the respondent. Section 10 of the Indian Stamp Act lays down that—

"Except as otherwise expressly provided in this Act, all duties with which any instruments are chargeable shall be paid, and such payment shall be indicated on such instruments, by means of stamps—

(a) according to the provisions herein contained; or

(b) when no such provision is applicable thereto, as the State Government may by rule direct."

Section 11 of the Indian Stamp Act lays down that the instruments set out under clauses (a) to (e) thereunder may be stamped with adhesive stamps. Clause (b) of S. 11 refers to 'bills of exchange, and promissory notes, drawn or made out of India'. Obviously, this clause would not apply to the case in question. Coming to the rules framed under the

*(Against order of Sm. C. C. Madras in N. T. A. No. 194 of 1974.)

Act by the State of Tamil Nadu, R. 5 reads as follows :—

"Promissory notes and bill of exchange — A promissory note or bill of exchange shall except as provided by S. 11 or by R. 13, be written on paper on which a stamp of the proper value, with or without the word 'hundi', has been engraved or embossed."

It will be relevant to refer to R. 13 also because R. 5 referred to above, states that a promissory note or bill of exchange shall except as provided ..... or by R. 13 be written on paper on which a stamp of the proper value has been engraved or embossed. Rule 13 reads as follows—

13. Use of adhesive stamps on certain instruments.— The following instruments may be stamped with adhesive stamps namely—

(a) transfers of debentures of public companies and associations,

(b) copies of maps or plans, printed copies and copies of or extracts from registers given on printed forms when chargeable with duty under Art. 24 of schedule I,

(c) instruments chargeable with duty under Art. 5 (a) and (b) of schedule I,

(d) instruments chargeable with stamp duty under Art. 47 of schedule 1,

(e) instruments chargeable with stamp duty under Arts. 19, 36, 37, 49 (a) (ii) and (iii) and 52 of schedule 1,

(f) instruments of transfer of shares of public companies or associations,

(g) bonds executed under any law relating to a central duty of excise or any rule made thereunder.

(h) deleted.....

(i) security bonds to be furnished by an appellant or an applicant in revision under the provisions of Sec. 31 (5), 33 (4), 35 (4). 36 (5), 37 (6) or 38 (6) and authorisation to be furnished under Section 52 of the Madras General Sales Tax Act 1959 (Madras Act I of 1959). Art. 49 (a) (ii) of schedule I relates to promissory notes where the amount or value exceeds Rs. 250 but does not exceed Rs. 1000 and Art 49 (a) (iii) of schedule I relates to promissory note of any other case.

The expression used in Rule 13 of the Rules is 'may'. Interpreting similar rules framed by State of Rajasthan Jagat Narayan J. in Kalwan Singh v. Bhanwarlal ILR (1965) 15 Raj 231 held that—

"The rule is merely a permissive one, permitting the use of an adhesive stamp on promissory notes payable on demand when the amount or value exceeds Rs. 250. The rule does not lay down that such promissory note shall be stamped with adhesive stamp of the requisite value. The result is that a promissory note exceeding Rs. 250 in value can be written on a paper having an impressed stamp or it can be stamped with adhesive stamps of the requisite value".

5. The same learned Judge pronounced the same view in Somdatta v. Abul Rashid AIR 1968 Raj 45 and the learned Judge observes that in view of the word 'may' used in the provisions the promissory notes of any value can also be written on impressed stamps.

6. I am inclined to follow the ratio of the learned Judge of the Rajasthan High Court because I find the expression used in the provision is 'may'. In my view, a promissory note can be stamped either with adhesive stamps or engrossed on a stamp paper of proper value. In this view. I find that the trial court is correct in holding the document as a properly stamped promissory note and giving reliefs to the plaintiff. Hence while setting aside the finding of the new trial Bench of the Court of Small Causes with reference to the character of the document in question. I confirm the findings of the fact arrived at both by the first court as well as the new trial Bench of Court of Small Causes and I do not find any warrant to interfere in revision. Hence this revision is dismissed but there will be no order as to costs.

Revision dismissed.

AIR 1978 MADRAS 413

RAMANUJAM, J.

M. Gopal Pondither, Petitioner v. The District Magistrate-cum-Collector of Chingleput and another, Respondents.

W. P. No. 4148 of 1974, D/- 21-3-1978.

Cantonments Act (1924), Ss. 84, 87 (b) — "Amount in dispute."

In an appeal against an order of assessment for a particular year, the assessee cannot be called upon, as a condition precedent to the entertainment of the appeal anything more than the amount assessed for the year of assessment which is the subject-matter of appeal. W. A. No. 470 of 1971 (Mad), Rel. on. (Para 5)

Anno: AIR Manual (3rd Edn.), Cant. Act, S. 84, N. 1.

Cases Referred: Chronological Paras

(1971) W. A. No. 470 of 1971 (Mad) 5

G. R. Abdul Kalaam, for Petitioner; C. Chinnaswami for Govt. Pleader and K. Alagiriswami, for Respondents.

ORDER:— The petitioner has prayed for the issue of a writ of mandamus directing the first respondent (The District Magistrate-cum-Collector of Chingleput) to dispose of the petitioner's appeal filed on 19-8-1968, in the following circumstances.

2. The petitioner is the owner of the house and ground bearing No. 7/19, East Chetti St., St. Thomas Mount, Madras 16. In respect of the said house, the property tax was originally levied for the half-year at Rs. 138, on the annual rental valuation of Rs. 1200. On 6-4-1968, the Cantonment Executive Officer (the second respondent) sent a special notice enhancing the property tax to Rs. 414 on the basis of the annual rental of Rs. 3960 for the period from 1-4-1965. The petitioner made his representations on 2-5-1968 to the second respondent that the enhancement by more than double the tax originally levied is unjust and illegal. Accepting the said objections, the second respondent issued a demand notice demanding the original tax of Rs. 138 for the period commencing from 1-4-1968. However, on 20-7-1968, the second respondent issued another demand notice for the same half-year i. e. for the period commencing from 1-4-1968, demanding a sum of Rs. 276 thus making a total of Rs. 414 on the basis of the revised assessment, against which the petitioner had already submitted his objections.

3. Thereafter, the petitioner preferred an appeal on 19-8-1968 under S. 84 of the Cantonments Act 1924 to the first respondent who is the prescribed appellate authority under the Act. By a communication dated 3-2-1970, the first respondent called upon the petitioner to deposit a sum of Rs. 1245 under Sec. 87 (b) of the said Act as a condition precedent to hear his appeal. The petitioner, thereupon, on 9-3-1970, deposited a sum of Rs. 414 being the tax demanded to the credit of the Cantonment Board. Subsequent to the deposit, the petitioner expected that his appeal would be disposed of by the first respondent. But the second respondent sent a letter on 6-4-1970 stating that his appeal could not be admitted unless the balance amount of arrears of Rs. 1245 is deposited. The petitioner, however, did not get any communication from the first respondent before whom the appeal was filed. After waiting nearly for six years, the petitioner has filed this writ petition seeking a writ of mandamus directing the first respondent to dispose of the appeal.

4. Both the respondents have not filed their counters. But it is contended on their behalf that the appeal could not be entertained by the first respondent unless the entire arrears of property tax due to the second respondent is deposited. That was the stand taken by both the respondents right from the beginning. They have been demanding the payment of the entire arrears of property tax as a condition precedent for disposing of the appeal. It is not in dispute that the petitioner has deposited a sum of Rs. 414 under Sec. 87 (b) of the Cantonments Act 1924. It is after deducting the said sum, the respondents have demanded a sum of Rs. 1245, as a condition precedent for entertaining the appeal.

5. The question is whether the petitioner is bound to deposit the entire amount of property tax arrears before his appeal could be entertained and disposed of by the first respondent. I am of the view that the insistence of the first and second respondents that the entire tax arrears should be deposited by the petitioner as a condition precedent for entertaining his appeal under Sec. 87 (b) of the Act is quite untenable and not supported by the statutory provisions. Sec. 87 of the Cantonments Act 1924 says that no appeal shall be heard or determined under Chapter V of the Cantonments Act unless the appeal is brought within thirty days next after the date of the authentication of the assessment list under Sec. 69 and the amount of tax in dispute in the appeal has been deposited by the appellant in the office of the Board. Admittedly, in this case, the tax in dispute is only a sum of Rs. 276 being the difference between the tax as enhanced and the tax as originally levied. But the petitioner has deposited a sum of Rs. 414 which represents the tax as enhanced. Therefore, the petitioner had paid more than the amount which he is bound to deposit under Sec. 87 (b) of the Act. Therefore, I do not see how the respondents could seek to recover the entire amount of tax arrears in the guise of giving effect to the provisions of Sec. 87 (b) of the Act. The action of the first respondent requiring the petitioner to deposit the entire tax arrears due by him in respect of his house is not only unjustified, but it leads to the inference that the first respondent has not looked into the statutory provisions under which he has to act as an appellate authority. In a similar situation, a Division Bench of this court in W. A. No. 470 of 1971 has held that the District Magistrate-cum-Collector, who is the appellate authority, is not justified in insisting on the payment of the entire amount of tax arrears as a condition precedent for entertaining the appeal. The writ petition is, therefore, allowed with costs and a writ of mandamus will issue to

the first respondent to entertain and dispose of the petitioner's appeal filed 19-8-1968 within six weeks from this date. e first respondent will pay the costs of t petitioner. Counsel's fee Rs. 100.

Peti allowed.

AIR 1978 MADRAS 4

FULL BENCH

RAMAPRASADA RAO, RAMA JAM AND SURYAMURTHY, J.

D. Thomas, Petitioner v. Tara, Rondent. Matrimonial Case No. 2 of I, D/- 28-11-1977.*

Divorce Act (1869), S. 11 (1) —it for dissolution alleging that wife is le g life of prostitute — Adulterer though wn to plaintiff not made co-respondent Suit, held, not maintainable.

If a petition for divorce is present by a husband on the ground of adultery, th laintiff is obliged to make the adulte as a party to it unless he is exempted from doing on any one of the grounds enumerd in S. 11. The first ground on which hould seek for such an excuse is that the dedant wife is leading the life of a prostitu and that the plaintiff knows no person withom the adultery has been committed. If, the circumstances of the case, a presution arises that the plaintiff did know the mes of such persons, then in the absenc an order excusing him from impleading said persons as parties. he cannot succfully prosecute the original petition for orce under S. 10 of the Act. In fact, the pcription in S. 11 is a mandate which can be avoided by a husband seeking divorce the ground of adultery. Where no such son, though known to the plaintiff, is de a party, the suit for dissolution is notaintainable in law. (a 2)

Anno: AIR Manual (3rd Edn.) Divo Act, S. 11, N. 1.

RAMAPRASADA RAO, J. :—The band went to court seeking for a divorce nder Sec. 10 of the Indian Divorce Act the ground that the defendant was unfai l to him from December 1972 and that s wa guilty of adultery. In the pleadings, the plaintiff as husband has set out in the various paragraphs the illegal conduct of the defendant and her illicit connections with the various named persons. In fact, he would allege that he had to leave the residence along with his children to his uncle's house unable to bear the misconduct of the defendant. He so separated himself from her on 13-1-1973. He says that the defendant is living the life of a prostitute and would add that she is living as the mistress of one Murali. In general, the case of the plaintiff-husband is that the defendant was leading an adulterous life with men known and unkonwn. He did not, however, make the adulterers as parties to this suit. The defendant's case was that she led such a life because of her husband himself and that on many occasions she refused to succumb to the invitation of the plaintiff to commit such indecent acts and that this is the reason for the suit.

2. We are not inclined at this stage to go into the merits of this case because Mr. A. R. Ramachandran who was appointed as amicus curiae took a preliminary objection that this suit under Sec. 10 of the Act is not maintainable, since the plaintiff has not shown sufficient cause for having exclud the adulterer as a party to the litigation. brought to our notice Sec. 11 of the A contends that the suit is not main Learned counsel for the plaintiff, ad is conscious of this position, but efore that after 13-1-1973. the defen e made ing the life of a prostitute an endant in there was no occasion for sion would a particular individual are pleadings in the suit. Ordinarily that the petitioner have had some fore ere. Sec. 11 (1) of the instant case di petition for divorce knew who the ad band on the ground the Act says th tiff is obliged to make is presented party to it unless he is ex of adultery, doing on any one of the the adult erated in Sec. 11. The first empted which he could seek for such an groun that the defendant wife is leading gro of a prostitute and that the plaintiff e s no person with whom the adultery has on committed. This sub-sec. (1) of Sec. 11, herefore, contemplates that even though there is the allegation that the wife is leading the life of a prostitute, the husband is not aware of the name of the person with whom the adultery has been committed. Sub-sec. (2) of Sec. 11 says that the adulterer is not at all known to the petitioner plaintiff and in

*(Case referred by Dist. Judge Tirun his letter D. No. 983/2-2-77 for tion of the decree nisi, D/- 2 ce passed under S. 17 of the India Act in O. S. No. 103 of 1975.)

spite of his efforts he could not discover his name. Thirdly under sub-sec. (3) of Sec. 11 of the Act, if the adulterer is dead, he need not be made a party. The second and the third sub-sections of Sec. 11 do not come into play in this case. So far as the first sub-section is concerned one limb of it is satisfied because the allegation is that the wife was leading the life of a prostitute. The other limb of the sub-section has not been complied with. It says that he could only seek for an excuse from impleading the adulterer if he does not know the name of any one person with whom, the adultery has been committed. We have already observed that in the relevant portion of the pleadings, the petitioner has given the names of the persons with whom the defendant is said to have been living in adultery during the first period, namely, before 18-1-1973 and also those who committed such adultery after that period. In fact, he would categorically admit that the defendant was leading the life of a harlot committing adultery with known and unknown persons. Such being the position, the plaintiff can plead at this stage, that he does not kn the names of any person with whom the tery has been committed. If in the circu ances of the case, a presumption arises t the plaintiff did know the names of s persons, then in the absence of an orde cusing him from impleading the said perso as parties, he cannot successfully pros te the original petition for divorce under Sec of the Act. In fact, the prescription ec. 11 is a mandate which cannot be av ed by a husband seeking divorce on the gr d of adultery. As no such person, thou known to the plaintiff, is made a party to s suit, we accept the preliminary objection ised by the learned counsel appointed amicus curiae and dismiss the suit for diss on as not maintainable in law.

3. W cord with appreciation the services rendere y the amicus curiae.

Suit dismissed.

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